The international legal personhood of nature and other ecosystems: a legal approach based on ecocentric ethics

Ph.D. Dissertation

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Acknowledgments

Abstract

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

In fairness, although the idea is not new at a national level and seems to resurface every now and then[1], the scheme of nature as a holder of rights merits further research and development. Indeed, the state of affairs has been significantly modified in the normal course of events, mainly because what was '*unthinkable*'[2] in the past, before the U.S. courts, has become presently feasible before tribunals of New Zealand, Colombia, and India, which have conferred legal personality to rivers and other ecosystems[3].

Effectively, although one of the first and most celebrated propositions about the recognition of rights of nature is on the records of *Sierra Club v Morton*, nay in the dissent opinion by Justice Douglas, the case also represented a relative setback, considering that the Court of Appeals rejected the lawsuit–brought to prevent the construction of a ski resort and its facilities on Mineral King Valley–holding that the claimant lacked legal standing to claim on behalf of the ecosystem[4].

Nevertheless, twenty years later, the community of *Whanganui Iwi* and the Crown of New Zealand signed an agreement to discharge a long-running legal dispute, begun in 1990, which mainly focused on the creation of legal personality for the *Whanganui River*[5]. Likewise, the Colombian Constitutional Court recognized to *Atrato River*, its watershed and tributaries as a subject of law in 2016, in order to be protected, conserved, maintained and

[1] A contemporary reference at domestic level in Gordon (2018) 50.
[2] Stone (1972) 450-7.
[3] An accurate compilation of contemporary experiences in Rights of Nature Law, Policy and Education (2018) <www.harmonywithnatureun.org/rightsOfNature/> accessed 4 September 2018.
[4] See *Sierra Club v Morton* (1972) 741-3.
[5] Agreement between *Whanganui Iwi* and the Crown (2012) para. 2.7.

restored, by the State along with ethnic communities[6]. India followed suit, when the High Court of Uttarakhand at Nainital bestowed legal personality to the rivers *Ganga* and *Yamuna*, in addition to the ecosystems comprised by the glaciers *Gangotri* and *Yamunotri* in 2017[7].

Moreover, the recognition of nature's rights has gone beyond, reaching out to be part of domestic law in the United States, Bolivia, and New Zealand, and even of constitutional law in Ecuador. Indeed, the first formal acknowledgment of an ecosystem as a person–endowed of rights–occurred in 2006, in Tamaqua Borough, Pennsylvania, by means of an ordinance relative to the ban on corporations from engaging in the land application of sewage sludge[8]. Thenceforth, a total of eighteen towns in the United States counts on similar bylaws, i.e. in addition to Pennsylvania, the states of Virginia, New Hampshire, New Jersey, New York, Maryland, Ohio, New Mexico, and California[9]. For its part, Nature or '*Mother Earth*' is legally a '*collective subject of public interest*', who has rights to life, diversity of life, water, clean air, balance, restoration, and life free of pollution in Bolivia[10]. Meanwhile, in New Zealand, the 2012 agreement between *Maori* people and the Crown of New Zealand was enacted as law in 2017, declaring to the so-called *Te Awa Tupua*–the ecosystem linked to the *Whanganui River*–as a legal person[11]. Finally, as the corollary of the constitution-making process in Ecuador, Nature has the constitutional right to '[…] *integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes*' since 2008[12].

All of these national experiences have led this question towards a new judicial, legal, and even ethical moment, in which will turn out crucial, at least, to contextualize the real scope of nature, as a global entity, and reinforce the mechanisms allowing to implement its legal representation in a systematic way. To attain these ends, it will be necessary to pose the dilemma of the bearer of rights since the perspective of international law, being this one the sole scenario capable of encompassing the authentic physical extension of nature beyond the mere national boundaries.

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[6] See Centro de Estudios para la Justicia Social "Tierra Digna" y otros v Colombia (2016) Decision No. 4.
[7] See Mohd. Salim v State of Uttarakhand & others (2017) Direction No. 19; Lalit Miglani v State of Uttar*akhand & others* (2017) Direction No. 2.
[8] See Ordinance Tamaqua Borough No. 612 (2006) § 7.6.
[9] *Harmony with Nature* (2018).
[10] See Ley de Derechos de la Madre Tierra (2010) Article 7; Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien (2012) Article 1(a) and 9(1).
[11] *Te Awa Tupua* Act (2017); Agreement between *Whanganui Iwi* and the Crown (2012).
[12] Constitución de la República del Ecuador (2008) Artículo 71, translated by Georgetown University & Center for Latin American Studies Program (2011) <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> accessed 31 May 2018.

On the other hand, the common thread running within this work is property rights, given their remarkable role played in the different dimensions of the debate about how to understand and address the current environmental emergency. Indeed, ownership of natural resources quite probably represents the major criticism of anthropocentrism, being deemed by its detractors as one of the key sources of ecological depletion[13], and social conflict[14]; although it should be said there are also utterly contradictory criteria thereon, such as Cole's or Flipo's. So Cole asserts that those views about property rights at the center of environmental concerns are too much reductionist, inasmuch as they do not take into account many other circumstances involved, like institutional distortions, technological deficiencies, extremely high transaction costs, and so on[15]. For his part, Flipo pleads the rights of nature should be articulated with human rights, given that both categories are not excluding. He believes the rights of nature, just like human rights, can be instrumentalized to both promoting surreptitiously selfishness and enforcing against polluters and exploiters. '*Nature rights might be enforced against the poor but not the rich,* [he asserts] *in a Malthusian approach, just as human rights can serve as a mask for ownership*'[16].

To that extent, the acknowledgment of nature as a holder of rights, instead of a mere set of possessions, comprises a radical measure going beyond the gradual necessity of rethinking and restructuring the very concept of property of natural resources, as suggested by Taylor[17]. In other words, it does not deal with that empirical definition of nature, wherein environmental protection and its economic functions are properly balanced[18], even though in the end without brushing aside its legal category of commodity. It rather involves bringing nature further the limits of the paradigm of legality, and even of morality, overriding any loophole of ownership, in order to extend its ambit of lawful protection like any another existent subject of law, similarly–somehow–to what has once occurred with slaves, women, workers or blacks, and so on[19]. Around this reasoning, it arises various inquiries that exceed the purely legal analysis and settle in the field of other related disciplines, particularly ethics.

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[13] See Sands (1994) 294; Borràs (2016) 113-4. With respect to the specific topic of genetic resources and biodiversity, see Ramlogan (2002) 15-6.
[14] Taylor (1998) 383.
[15] Cole (2002) 1-19.
[16] Flipo (2012) 136-7.
[17] Taylor (1998) 394-5.
[18] Taylor employs Sax's, Hunter's, and Rieser's explanations about this point (ibid 384-5). See Sax (1993); Hunter (1988); Rieser (1991). A more recent and exhaustive compilation of articles relative to the incorporation of ecological variables into the concept of property rights, including critical stances, in Grinlinton and Taylor (2011). More references about parallel approaches, for instance, in Maguire and Phillips (2011); Meyer (2009); Rodgers (2009); Freyfogle (2003) 203-27; Searle (1990); Cribbet (1986).
[19] Nash (1989) 7.

First Chapter
Introduction

1.1 The multidisciplinary character of the study of nature

Nature is not a simple organism, but rather a multidimensional entity. Thus, its intricacy cannot be explained solely from one single perspective, say the biological one, because the very functioning of the planet does not correspond to an individualistic approach. The understanding of its different processes requires the contribution of several scientific disciplines, such as zoology, botany, physics, and chemistry, among others, intended to elucidate how nature performs and which its ecological risks and threats are. Thereon, Berry's description about the food chain, in order to illustrate the importance of the so-called '*absolute interdependence*' among the beings coexisting on Earth, constitutes a clear example. He points out that animals rely on plants to survive and plants transform energy from the sunlight and use minerals from the soil to carry out the photosynthesis for self-nourishment. Humans depend on all of them[20]. From a scientific angle, a consistent explanation of the whole process would be only possible from a multidisciplinary approach, eliminating any attempt to isolate a specific field of knowledge.

Something similar occurs in the relationship between nature and humans, where the ecological system, the economic rules of the market, and the social responsibilities, for example, are merely a small sample of the wide variety of factors involved. Curiously, even the necessity of co-operation and global ***interdependence***–as it happens in the natural processes–is becoming an increasing tendency in international law these days[21]. Thus, the proposal of recognizing nature as an international bearer of rights cannot be analyzed exclusively from a legal insight, despite it can be the most relevant component for the aim of this study. It would be unimaginable to elaborate on the present research without a multidisciplinary focus, considering particularly the contributions of environmental ethics.

Accordingly, this section is aimed at a brief multidisciplinary examination of the most significant scholar approaches supporting the idea of nature as a subject of international law and its key interactions with human beings, emphasizing the question of property rights as part of the current ecological crisis. It is worth it to clarify that it does not deal with an erudite

[20] Berry (1999) 148.
[21] Chen (2000) 425; Shaw (2003) 35.

analysis of all disciplines involved because it would require an entire team of experts in each field of knowledge, which is neither the objective of a doctoral dissertation.

1.1.1 Gaian approach as scientific support of nature as a holder of rights – ecological implications

It turns out difficult to escape the inevitable parallelism that promoters of rights of nature[22] have perceived regarding the principles of *Gaia* hypothesis–particularly with its definition, as a '[…] *complex entity involving the earth's atmosphere, biosphere, oceans and soil* [whose] *totality constitutes a feedback or cybernetic system which seeks an optimal physical and chemical environment for the biota*'. This concept originally appeared in a 1974 article by Margulis and Lovelock[23]. Later, in 1979, it came out in probably the most popular Lovelock's works, '*Gaia: A new look at the life on Earth*', including only a tiny modification; i.e. instead of the phrase: '*for the biota*', one reads: '*for life on this planet*'[24]. From its very title, *Gaia* (also *Gaea*) means literally '*Mother Earth*', the mythological primordial Greek goddess, mother of the Titans. Sagan and Margulis recount the anecdote about the name '*Gaia*' was suggested to Lovelock by a neighbor, the celebrated novelist Willian Golding[25].

Indeed, in spite that the Gaian tenets have been severely brought into question within certain scientific circles, their discursive influence has been efficient enough to permeate through the environmental parlance and guide it towards the '*holistic views*', even promoting the modern '*ecocentrism*'[26]. Alan Marshal, for example, despite of being a skeptical critic of Lovelock, who has labelled the Gaian postulates as '*technocentric embodiment*', has recognized the enormous repercussion of the hypothesis Gaia within the currents of thought that promote the modern tendencies toward the 'wholeness'; or in his own words, '*the unity of nature*'[27]. Nevertheless this trend should not be necessarily considered fresh at all, inasmuch as one of its antecedents might be easily located in the older idea of the '*indivisibility of Earth*', written by Aldo Leopold in a 1923 article, published in journals and compilations after his death[28].

[22] For example Harding (2012) 79; Donahue (2010) 51; Cullinan (2008) 26.
[23] Margulis and Lovelock (1974) 473.
[24] Lovelock (1979) 11.
[25] Margulis and Sagan (1997) 202.
[26] Leib (2011) 29.
[27] Marshall (2002) 53-80.
[28] Leopold (1991) 95.

Nowadays, for instance, the best evidence of its influence consists of having achieved the incorporation of some its key features into the *draft Universal Declaration of Rights of Mother Earth*, promoted by the Bolivian government in 2010, which constitutes the only updated document addressing rights of nature at a global level. From the outset, it establishes the living condition of the planet, when effectively reads: '*Mother Earth is a living being*'[29].

In context, the head objection relative to Gaia hypothesis perhaps resides in the lack of concurrence between the homeostatic auto-regulation of the planet, which creates purposefully optimal conditions for life, and the evolution by natural selection. To Dawkins, one of its critics, homeostasis is a typical activity of living organisms, whose development derives from evolution, i.e. after a competition among individuals wherein the survivors are those who have been more successful in transmitting their genes. Therefore, being Earth the only living planet without rivals in the solar system, the development of its homeostasis sounds unrealistic[30]. Indeed, Margulis herself from the outset rejected the term '*organism*', as a personification of the Earth's surface. In both '*Simbiotic Planet*'[31] and '*Acquiring Genomes*' (along with Sagan)[32], she made it clear that no organism is able to survive consuming its own wastes and breathing its own gas excretions. She even was of the opinion that Lovelock had allowed people to believe that Earth was an organism, just as a mechanism to avoid its mistreatment. '*To me, this is a helpful cop-out, not science*' she wrote in '*Gaia is a Tough Bitch*', although at the same time recognizing that despite she did not share Lovelock's opinion about Gaia as an organism, she realized that his stance had been more effective in communicating Gaian approach than hers[33]. Sagan and Whiteside complemented the objection remembering how Ford Doolittle ridiculed the idea about searching for optimal conditions for life, as if it were a teleological system, suggesting a '*secret consensus*' among microorganisms to determine their common interests[34]. In response, Lovelock accepted having designed a computer simulation, termed '*Dasiyworld*', especially to answer his detractors, Doolittle and Dawkins, and demonstrated that world, weather and environment are result of an automatic, not teleological, goal-seeking system. In addition, he admitted as obvious that '[…] *Earth was alive in the sense that it was a self-organizing and self-regulation system*'[35].

[29] Draft Universal Declaration of Rights of Mother Earth (2010) Article 1.
[30] Dawkins (1999) 234-6.
[31] Margulis (1998) 118-9.
[32] Margulis and Sagan (2002) 130.
[33] Margulis (1995) Chapter 7.
[34] Sagan and Whiteside (2004) 178-9.
[35] Lovelock (1988) 31, 39.

At present, the Gaia hypothesis has experienced a conceptual transition from exclusive homeostasis towards autopoiesis, a definition created by biologists Varela and Maturana to describe self-production and maintenance of living beings; namely, as Lyon asserts, a '[…] *continual production by a network of the very components that comprise and sustain the network and its processes of production*'. The interconnectedness between the living organism and its surroundings, anchored to autopoiesis, is fundamental for its own survival– Lyon continues–because if the interplay between living systems and their surroundings is inappropriately or simply comes to a halt, the latter would be in serious jeopardy of dying[36].

It is fair to say the Gaia hypothesis has also received a significant acceptation by other wings of scientific knowledge[37]. For example, certain law scholars, such as Burdon, have interpreted the concept of *Gaia* as '[…] *the notion that the Earth's surface is alive* [and] *characterised by communion, differentiation and autopoiesis*'[38]; i.e. the three basic conditions of Earth during the '*Ecozoic Era*', a term coined by Thomas Berry to signify the emerging period succeeding the Cenozoic, i.e. '[…] *when humans will begin to live on the Earth in a mutually enhancing manner*'[39]. In essence, Berry perceived that the only possibility to overcome the contemporary problems of '*macrophase biology*', characterized by an erratic interaction of its five spheres (land, water, air, life and human mind), was the transition towards this new biological period, the *Ecozoic era*. In this context, communion represents the interconnectedness among beings, '*subjects*' in words of Berry, in contrast to the notion of simple '*collection of objects*', evoking the symbolic link with the proposed legal transmutation of nature, from being an object towards being a subject of law. Likewise, although differentiation refers to the uniqueness of organisms, which could not live fragmented, the sole fashion to sustain life on Earth consists of its integral functioning. '[E]*arth is not a global sameness*', Berry asserts. Finally, as it was already mentioned and following Burdon's synthesis, autopoiesis relates to systems capable of producing and maintaining by themselves. Lovelock and Berry's coincidences turn around this ensemble of elements relative to the integral operation of nature. In fact, Berry though Lovelock was one of the very few scientists concerned about the operation of living systems[40].

[36] Lyon (2004) 29-30.
[37] In general terms, a quite exhaustive compilation of pro-and-against contemporary arguments in Schneider and others (2004).
[38] Burdon (2012) 89-92.
[39] Berry (1991) <https://centerforneweconomics.org/publications/the-ecozoic-era/> accessed 14 September 2018.
[40] ibid

Empirically the key tenets of *Gaia* hypothesis are clearly represented in the whole text of the *Draft Universal Declaration of Rights of Mother Earth*, particularly in the second paragraph: '*Mother Earth is a unique, indivisible, self-regulating community of interrelated beings that sustains, contains and reproduces all beings*', which represents a compilation of what has been mentioned up to this point. The wholeness of nature is addressed through the notions of uniqueness and indivisibility, which somehow means also differentiation, communion is illustrated by means of the community of interrelated beings, and autopoiesis appears in the insight of a self-regulating community that sustains and reproduces all beings[41].

1.1.2 The monetary value of nature as commodity – economic implications

From the economic point of view, the question of property rights has, at least, three remarkable implications relative to nature: i) management of natural resources, ii) employment of market mechanisms to combat pollution, and iii) pricing of nature. All of them depict an important discussion within the framework of sustainability, given the recognition of nature's rights replaces the notion of nature as tradable commodity, directly striking at the idea of appropriation and consequently at its potential commercial utilization.

Firstly, regarding the ***management of natural resources,*** some environmental economists, like Farber, Turner, Pearce, and Bateman state that one of the chief hindrances for sustainable management of natural resources is owing to lack of or failures in property rights[42]. The idea comes originally from Hardin and his 1968 work, '*The Tragedy of the Commons*', in which, by means of an example about a '*pasture open to all*', he describes the rational choice of shepherds towards the maximization of their utilities. Hardin explains that shepherds will usually prefer adding another animal to grazing livestock, because the overgrazing's costs are shared among all, while the gains from cattle's sale corresponds individually to each shepherd. However, given that everybody will draw the same conclusion, grass will tend to depletion. '*Therein is the tragedy*', Hardin asserts, '[f]*reedom in a commons brings ruin to all*'. So the solution? Hardin's response consisted of punitive laws and taxes for water, air and other resources being tantamount difficult to control, and

[41] Draft Universal Declaration of Rights of Mother Earth (2010) <https://pwccc.wordpress.com/programa/> accessed 19 September 2017.
[42] Farber (1991) 344-5; Turner, Pearce and Bateman (1994) 215-7.

privatization or equivalent measures for the rest[43]. This approach was somehow validated by other economists, for one, Dasgupta and Heal[44]. Transposing this scenario into a macroeconomic context, as Farber puts forward, wealth will concentrate on developed countries to the detriment of the poorest ones. He avers there is a '*tragedy*', derived from the absence of clearly defined property rights, when investors pass concessions of logging or mining from one hand to another, due to either political instability or economic influence. Under these circumstance, those investors will probably tend to exploit the resources faster, '[…] *since what you do not harvest today will belong to someone else tomorrow*'[45]. In consequence, following Mary Clark, this reasoning leads thinking about the tragedy of the commons is the '*inevitable cause*' of environmental degradation, being the privatization of natural resources the most accurate treatment[46].

In contrast, critics deem there is a conceptual confusion in Hardin's argument, when he speaks about '*commons*' instead of '*open access goods*'. In other words, commons are property of groups or communities, in certain sense a sub-type of private property; while open access means absence of ownership. From the standpoint of ecological economics, Aguilera explains that Hardin's paradox does not deem the essential characteristics of the '*commons*', or '*goods in common property*' viz the whole owners have the right to use the resources, without losing it if they do not exercise it, and who is not an owner is consequently excluded[47]. Another well-known ecological economist, Joan Martínez Alier, adds that Hardin's dual envision is inaccuracy, taking into account that a more correct taxonomy of property rights would consider not only open access and common property, but also private property and state property, i.e. four categories in total[48]. Moreover, both authors utterly dissent from attributing the depletion of natural resources to communal property system, emphasizing, even historically, its crucial role played in the protection of nature, where '*reciprocity*' and '*voluntary cooperation*' turn out key elements of a more sustainable management of ecosystems. To them, privatization is not certainly the best option[49]. Clark is also in the same line[50]. In spite of advocating a diametrically opposed stance, Turner, Pearce and Bateman share the criticisms[51].

[43] Hardin (1968) 1244-5.
[44] Dasgupta and Heal (1979) 55-73.
[45] Farber (1991) 347-8.
[46] Clark (1991) 408.
[47] Aguilera (1992) 137-8.
[48] Martínez Alier (1998) 94-5.
[49] ibid; Aguilera (1992) 142-3.
[50] Clark (1991) 407-8.
[51] Turner, Pearce and Bateman (1994) 218-9.

Secondly, the ***use of market mechanisms to control pollution*** is not new. Indeed, it has its origin in the widely known '*Coase theorem*' of 1960, relative to the neoclassical idea about direct negotiation between polluters and sufferers, minimizing to the extent possible the State intervention. Coase certainly considered inappropriate the application of those *Pigovian* postulates that recommended establishing taxes in proportion to the emission or dumping, making the polluter the exclusive responsible for the damage, or simply excluding the hazardous activities from residential locations, measures that later became principles of environmental law, such as the '*Polluter pays principle (PPP)*' or '*internalization of externalities*'. To Coase, the existence of well-defined property rights would allow to reach somehow social agreement regarding contamination, i.e. the '*optimum amount of* […] *pollution*', without State's interferences. In an ideal unregulated market, parties by themselves would be able to offset the costs of pollution back to the other, whoever be the owner, either the polluter or the sufferer, or both[52].

Opinions about the applicability of the '*Coasian Property Rights Approach*' are currently divided. For example, the bulk of contemporary environmental economists, Hackett, Singh and Shishodia, among them, see more advantages relating to low transaction and administrative costs, feasible assignation of property rights to environment (including water and air), absence of free riders, automatic adaptation to new circumstances, few market distortions, etc. than disadvantages[53]. On the other hand, it does not certainly seem to be the feeling of other environmental economists, such as McKitrick, Turner, Pearce and Bateman, who point out that the market is not perfect so that one finds problems of competition, high transactions costs, difficulties to define who the owner is, and so on, aspects that in the end obstruct the bargaining. They are more partisans of State intervention, by means of either incentives (e.g. taxes or charges) or direct regulatory measures of 'command-and control (CAC)' (e.g. standards for environmental quality of air or water, or even the precautionary principle)[54]. However, it draws attention how Pearce himself, accompanied by other colleagues like Markandya and Barbier, fosters the valuation of environmental services and externalities, arguing that the '*zero value*' tends to provide an incentive for people to overuse natural resources, placing them in serious jeopardy of exhaustion[55].

[52] Coase (1960) 1, 42.
[53] Hackett (2006) 161-3; Singh and Shishodia (2007) 251-3.
[54] McKitrick (McKitrick, 2011) 196-7; Turner, Pearce and Bateman (1994) 144, 153, 155.
[55] Pearce, Markandya and Barbier (1997) 5-7.

For his part, although Martínez Alier recognizes the Coase theorem could be useful in the case of mutual externalities between two companies, or from one to another, or even between consumers, he does not really appear to sympathize too much with the idea of assigning property rights to natural resources, let alone prices. He believes the valuing of externalities is arbitrary mainly because the real impacts over future generations are uncertain and this uncertainty is immeasurable[56]. Daly and Farley are of similar opinion. They state that economic information about human impacts is unobtainable in practice so that they should be deemed market failures if appropriate[57].

Thirdly, concerning the question about the ***pricing of nature,*** from the perspective of environmental economics, as Pearce, Markandya and Barbier explain, the allocation of suitable monetary values to services provided by nature is a pivotal aspect of sustainability. For the authors, the paramount problem consists in the bulk of environmental services do not have any price, owing to the lack of a market where they can be commercialized. In general, they argue, the absence of value motivates people to misuse natural resources to the point of provoking them serious harm or even depletion. In this context, the economic function of valuation will be the control and protection of environmental services, prioritizing those that contribute to human well-being, living standard and development[58]. Additionally, valuation is also important due to the neoclassical postulate of substitutability between natural and human-made capital, originally formulated by Solow and Hartwick. In parenthesis, this theoretical construct revolves around the feasibility of compensating natural assets (resources) with human-made ones, once the former has declined in terms of quantity and quality, in order to maintain a permanent stock of capital, or '*constant wealth*'. Current generations are thereby able to inherit to future ones exactly the same stock of capital, no matter whether natural or artificial, guaranteeing the '*intergenerational equity*'[59]. Recapitulating, environmental economists believe that the importance of a proper valuation of natural resources resides in the avoidance that the '[…] *unfettered market forces* […] *dictate the substitution* […]', due to the lack of '*market prices*', assuming that this assumption would be '[…] *necessarily incompatible with sustainable development*'[60].

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[56] Martínez Alier (1998) 30, 58, 115.
[57] Daly and Farley (2004) 179-80.
[58] Pearce, Markandya and Barbier (1997) 5-7.
[59] ibid 34-8; Solow (1986) 146-8; Hartwick (1978) 353.
[60] Pearce, Markandya and Barbier (1997) 50.
Robert Costanza and Herman Daly, 'Natural Capital and Sustainable Development' (1992) 6:1 *Conservation Biology* 37, 38-42.

For its part, ecological economists are of the opinion that it really works out better in mathematical models than in practice. Indeed, Costanza and Daly object those premises of substitutability, firstly arguing they do not take account of the varied kinds of existing concepts around the notion of capital. On the one hand, in contradistinction to an only natural capital, one should separate '*renewable or active capital*'–whose self-maintenance is due to solar energy, such as flora or fauna–from '*nonrenewable or inactive*' one, like minerals or fossil fuels. On the other hand, human-made capital could be physically '*manufactured*', as in buildings, machinery, and any other constructed goods; but defenders of substitutability do not consider other aspects, say, culture, education, or knowledge, which could be termed '*human capital*'. This absence of differentiation fosters paradoxical conclusions. For instance, if manufactured capital (e.g. industrial tool) is essentially an output of combining natural capital (e.g. any type of metals) with human capital (e.g. knowledge), it turns out that the '[c]*reation of the "substitute" requires more of the very thing that it is supposed to substitute for!*' Secondly, the substitution of natural capital with human-made capital appears to operate quite normally, at least in theory, but it does not in the opposite direction. Costanza and Daly observe, with quite precision, that if it would be possible to replace human-made capital with natural assets, the production and accumulation of the former would be useless. They consequently inquire '[w]*hy does one need human-made capital if one already has an abundance of a near-perfect substitutes?*' Obviously, the response is that both capitals are not substitutes, they are rather complements. Hence, complementarity is the key tenet guiding what ecological economists have called '*strong sustainability*'[61].

Under this circumstances, the eventuality of valuing natural resources turns vague and impracticable. If capitals are not substitutes, then it is not necessary they have the same value, as suggested the environmental economists. Moreover, it is fairly possible that the accounting of certain natural resources and their services be literally so large or so complicated to determine than it prove to be impossible to measure. For instance, how could a valuator establish the price of species in danger of extinction? What about the incomes and flows understood as biophysical yield (new population of trees or fish)? These questions have and will have hardly a monetary answer. In *Green Economics*, Pearce curiously attempted to clarify the idea, arguing that valuation of nature does not imply necessarily a monetary measure of environment in itself, but rather of human preferences, attributing the misunderstanding to the use of improper economic language[62].

[61] Costanza and Daly (1992) 38-42.
[62] Pearce (1992) 7.

To conclude, while the economic perspective is quite probably one of the best ways to describe the relationship between humans and ecosystems, in terms of property rights, this is perhaps the academic realm where the idea of nature as a set of things is more robustly embedded. The discussions about the substitutability between natural and human-made capital–let alone the potential pricing of nature–constitute a clear example of how economists, neoclassical ones, can equate nature with something produced through human intellect and work, i.e. with something that one could really define as a '*thing*'. From a chrematistic point of view, nature is not yet an actor in the market, but the commodity, the object of trade. Nevertheless, neither the complementarity of capitals nor the strong sustainability, proposed by ecological economists, have attained to fade the connotation of nature as an array of goods or even the employment of market instruments as a measure of environmental protection. As Martínez Allier admits, the fact of casting on doubt the possibility of a convincing internalization of externalities or the defense of the thesis about the immeasurability of natural resources '[…] *does not mean* [they] *have to be against, in practice, the taxes regarding the use of non-renewable energy, or the emissions trading of* SO_2*, as instruments to reduce negative impacts from the economy on ecology*'[63].

1.1.3 Native worldview as source of the nature's rights – social implications

One of the most thought-provoking, and somehow still pristine, fields of social and cultural research relative to the interconnections between nature and human beings, bears upon the native worldview regarding environmental management and its influence in the recognition of nature's rights. Paradoxically, the decisive role played by indigenous people in the defense of '*their*' natural resources has proved to be extremely efficient in propitiating the delivery of judgments, and even the enactment of legislation, assigning legal personhood to nature at domestic level. Namely, in spite that indigenous communities have preserved a deep-rooted belief of natural resources as things or places–it is worth it to say '*sacred ones*'–they have, in one way or another, underpinned the legal transmutation of nature from being lawfully considered object to being lawfully considered subject. The law relative to the conferment of legal personality to the '*Te Awa Tupua*', an ecosystem comprised by '[…] *the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements*', in New Zealand, is probably the most paradigmatic case[64]. According to Rodgers,

[63] Martínez Alier (1998) 58.
[64] *Te Awa Tupua* Act (2017) para. 12nd.

it deals with the longest running dispute over indigenous Maori territories in the history of New Zealand. The claim was official brought and registered in December 1990 by the Maori Trust Board, being initially a litigation to obtain the restitution for natural resources, customary lands and governance of the river system; which means, in other words, goods deemed Maori property and their management[65]. Nevertheless, if one reviews the 1999 report by the Waitangi Tribunal, one notices the conflict dates from nineteen century, having its origin in alleged breaches of principles of the 1840 Treaty of Waitangi[66]. Therefore, it is the result of a long-standing and tedious popular struggle to defense not only property and its administration, but also ancient, traditional and cultural values, relative to memories of ancestors and history, sources of physical and spiritual nourishment, sacred places, and so forth.

For its part, the Indian Forest Rights Act of 2006 constitutes another example regarding the exercise of property rights and its associated entitlements by tribes and other traditional forest dwellers over ancestral lands. In addition, as it also occurs in South America, explained below, in so far as one reads the law, it is possible to distinguish a robust connection between the occupation or tenure of lands by traditional communities and more sustainable management of the territory[67]. It does not necessarily mean the ancestral practices are eco-friendly per se, but there seems to be a general tendency to believe so in the social and legal parlances. Effectively, to Vandana Shiva, recognition of legal rights of the forest, by means of the enactment of this law favored its environmental protection, characterized by the practice of native traditions, such as diversity, pluralism, multi-functionality and non-exclusivity[68].

This great discursive impact about how efficient aboriginal people have been in managing their natural resources and accomplished the conservation of ecosystems has penetrated profoundly into the ecological literature as well, in particular the legal one. It has even turned out often the key support of those visions pro nature as a bearer of rights in Constitutional Law. Thereby, in Latin America, the ideal of '*Pachamama*' (also '*Pacha Mama*') as the model of suitable symbiosis between humans and nature has become a clear example. Eugenio Zaffaroni, one of the most reputable defenders of the rights of nature, states that Pachamama has come as a resurgence of the ancestral culture of harmonious

[65] Rodgers (2017) 266-7.
[66] Waitangi Tribunal (1999) xviii, 55-104.
[67] The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act (2006) Chapter II. Hereinafter Indian Forest Rights Act of 2006.
[68] Shiva (2009)101-2.

coexistence within nature, incorporating itself to universal Constitutional Law[69]. In a similar vein, Llasag affirms the recognition of Pachamama´s rights depicts also a recognition of indigenous worldview, characterized by the principles of the Andean philosophy wherein the harmonious relationship between humans and nature prevails[70]. In practice, some authors have argued that the constitutional recognition of nature's rights has been inspired by the harmful impacts by the petroleum industry[71] and has been visualized mainly through environmental alternatives to the oil exploitation, such as the Ecuadorian Yasuní-ITT Initiative[72]. Aguilera and Cóndor prefer the term '*materialized*'[73]. By the way, the project consisted of leaving underground the reserves of heavy crude oil, located in the Yasuní National Park, in exchange for a monetary contribution of '[…] *at least, half the revenue that the country would receive if such crude oil reserves were exploited*'[74], although it was never really carried out. In either event, the notion of *Pachamama* has overshot the academic expectancies, even coming to be recognized by Ecuadorian and Bolivian Constitutions, whose preambles invoke it[75], albeit with a couple of differences.

Firstly, while the Bolivian Constitution does not comprise any definition, the Ecuadorian one defines it as a kind of synonym of '*nature*' (Article 71), a word coined by Western ancestors, Gudynas argues, which implies a wider cultural focus towards the incorporation of other perceptions in practice[76]. Secondly, it is an expression implying a multiplicity of connotations, depending on the native tongue. In the Aymara language, for example, it means '*earth*', '*earth goddess'*, '*female'*, or '*fertility spirit'*[77]. Notwithstanding in a much more remote version, of 1612, Father Bertonio translated it as '*land to sow bread'*, which was also used as a reverence name. According to him, natives used to praise saying: '*Pachamama wawamaja*', meaning '*Oh Land, I will be your son or take me or have by your son!*'[78] Furthermore, it is Quechuan expression translated integrally as '*mother nature'* or '*mother earth'*, although '*pacha'* separately means '*time-space'* while '*mama'* means '*mother'* or '*madam'*[79]. Both languages are the most important native ones in Bolivia, being

[69] Zaffaroni (2011) 21.
[70] Llasag (2011) 79-81; 86-7.
[71] Galeano (2009) 28-9.
[72] Acosta (2009) 191-2.
[73] Aguilera and Cóndor (2011) 220.
[74] Vallejo, Burbano, Falconí, and Larrea (2015) 175.
[75] Constitución de la República del Ecuador (2008) Recital 2nd; Constitución Política del Estado, República de Bolivia (2009) Recital 6th, translated by Max Planck Institute (2009).
[76] Gudynas (2011) 98.
[77] Wexler (1967) 211.
[78] Bertonio (1993) 420.
[79] Laime (2007) 72.

spoken roughly by 14.7% and 8.9% of inhabitants respectively, pursuant to the 2012-census[80]. Additionally, this terminology appertains to Kichwa, the most important official national language for intercultural communication purposes in Ecuador and the second one after Spanish in terms of number of speakers (4.1 percent of the population approximately), according to the 2010-census[81]. In accordance with the Kichwa/Spanish dictionary, '*pachamama'* is generally defined as '*nature'*, although there are some other extra significances, like '*habitat'*, '*environment'*, and '*ecosystem'*. Separately, '*pacha'* means '*world'*, '*space'*, '*nature'* and '*ecosystem'*, while '*mama'* has been translated as '*mother'*, '*momma'*, '*madam'*, or '*matron'*, which could be certainly interpreted as a kichwa and female form of '*Mother Earth'*[82]. This phrasing concurs with an ancient interpretation by Cristóbal de Molina and others of the following prayer: '*Pachamama cuyrumama casillacta quispillacta, capac Ynca guaguay yquicta macari hatalli*', signifying: '*Oh Mother Earth, to your son, the Inca, have him over you, still and pacific!*'[83] It is noticeable the common purport between Aymara and Kichwa regarding the interplay earth/humans as if they were mother and sons. Moreover, certain historians, like Métraux, have equated the image of Mother Earth with the image of the Virgin Mary, i.e. as a benevolent pagan deity who protects crops and animals[84]. Summing up, as Henderson indicates, pachamama deals with '[…] *a universal deity still revered in indigenous communities because she is responsible for ensuring a good harvest*'[85]. In any case, as Gudynas warns, the signification of pachamama as Mother Earth or Mother Nature is not all accurate, being necessary to formulate a more precise analysis, which could be elaborated as part of a specialized future study[86].

By and large, within the environmental literature, there is a kind of association between this ancestral native worldview about the earth as a mother and respectful management of natural resources, where indigenous peoples play a key role in terms of conservation[87]. Nevertheless, even though there is evidence of certain indigenous people having carried out effectively these '*eco-friendly*' practices in remote times, the fact that these habits used to

[80] Censo de Población y Vivienda (2012) <http://datos.ine.gob.bo/binbol/RpWebEngine.exe/Portal?LANG=ESP> accessed 22 September 2018.
[81] Constitución de la República del Ecuador (2008) Artículo 2 (par. 2nd); Censo de Población y Vivienda (2010) <http://redatam.inec.gob.ec/cgibin/RpWebEngine.exe/PortalAction?&MODE=MAIN&BASE=CPV2010&MAIN=WebServerMain.inl> accessed 22 September 2018.
[82] Ministerio de Educación (2009) 96, 108.
[83] De Molina (1916) 92.
[84] Métraux (1970) 191.
[85] Henderson (2013) 359.
[86] Gudynas (2011) 106-7.
[87] For example, Zaffaroni (2011) 108-9; Acosta (2011) 344; Gudynas (2011) 250, among others.

be generalized along the bulk of ancestral territories has not been contrasted enough. Thus, Eduardo Gudynas, for instance, warns about the perils of idealizing the interaction of indigenous people regarding their ecosystems, focusing particularly in the recurrent invocation of Pachamama, somehow as the pattern of the efficient management of natural resources. He argues that the proliferation and generalization of Buege's image of '*noble savages*'[88] creates the myth that indigenous and country people have been the best gestors of environment, promoting an idealistic view, but forgetting -at the same time- important factors. For example, it has been set aside the fact that those groups historically carried out extensive modifications of the environment, in spite that they were not too much great in number and they did not count on the technology of exploitation. In addition, the notion of Pachamama does not only comprise a physical interconnectedness between humans and nature, but also a spiritual scope that differs from group to group, above all considering the enormous historical influence of Catholicism in Latin America. Likewise, the intense propensity of Pachamama, by the way, towards the fertility of soils and the production of food in the social imaginary of certain natives are often agents of depletion more than protection of resources, particularly in the Andean world, as Gudynas so rightly asserts, where scarcity, erosion, water availability, among others aspects, are permanent variables that impede or hamper their subsistence[89]. Jared Diamond has expressed a parallel reasoning, arguing that one should not take it for granted that native people were thoroughgoing or incompetent administrators of natural resources; '[t]*hey were people like us,* [Diamond asserts] *facing problems broadly similar to those that we now face*'. They are as prone to fail or succeed as current generations, depending on different, though also equivalent, circumstances[90]. One can find some other analogous critical stances in the works of Worster, Soulé, and León, among others[91].

1.1.4 The recognition of nature's rights as an alternative to combat the failures of environmental governance – public policy implications

Another question revolving around the acknowledgement of nature's rights refers to the association between its emergence and the factual perception that both legal systems and

[88] Buege (1996) 71 (quoted by Gudynas).
[89] Gudynas (2004) 22-4
[90] Diamond (2005) 10.
[91] Worster (1995) 65-86; Soulé (1995) 137-70; León (1994) 285.

public policies, just as they are organized these days, are not sufficiently effective to protect habitats, avoid pollution, counteract environmental harms, and so on. The signature of new formal '*commitments*'–rarely unswerving–by the international community, every so often, is evidence. For instance, the United Nations Framework Convention on Climate Change of 1992 has not definitively had an overriding repercussion in the enhancement of climatic conditions of the planet, despite of being a full-blown international treaty in the environmental field, and having been ratified by almost two hundred states all over the world[92]. Its implications have been discussed by state' international delegates in more than twenty conferences of the parties (COPs) and a numberless of other meetings and procedures. Their commitments have been adapted and integrated to domestic legislation of the bulk of nations. There have been four important milestones in terms of amendments, in Kyoto (1997), Nairobi (2006, not yet in force), Doha (2012, not yet in force) and Paris (2015), mainly oriented to correct '*inadequate*' levels of emissions[93]. Nevertheless, despite the efforts, as United Nations' experts themselves admitted in 2017, the global response to the climate change *'[…] has yet to reach the scale and speed needed to stabilize the global temperature at a safe level*'[94]. In consequence, it proves surely pretty difficult to state it has not been a complete fiasco after twenty five years.

Therefore, the bestowal of legal personality to nature stems as a response to this breakdown, as a new phase aimed at the quest for the integration and interaction of humans within the natural ambit, instead of insisting in archaic systems and obsolete mechanisms of use, conservation, preservation and protection of natural resources, whose results have been seriously cast doubt on. In this line, Laitos, Okulski and Wolongevicz ascribe a large part of the environmental disaster to the anthropocentric character of current laws and policies, whose main goals would be designed exclusively for the sake of humans, accentuating their superiority over nature and hence marking boundaries to their integral interdependence (fragmentation)[95]. Although this anti-anthropocentric stance is not actually new, paying heed to 1970's environmentalism, primarily since ethical standpoint, which came into being as a set of objections against those human-centered traditions[96], or at least against the harmful of human activities[97], it turns out however useful for understanding why certain contemporary

[92] United Nations Framework Convention on Climate Change (1992). Hereinafter Convention on Climate Change.
[93] Kyoto Protocol (1997); Nairobi Amendment (2006); Doha Amendment (2012); Paris Agreement (2015).
[94] United Nations (2018) 10.
[95] Laitos and Okulski (2017) 204-5; Laitos and Wolongevicz (2014) 1-2, 7-8.
[96] Keller (2010) 1
[97] Jamieson (2008) 6-8

thinkers–particularly those who promote the rights of nature–are firmly convinced of the paradigm shift. Namely, if none of what has been done operates properly, perhaps it is time to change the whole system. Indeed, to Laitos, Okulski and Wolongevicz, current environmental law and public policy are the result of a long run anthropocentric influence of, at least, three hundred years, which could be divided in four sections. In the start, the '*Use Era*', occurring between the seventeenth and nineteenth centuries, was characterized by the belief of natural resources had a productive human use, which, along with the advent of property laws, accelerated the exploitation of natural resources. The second phase was called the '*Conservation Era*' and overlapped the first one in late nineteenth century, continuing until early twentieth one. During this stage, laws kept their anthropocentric essence in favor of human consumption, but a future consumption, having realized that exhaustion of natural resources leads to long-term scarcity. During the '*Preservation Era*', around mid-twentieth century, lawmakers noticed that naturally valuable places, flora and fauna were vanishing as a consequence of what has been previously done. Hence, the response consisted of enacting laws oriented to preserve endangered species and isolate wilderness areas, but retaining the human-centered focus on sites and resources for the sake of people's existence. Finally, the '*Protection Era*' came the second half of the twentieth century, in the middle of a more conscious suspicion of planetary limits. Lawmakers began formulating controls and economic disincentives to harmful activities and behaviors, but still promoting regulations aimed at human welfare. A key characteristic of this last stage comprises the arrival of certain voices, mainly from moral philosophers, that promote environmental concerns based purely on nature, which are paving somehow the way to the entrance of ecocentric legislation, as the foreseen phase and the forthcoming destination[98].

1.1.5 The transcendence of environmental discourse and commitments in the international arena – political implications

Politics is a very important variable, probably the most, in practice. Thence the bulk of crucial decisions in the environmental matter are made on the political basis, sometimes to the detriment of scientific, social or, even economic reasons, such as it occurred with the United States withdrawal of Paris Agreement in 2017[99]. This refusal to honor the commitments could be an irrefutable evidence that environmental issues are still more

[98] Laitos and Okulski (2017) 43-4, 47-8, 51-2, 55-6; Laitos and Wolongevicz (2014) 24-5, 28-9, 32-3, 35-6.
[99] Communication of the United States of America (2017).

rhetoric pamphlets than real concerns in the international arena, wherein prevails the discursive exchange of beliefs and disbeliefs over any other dimension. Thus, in his speech, President Trump referred about Paris Agreement as '[…] *a deal that aimed to hobble, disadvantage and impoverish the US*', despite that one of its key objectives is precisely the eradication of poverty[100]. After that, it worth it to wonder whether environmental issues actually occupy a predominant and permanent place in the international agenda, as some commentators state[101], or if they are just a secondary factor below sovereignty, economic interest and the like. This response is vital in matter of rights of nature, because both state sovereignty and economic interests over natural resources tend to perpetuate their exploitation's conditions. Thereon, Sands examines historically several examples of international binding instruments and soft law, in which the generally accepted principle of state sovereignty has predominated over the exploitation of natural resources and cooperation among nations to face climate change[102]. A reaffirmation of the principle is even within the preamble of the Climate Change Convention[103]. Summing up, while states continue to see nature as groups of commodities to extract in order to meet their needs, it is going to be quite difficult to change the paradigm.

On the other hand, certain [superficial] aspects could lead to believe at first glance in the existence of a genuine interest in the international community. Indeed, the large amount of world and domestic entities–between governmental agencies and non-governmental organizations–involved in the environmental debate could be seen as a measure of their importance. By way of example, there are currently more than 540 accredited organizations to the United Nations Environmental Programme (UNEP)[104]. Likewise, the intense exposure of green discourse to media could be interpreted as evidence of its significance at a global level, such as it occurred with the signature of Paris Agreement[105], which was breaking news, part of newscasts in prime time, and the front page of several renowned newspapers. Some of the most important journals and news agencies worldwide gave it large coverture, maybe because it was the first time that so many nations accorded a set of common measures to face the effects of climate change. For example, Reuters spoke about a '[…] *historic*

[100] BBC News (2017) <www.bbc.com/news/world-us-canada-40127326> accessed 28 September 2018; Paris Agreement (2015) Article 2, para. 1st.
[101] Bocking (2014) 1.
[102] Sands (2003) 236-7.
[103] Convention on Climate Change (1992) Preamble, paras. 9th and 10th.
[104] United Nations (2018) <www.unenvironment.org/civil-society-engagement/accreditation/list-accredited-organizations> accessed 21 February 2019.
[105] A general compilation of facts in United Nations (2018) <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> accessed 2 May 2018.

transformation of the world's fossil fuel-driven economy […]'[106], while Le Parisien referred to an '[…] *unprecedented world deal to struggle against global warming* […]'[107] and the United Press International pointed out that intense negotiations led '[…] *to the first international agreement committing nations to reduce emissions* […]'[108]. Nevertheless, from a more pessimistic expectation, neither the existence of an important number of actors nor the wide exposure to media seem to be enough to lay the environmental questions on a preponderant place of the international agenda. They often appear to be merely vain attempts to enhance public opinion in the long run regarding the environmental crisis.

Therefore, it becomes necessary to recognize that any potential endeavor to shift the current legal paradigm regarding nature as a set of goods towards its acknowledgment as a new actor of the international realm will not be possible if the political variables are not directly involved. Even if it were possible to change the legal status of nature in the short-term, the enforcement of legislation would require a vigorous political bargain. Once again, the withdrawal of the U.S.A. from the Paris Agreement is the epitome of the role played by the political influence.

1.1.6 Delimitation of final scope

The complexity of the current environmental crisis seriously demands a response of similar character. In this regard, a multidimensional approach of any propounded alternative, in this case the conferment of international legal personhood to nature, would seem to be a plausible option due to its implications on ecological, economic, social, cultural and political facets. Nevertheless, such a vast assignment would require an interdisciplinary team of experts to achieve accurately its objectives, being an incongruous undertaking in the ambit of an individual doctoral research.

Therefore, considering the essentially juristic nature of the focus proposed in the present dissertation, the analysis will comprise the three requisite dimensions, ethical, legal and judicial, derived unfailingly from the doctrines of nature as a subject of law. It will permit to respect the multidisciplinary character of the proposal, without omitting the permanent

[106] Doyle and Lewis (2015) <www.reuters.com/article/us-climatechange-summit/with-landmark-climate-accord-world-marks-turn-from-fossil-fuels-idUSKBN0TV04L20151212> accessed 2 May 2018.
[107] Laystary and Cloris (2015) <www.leparisien.fr/environnement/cop21/en-direct-cop21-le-projet-d-accord-est-finalise-11-12-2015-5362495.php> accessed 2 May 2018.
[108] Pestano (2015) <www.upi.com/Top_News/World-News/2015/12/13/UN-reaches-historic-climate-change-agreement-in-Paris/8631450018466/> accessed 2 May 2018.

process of rethinking paradigms, redefining conceptions and restructuring hypotheses, as diverse mechanisms to address the dilemma about how to protect nature more efficiently and effectively. Every single dimension will be addressed throughout the different chapters.

1.2 Research questions and general methodological aspects

1.2.1 The environmental crisis as a problem of legal research

Notwithstanding the multiple endeavors that one can perceive from various ambits of sciences and humanities to preserve nature or, at least, to control the environmental depletion of the ecosystems, it turns out actually quite difficult to stop thinking about something is failing. It is enough to review the results of international reports about the current conditions of certain environmental components and resources, such as forestry, climate or biodiversity, for instance, to notice that the pendant tasks to do ends up being much more than the achieved goals in practice.

Thus, in matters of forestry for example, the '*official*' discourse sounds often contradictory. Effectively, apropos of the last report about the state of the world's forests, despite there are references of slower rates of deforestation (from 1.8% in the 1990s to 0.8% between 2010 and 2015) and enhancements in the indicators of sustainable forest management in 2015, one can also find statements, such as '*Time is running out for the world's forests, whose total area is shrinking by the day*'; as well as recommendations to halt deforestation, manage forests sustainably, restore degraded forests, increase the global forest area, and so on. This contraposition of ideas leads to believe that the efforts are not still sufficient and the international entities' perspective about the future of forests is not completely optimistic[109]. Regarding climate change instead, in the last report of the Intergovernmental Panel, one can observe the description of a series of impacts on the climate system, the sea level, the land use, and even the atmospheric components, derived from the global warming brought about mainly by human activities[110]. Likewise, according to the latest Living Planet Index (LPI), there has been a general decrease of 60% of the species population between 1970 and 2014. The LPI is '[…] *a measure of the state of global*

[109] FAO (2018) xvi, 61, and 89.
[110] Hoegh-Guldberg and others (2018).

biological diversity based on population trends of vertebrate species from around the world'[111].

In the legal field, for example, there is an innumerable array of instruments aimed at the conservation and protection of nature, but they do not seem to be properly working out. Therefore, emphasizing what Laitos and Wolongevicz warn, it is worth it to inquire oneself ***why does environmental laws fail?***[112] Although the question could encompass an excessively wide variety of responses in the existing literature, mostly due to the enormous complexity of the environmental interplays and including those voices who attribute the ecological degradation to a '*natural evolutionary process*'[113], the most spread reply concerns probably the anthropocentric character of laws and the economic logic governing the relationship between humans and nature[114], i.e. basically property rights. From this point on, the advocates of nature have clamored for not only a change of laws but also a thorough shift of paradigms, beyond even the ethical perspective, wherein the assumed superiority of humans over nonhumans can be replaced by a much more balanced interaction. In words of one of the most celebrated philosophers of nature, the great Thomas Berry,

> '[t]*his is not a change simply in some specific aspects of our ethical conduct. Nor is it merely a modification of our existing cultural context. What is demanded of us now is to change attitudes that are so deeply bound into our basic cultural patterns that they seem to us as an imperative of the very nature of our being, a dictate of our genetic coding as a species*'[115].

In sum, the idea consists of changing the way how humans see and treat nature, as a set of goods they can use and trade, towards a more holistic view of their interactions, in which humans and nonhumans can have a closer rapport. In this framework, the approach of the recognition of nature's rights has brought into being, fostering a change of paradigm, where nature occupies a position of a subject of law, instead of continuing to be lawfully an object.

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[111] Grooten and Almond (2018) 88; WWF and Zoological Society of London (2014) <http://livingplanetindex.org/projects?main_page_project=AboutTheIndex&home_flag=1> accessed 7 January 2019.
[112] Laitos and Wolongevicz (2014) emphasis added.
[113] Cullinan (2011) 36.
[114] Laitos and Wolongevicz (2014) 1.
[115] Berry (1999) 105.

Therefore the primary objective of this research comprises the assessment of the current proposition of bestowing legal personhood to nature, within the realm of international law, as an alternative mechanism to face the environmental crisis of these days.

1.2.2 Why an international insight?

Certainly, all existing experiences about recognition of rights of nature and its legal personality come from local legislation and national courts[116]. Nevertheless, nature is indivisible in practice. Its cycles of life, its structure, and its functioning cannot be separated by territorial boundaries. Its natural processes do not bring about isolated effects that one could differentiate by countries or regions, their effects are evidently global.

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

In conclusion, laws should be designed to respond the totality, not the particularities, and the best fashion, quite probably the only one, to address those integral visions of nature is through international law.

1.2.3 Research questions

The General research question has been somehow tacitly mentioned above, so that it can be written as follows: ***How feasible is to confer international legal personality to nature, as an alternative instrument to cope with the environmental crisis?***

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

From the ethical perspective:

[116] Rights of Nature Law, Policy and Education (2018) supra note 3.

a) *How influential is the discourse about property rights within the traditional approach of natural resources in the ambit of ethics?*

b) *Are the traditional human-centered principles sufficient to provide the ethical foundations to international law and justice aimed at facing the environmental crisis?*

c) *How reasonable would be the extension of the anthropocentric moral limits toward nature?*

d) *Would the rights of property tend to disappear as a direct effect of the recognition of the moral standing of nature?*

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

From the legal viewpoint:

f) *How influential is the legal approach of property rights upon nature, within the international parlance and legislation?*

g) *Are there enough legal mechanisms to protect nature against the influence of property rights in the light of international legal instruments currently in force?*

h) *How necessary would it be the recognition of nature as a bearer of rights and a subject of international law in the current state of legal affairs?*

i) *To what extent would the bestowal of international legal personality to nature modify the legal conditions of the property rights?*

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

k) *Who would represent nature as a subject of law in the international ambit?*

l) *What aspects of the national laws in current force, by which nature has been recognized as a holder of rights, would be useful for its international acknowledgment?*

From the judicial standpoint:

m) *Do international courts of justice rule in favor of property rights and individual interests to the detriment of nature?*

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

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

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

q) *What aspects of the successful national cases, in which nature has been recognized as a bearer of rights, would be useful for its international acknowledgment?*

r) *Who would represent nature as a subject of law before international courts of justice?*

Solely once these questions have been addressed one could prepare an evaluation of the proposal's feasibility. In this sense, the role played by the international adjudications is remarkable because, for example, if it would not be possible to demonstrate the judges are deciding against environmental protection any potential analysis about the viability to recognize international personhood to nature would be useless. Therefore, inasmuch as the last subsidiary question should be subject to the confirmation of the previous hypotheses, it will be formulated only in referential terms.

s) *What should be the main ethical and legal conditions to recognize nature as a subject of international law?*

1.2.4 Novelty of the research

The thesis is novel in the field of study. Despite there is a lot of developments in matters of recognition of rights of nature at a national level, as one will be able to see in the unfolding of the research, or a series of works about comparisons among different countries, this will be the first time that someone presents an assessment from the universal legal perspective and addresses the international decisions thereon.

1.2.5 Qualitative methods

The methodology employed in the present thesis has been determined by the scope of the legal, judicial, and ethical perspectives. In that regard, the analysis of the legal and judicial components of the research will be guided by the traditional doctrinal methodology, which represents–pursuant to Chynoweth–the characteristic technique to study those legal texts described as '*black-letter law*'[117]. In general terms, black-letter law deals with an especially colloquial expression relating to '[…] *the basic principles of law generally accepted by the courts and/or embodied in the statutes of a particular jurisdiction*'[118]. Its application is going to allow counting on a systematic formulation of legal data about the international instruments currently in force, just like the academic works about the topic.

Additionally, the processes of collecting information, processing of data, ascertaining of facts, and analysis of results have followed the general steps explained in the literature thereon. Thus, the empirical data, comprised mainly by the normative sources and case-law, was collected in function of its *relevance* for each case, in the sense adopted by Van Hoecke; i.e. as one will be able to notice, the quotation and report of certain repealed European directives, for instance, corresponded to the level of importance they implied for specific jurisprudence in particular. In a similar vein, the guidelines for the interpretation of wording has been crucial to obtain results, focusing primarily on the texts of the adjudications. The position of the CJEU is not always homogeneous so that it is necessary to determine the diverging readings about the same norm, in order to construe a potential position of the Court or its meaning concerning this and that specific matter[119].

[117] Chynoweth (2008) 29.
[118] Jacobstein, Mersky and Dunn (1998) xx.
[119] Hoecke (2011) 11-4.

Complementarily, one cannot lose sight of the uncertainty principle in legal research, particularly in this kind of environmental studies, in which the replies are largely interpretative and not definitively the simplest ones so that the results are really far to be totally conclusive[120]. In any event, the comments, opinions, and arguments are based on the major possible number of sources and evaluations in order to correct, to the extent feasible, the errors or misunderstandings derived from the uncertainty of data. By the way, an accurate compilation of legal sources in several disciplines of law, but particularly in international environmental law can be found in Hoffman and Rumsey[121]. Moreover, being conscious about the existing tensions between the attributed rigid and inflexible features of doctrinal analysis, in contradistinction to the wider challenges of the interdisciplinary tools, just as have been described by Vick, the employment of concepts taken from different scientific disciplines has been inevitable, above all when they have been useful to avoid misinterpretations[122].

On the other hand, the search for bibliographic information about the methods '*of*' ethics does not look like a difficult task at first glance. However, once one has undertaken the quest the lack of specific references is quite noticeable. The bulk of study materials refers mainly to the role of ethics in the research of both sciences and humanities, evidently including law, emphasizing the addressing of ethical challenges and dilemmas during the process of conducting research[123].

Thus, when one reviews several works about applied ethics, including academic dissertations, it gives the impression that authors take it for granted the analysis of moral principles should fit the traditional Western practices, influenced mainly by Kant and his categorical imperative towards deontological inquiries. In the course of the examination, however, it is common to be tempted to occasionally opt for an empirical analysis, assigning a major weight to the behavioral observations and practices than the categories of thought, in contradistinction to what Kantianism states, above all in a field like environmental ethics wherein generally accepted tenets like the precautionary principle contravene the aprioristic focus of the categorical imperative[124]. It turns out really difficult to contrast the scientific persuasive evidence through, so to speak, mere intuitions.

[120] Elias, Levinkind and Stim (2007) 16.
[121] Hoffman and Rumsey (2012).
[122] Vick (2004) 163-4.
[123] Wiles (2013) 9.
[124] Hill (2000) 228-9.

In the same line of reasoning, at the risk of being superfluous as suggested by Sidgwick, it has been also important to prevent certain casuistry from outweighing fundamental principles of ethics, in order to avoid obtaining misplaced results to the main objective of this research, such as the responsibility of animals, promoted by utilitarianism, for example[125]. Incidentally, one of the most prominent thinkers of contemporary utilitarianism, Peter Singer, affirmed that Sidgwick's book was the best on ethics ever written[126]. Therefore, pursuant to Katz, one has attempted to balance the metaphysical approach, as the '*proper*' ethical method, with the tools of casuistry, being beforehand conscious of the theoretical incompatibilities between both, but assuming the risks about the final results[127].

1.2.6 Quantitative tools

The comparisons of data regarding the adjudications issued by the European Court of Justice were developed through one of the most known and used correlation coefficients for two variables, the '*Pearson product-moment correlation coefficient*'. The variables subject to comparison were environmental protection, property rights and healthy environment. Given the nature of the information and its process of collection, a detailed explanation is offered in the corresponding section.

[125] Sidgwick (1893) 99.
[126] Singer (2007) <https://web.archive.org/web/20110714194546/http://www.normativeethics.com/interviews/singer.html> accessed 9 January 2019.
[127] Katz (1988) 20-1.

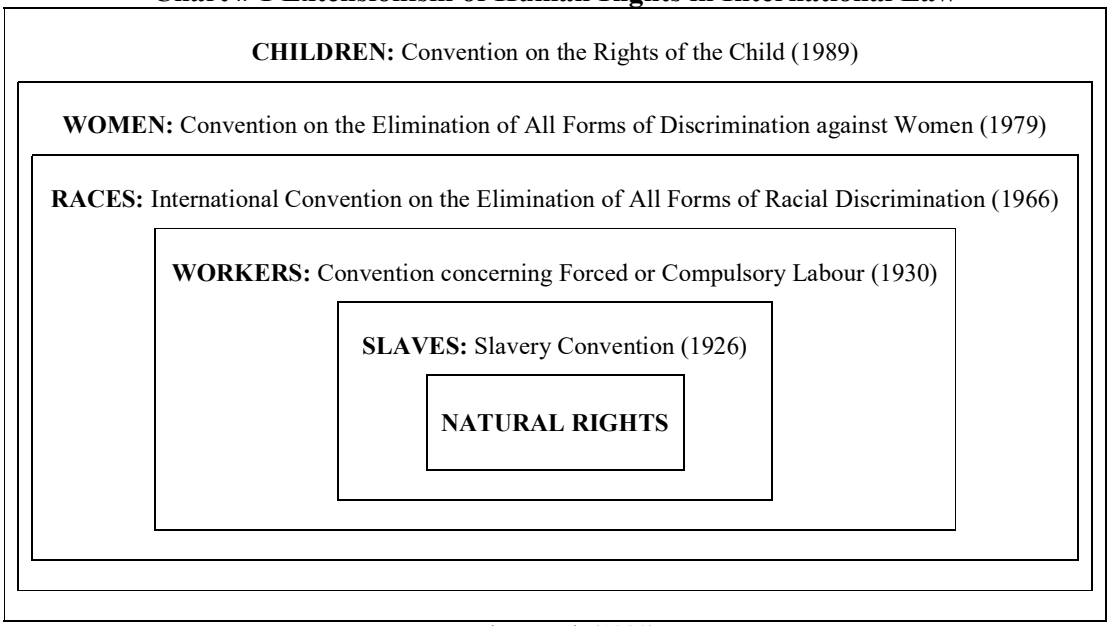
Second Chapter

Moral and Legal Standing of Nature, a brief state of the art

2.1 Moral standing of nature in the ethical thought

The terms '*moral standing*', '*moral considerability*', '*morality*', and '*moral status*' are going to be used as synonyms in the present research, mainly to avoid misunderstandings. Their conceptual differences are so tiny in the philosophical parlance that they could be completely ignored. The expression '*moral personhood*', which is also used although less frequently, could be considered as another synonym but only in strict reference to humans[128].

Chart # 1 Extensionism of Human Rights in International Law



Based on Nash (1989) 7

An ethical entry has been assumed as indispensable considering that a great part of law-making in matters of legal status, understood in the conventional sense as a person's legal standing or capacity, or the '[…] *index to legal rights and duties, powers and disabilities*'[129] is often derivative from moral philosophy. In essence, as Stone magisterially suggests, the interconnectedness between the conferral of [fundamental] rights to new subjects of law and

[128] Jaworska and Tannenbaum (2018) <https://plato.stanford.edu/entries/grounds-moral-status/> accessed 3 October 2017; Scott (1990) 6-10; Gluchman (2013) 111ff.
[129] Martin and Law (2006) 512.

the concomitant expansion of the frontiers of moral standing towards themselves responds to a parallel history, although it would be worth it to clarify this parallelism does not necessarily consist of temporality[130]. Namely, holders of rights are usually deservers of moral standing and vice versa. This '*expanding concept of rights*' has been illustrated in an outstanding work by Nash, whose idea originally referred to the cases of the United States and the United Kingdom[131]. An adaptation to international law is shown in the chart # 1.

In consequence, historically the enlargement of the ambit of rights corresponds exclusively to those people who have been recognized as subjects before law and, at the same time, merit moral standing. In certain sense, what the study of legal status implies to jurisprudence, the moral considerability implies to ethics. In a similar vein, slavery is the example *par excellence* of the expansion of rights. Slaves really experienced both legal and moral transmutation of their inherent nature, from being originally considered mere objects or goods, property of others, to being recognized like human beings–their rightful condition–within the social and legal spheres[132]. An explanation in detail about how moral perceptions were shifting during eighteenth and nineteenth centuries regarding slavery can be found in Davis[133]. Moreover, slavery was not seen as a completely wrong practice under moral principles during centuries, above all referring to blacks, until groups of abolitionists called into question its ethical legitimacy to the point of going to war, such as the United States did it in 1861. Undoubtedly, there are older examples of abolition experiences, albeit with less historical resonance, such as the enactment of the decree to adopt the '*Freedom Principle*' by Louis X in France, in 1315, mentioned by Christopher Miller[134]. Nowadays, despite there are estimations about 40.3 millions of people in diverse modalities of modern slavery all over the world, this practice is penalized as a hidden crime, and consequently reproachable in a moral sense[135].

So far the idea about the expansion of rights seems to be relatively simple to the extent that the subjects at stake have been historically human beings, i.e. although they possessed a legally different status, both free people and slaves shared the same nature, so that when their instrumental attributes (legal status) were overcome, nay equated, their human essence (ethical value) manifested in itself identical before law [well, at least in principle]. Presently,

[130] Stone (1972) 450.
[131] Nash (1989) 6-7, figure # 2.
[132] ibid 199-213.
[133] Davis (1966)
[134] Miller (2008) 20.
[135] Walk Free Foundation (2018) ii, 6.

save for extremely controversial cases about abortion, say fetuses and embryos[136], it has occurred more or less the same with others, such as women and children[137].

In the case of nature, chiefly moral philosophers or ethicists have pretended to follow analogous paths of rights' expansion, though not necessarily in the same direction. As a result, the theoretical developments have obviously brought into a wide range of heterogeneous currents of thought, whose characteristics–albeit on occasion incomparable among themselves–have allowed, in the end, to segregate them in two somewhat general tendencies: individualism and holism[138]. In parenthesis, in certain scientific spheres, rarely philosophical ones, this dichotomy has been sometimes simplistically tackled as a tension between anthropocentrism and biocentrism/ecocentrism (attributing the latter even synonymous meanings)[139]. To avoid confusion, it is imperative to bear in mind their theoretical differences, so that the analytic ambit of nature as a legal person of international law can reflect coherently and consistently the philosophical basis in which it is supported. Therefore, this differentiation will have a momentous repercussion in the course of the present research, principally owing to it strikes a chord directly with the essence of moral considerability, namely in its very concept.

2.1.1 What is moral standing? - A flashcard

Moral standing is at the present day perhaps one of the most challenging issues to define in ethics, given the vast variety of existent conceptions and their subsequent epistemological connotations. The plethora of definitions illustrates its ambiguity and complexity to the point that the contrasts are usually notable even in a small sample. Indeed, depending on each perspective, moral considerability could be seen, for example, as an entity's attribute of deserving obligations from its peers[140], or maybe like the capacity to absorb a moral behavior that can be intelligibly addressed[141], or the level of autonomy to act in a certain way[142], and so forth. Moreover, if one considers the potential projection of certain current tools, say

[136] See, for instance, Lee and George (2005) 13ff about abortion; Payne (2010) about fetuses; Banchoff (2011) about embryos.
[137] About women Tong and Williams (2009) <https://plato.stanford.edu/archives/win2018/entries/feminism-ethics/> accessed 29 September 2017; about children Matthews and Mullin (2018) <https://plato.stanford.edu/entries/childhood/> accessed 29 November 2018.
[138] Keller (2010) 11.
[139] For example Godrej (2016) 50-1; Martinez (2014) 66; Clayton and Opotow (2003) 98, 348; Robertson (2017) 11, 42.
[140] Warren (2006) 439.
[141] Bernstein (1998) 9.
[142] Perry (2014) 27.

internet, it is quite probable to obtain a relatively wider set of heterogeneous insights, which will turn out in a much more complex concept. Either way, whichever the scope is, it seems clear that it is not merely a technical jargon[143], but rather an ethical recognition of importance, relevance, value, or significance in front of other entities, which is generally derived in granting rights and demanding duties.

In addition, the conceptual diversity relating to '*moral standing*' has not been the only epistemological hindrance to address this subject matter in a cloudless enough manner. Since the formal emergence of environmental ethics in early 1970s, as a philosophical discipline oriented to deal with the relationship between humans and nature, and much more in a contemporary context, this expression has been becoming more and more confusing[144], especially due to the expansion of its thresholds, in function of capacity to suffer[145], self-consciousness of its own rights[146], having a life[147], or being part of the biotic community[148], *inter alia.*

Furthermore, it has also had a remarkable resonance insomuch as these extensions denote an acknowledgement of moral value for nonhumans at the same level of their human fellows. This perception has been quite significant so far as it goes directly to the ethics' core in itself. To Keller, for instance, it is not only an isolated topic of philosophical interest. He firmly believes it is so important that the whole discipline of '***Environmental Ethics*** *can be seen as a project of widening the scope of the class of beings worthy of moral consideration (directly or indirectly) beyond humans*'[149].

Therefore, the ethical gist of the dissertation argument should be to determine the scope of the extension of rights, speaking about the conferment of international legal personality to nature. Namely, one has to wonder if the enlargement of rights will protect individually just to humans (anthropocentrism), or humans and non-humans (animalism and biocentrism); or holistically just to ecosystems (ecocentrism) or also to the wholeness, i.e. including human-built environment (general ethics). In the chart # 2, one can see a visual explanation of the enlargement of rights based on Keller.

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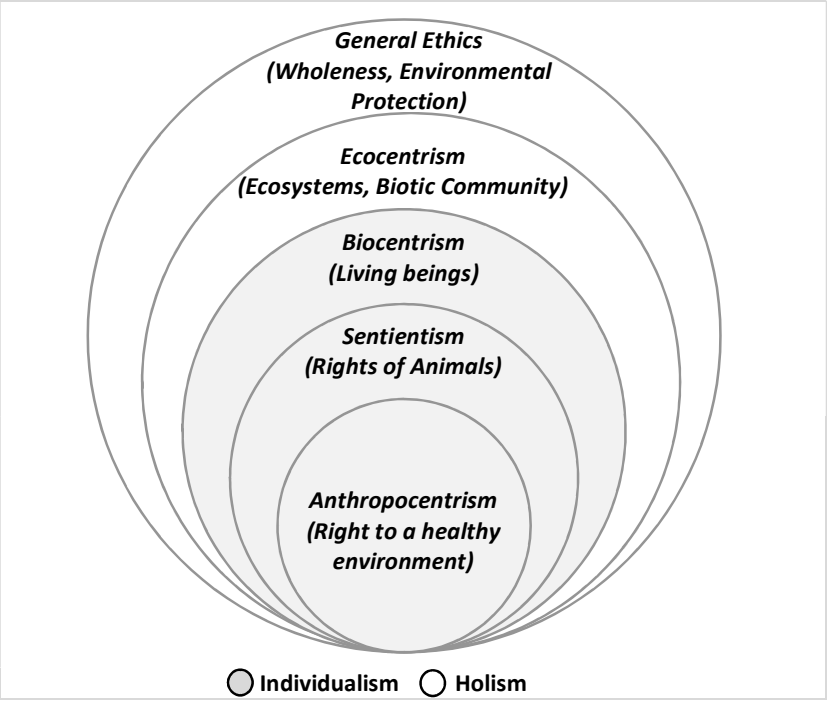
[143] The Misanthropic Principle (2007) <https://misanthropicscott.wordpress.com/?s=moral+considerability> accessed 21 September 2017.
[144] Cahen (1988) 195.
[145] Singer (1999) 57.
[146] Regan (1983) 243-8.
[147] Rolston III (2012) 63-4; Taylor (2011) 14-24.
[148] Leopold (1970) 239; Callicott (1987) 186-217.
[149] Keller (2010) 149 emphasis added.

Chart # 2 Enlargement of rights



Based on Keller (2010) 11.

2.1.2 Glancing at nature from an anthropocentric look

When thinkers advocate humans as the only deservers of moral considerability, their ethical stances can be undoubtedly categorized within the ambit of anthropocentrism. In context, it concerns to a worldview in which humans are philosophically laid at the center of a whole, either an ecosystem, or the planet[150] or even the cosmos[151]; albeit under a much more pragmatic outline, its scope probably '[…] *involves simply applying standard ethical principles to new social problems*'[152]. Indeed, John Passmore believed that a '*new ethics*' was useless, given that traditional tenets were enough solid to face up contemporary environmental threats, such as pollution or overpopulation; or even to promote the preservation of wild world under a utilitarian conception[153].

According to the taxonomy proposed by Callicott, this human-centered perspective refers to the Western traditional and protracted *Humanism*, in which there is not extension of rights in favor of any non-human being. Moral standing can be prolonged, as long as deals

[150] Boslaugh (2013) <www.britannica.com/topic/anthropocentrism> accessed 12 September 2017.
[151] Keller (2010) 59.
[152] DesJardins (2013) 17.
[153] Passmore (2010) 109.

with humans, even towards future generations[154]. Therein, although the recognition of moral status towards forthcoming people can entail in itself an array of ontological and epistemological incongruences[155], for the moment it will be enough to affirm that the key discussion revolves around the existence or not of a human duty to help those expected people generations to meet their necessities[156].

Summing up, nature is not involved into a discussion about moral considerability within an anthropocentric point of view, given that natural resources constitute a set of goods that provides nourishment, attire, and other services for human well-being. In this case, environmental issues are addressed through the notion of the '*right to healthy environment*', which in fact is the most well spread constitutional mechanism of nature's protection worldwide[157].

Consequently, under no circumstances, the bestowal of legal personhood or the concession of rights to nature can be categorized inside this anthropocentric outlook.

2.1.3 Expanding rights to other living beings

The second category proposed by Callicott is termed '*extensionism*' and consists of enlarging the limits of moral consideration towards creatures and other living non-human organisms, individually deemed[158]. In principle, the extended borders are the same which in the Western classical traditions were used to separate human from non-human world. The general understanding of moral status as a kind of umbrella over living beings, humans and non-humans, represents for the moment the crux of the matter, given that there is an important number of authors, within different schools of thought, who require detailed attention and comprehensive analysis, which should be practiced in due course, although not as an immediate part of this dissertation. It is not the main topic. Either way, biocentrism (depicted by Taylor, Goodpaster, Varner, Bernstein, among others)[159], animalism (with Snowdon, Liao, Shoemaker, Olson, and so on)[160], zoocentrism (expression used to encompass sentientism and psychocentrism)[161], sentientism (mainly from the points of view

[154] Callicott (1986) 392-3.
[155] Partridge (2001) 377-8.
[156] DesJardins (2013) 77ff.
[157] Borràs (2016) 124-6.
[158] Callicott (1986) 395ff
[159] Kaufman (2003) 194-245.
[160] Blatti (2014) <https://plato.stanford.edu/entries/animalism/> accessed 3 October 2018.
[161] Vilkka (1997) 37ff.

of Singer and Regan)[162] or psychocentrism (expression often used to describe the same content of '*sentientism*')[163], among other expressions, are just some examples of the heterogeneous terminology.

For that reason, certain ethicists prefer a simplification of lexis, employing the generic name of '*biocentric ethics*', in which the idea in common consists of bestowing an '*intrinsic value*' to life, no matter if it refers to humans or non-humans, of course, under specific conditions. In this regard, Professor DesJardins defines intrinsic or inherent value as a characteristic of people or things, valuable in itself, which does not depend on outside factors or judgements. In other words, it is usually defined as opposite to instrumental value, as a function of usefulness[164].

By and large, Callicott explains that extensionism could be analyzed in two levels, whose first phase comprises the concession of rights to those living beings with capacity to experience pleasure and pain[165]. In effect, based on the utilitarian Bentham's discourse, Peter Singer has built the moral considerability of beings on their capacity to suffer and enjoy, i.e. he has proposed broadening the '*moral circle*' of humans towards animals, motivated by '*altruism*'. Nevertheless, this expansion of morality does not encompass all living organisms, as Singer himself clarifies, because '[…] *there comes a point* […] *when it becomes doubtful if the creature* […] *is capable of feeling anything*', e.g. oysters[166].

For his part, Tom Regan contributed to the analysis with an approach grounded on '*rights*', in certain sense chastising Singer and other thinkers, both utilitarian and contractarian[167], for denying rights of animals[168]. Regan believes in the intrinsic value of the so-called '*subjects-of-a-life*', who are beings endowed of capacity to feel but also to become aware of their desires, pleasures, perceptions, memories, future, preferences, welfare, and so forth; by way of explanation, those conscious individuals of '[…] *what transpires "on the inside", in the lives that goes on behind their eyes*'. Accordingly, all those beings that are not immersed in the category of humans, mammals or maybe birds would not be endowed of moral status in practice[169].

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[162] Varner (2001) 192ff.
[163] Keller (2010) 149-50.
[164] DesJardins (2013) 125ff, 275.
[165] Callicott (1986) 395-401.
[166] Singer (1991) 7; Singer (2011) 120.
[167] See Cudd and Eftekhari (2017) <https://plato.stanford.edu/entries/contractarianism/> accessed 4 October 2018.
[168] Regan (1986) 15-6.
[169] Regan (1983) 243; Regan (2003) 93.

Philosophical adversaries of both authors have detracted from their ideas, arguing principally the excessive narrowness of their conditions for deserving moral considerability, given that both sentientism and self-awareness perpetuate the arbitrariness of the anthropocentric hierarchies they pretend to combat[170], ascribing, for example, mere instrumental value to plants or other animals that cannot qualify inside any of those categories[171]. Rodman, for example, does not see any difference between what he calls '*zoocentrist sentientism'* and the anthropocentric extension of specific rights to the British upper middle class, by means of the Reform Bill of 1832. To him, the arbitrariness of conditions to deserve moral considerability is analogous in both circumstances[172].

In this particular case, albeit the dogmatic teachings of animal rights encompasses much better the idea about rights of nature than anthropocentric doctrines do, even epistemologically, the possibility of backing up the conferment of international personhood to nature, based upon these philosophical premises, has not been foreseen. The high degree of uncertainty about a latent simplification or trivialization of relevant criteria around the inherent value of the natural world represents a too much risky option that does not worth it to take. Although it is necessary to examine very carefully the arguments in favor of a possible recognition of animals as legal subjects, it is not the key objective of the dissertation. It will be slid it a sideways glance, and no more than that, avoiding mainly the emphasis on repetition of outdated and already overcome practices, relating to trials and punishments of animals, as consequence of their supposed '*actions*'. There are numerous ancient examples in Evans[173]. After all, if there is not enough solicitude about the arguments, animals could experience a mere aesthetic transfiguration from defendants to plaintiffs before courts, which is surely not the objective of any theorist or doctrinal position[174].

To conclude, the postulates of psychocentrism do not correspond to the theoretical stance of the rights of nature because they brush aside the moral status of an important array of living beings and other abiotic elements of the ecosystem. Therefore, this theoretical approach will be discarded of the analysis.

2.1.4 The intrinsic value of life

[170] Keller (2010) 13-4.
[171] Callicott (1986) 397.
[172] Rodman (1977) 91; Act to amend the Representation of the People in England and Wales (1832) 154ff.
[173] Evans (1906).
[174] The Harvard Law Review Association (2009) 1205-6.

Some compilers, such as Engel and Keller, have categorized the enlargement of the moral thresholds towards the whole living beings, mainly proposed by Paul Taylor, as '*egalitarian biocentrism*', although there is not really a general consensus regarding this name among the ethicists. For instance, while Carter prefers the complicated expression '*egalitarian deontological biocentrism*', Attfield writes merely about a '*biocentric egalitarianism*'. In any case, these somehow tangled definitions denote only a brief sample of the conceptual complexity of the environmental literature about biocentrism, where one could find a countless multiplicity of expressions comprised by numerous combinations of words, such as biocentrism, biocentric, biospherical, biological, biotic, equal, equality, egalitarian, egalitarianism, sameness, ecology, ecological, and so forth[175].

Something similar occurs in the opposed ethical stances, such as the '*inegalitarian consequentialism*' or the '*hierarchical biocentrism*'. Effectively, the former is an expression employed by Carter to categorize the superiority of high animals over the other living beings, mainly depicted by Singer, Regan or Attfield; while the latter corresponds to what Keller has pigeonholed into '*weak holism*', which endows intrinsic value to those ecosystemic wholes able to provide life-support to individual living beings. The use of '*hierarchical biocentrism*' is also shared by Brennan. Nevertheless, other commentators, like Kaufman and DesJardins, do not label them expressly inside any particular class, although they do point out their hierarchical character. In addition, Keller have pigeonholed them into the so-called 'weak holism' as well, based precisely on this hierarchical feature[176].

The emergence of the second-phase extensionism, characterized by a life-centered insight, could correspond to a dichotomy between correctness and complementarity. In effect, while some thinkers see the enlargement of morality margins (towards a wider range of living beings) as an attempt to rectify the arbitrary conditions of moral considerability[177], imposed by both anthropocentric and psychocentric worldviews, others believe in the necessity to complete what fell short[178]. To achieve their ends, either correcting the errors or adding what is missing, biocentrists appealed to a quite effective tool, teleology.

In effect, the conception about that every organism is a '*teleological center of life*', endowed of uniqueness, individuality and whose final cause is the pursuit of its own good

[175] Engel (2009) 398; Keller (2010) 14-5; Carter (2005) 63; Attfield (1991) xvi, 208.
[176] Keller (2010) 11-2, 15-6; Carter (2005) 63; Attfield (1991) xvi; 101; Brennan (2009) 375; Kaufman (2003) 67; DesJardins (2013) 162.
[177] Callicott (1986) 401-3.
[178] Keller (2010) 14-5.

on its own manner[179], makes up one of the pillars of Taylor's *egalitarian biocentrism*, and maybe even its backbone. In contrast to Regan, Singer, and even some *hierarchical biocentrists*, the fact of believing in all entities having a good in itself makes Taylor's stance much more inclusive in terms of moral considerability. Moreover, if one thinks about humans as fellows of nonhuman living beings within the framework of a community membership, namely, a fellowship characterized by vital interdependence among them, instead of a ranked relationship where humans are superior, it is unarguable that Taylor's objective revolves around the elimination of categories, the '[…] *belief that humans are not inherently superior to other living things* […]', i.e. the equality. In addition, his theory is sturdily reinforced in the 'respect for nature', his own book's title, which he conceives as an '*ultimate moral attitude*', adopted by those who have the normative duty of doing it (moral agents), regarding the other nonhuman living beings[180].

According to several commentators[181], other important contribution to egalitarian biocentrism have come from Goodpaster's thinking, whose work arose primarily in contradistinction to humanism and sentientism. To him, neither reason nor capacity of feeling were necessary for configuring moral standing. He prefers speaking about the '*life principle*', in which the sole '[…] *condition of being alive seems* […] *to be a plausible and nonarbitrary criterion*' of morality, aspect that allows to include a wider range of living beings, such as plants for example, expanding somehow the verges of the '*conative life*' proposed by Feinberg through his '*interest principle*'[182]. However, to be fair, Goodpaster stops short of affirming if moral importance is the same for all living beings or if there is any difference, although there is not really an explicit reference about the point within Goodpaster's article. This observation comes originally from Keller[183].

Additionally, Attfield believes that Arne Næss and James Sterba can be deemed as part of this philosophical stance, although with certain nuances. For his part, Keller agrees with Næss and includes other deep ecologists, such as Bill Devall and George Sessions. There is a coincidence of opinions about the three latter authors between Keller and Mathews. Nevertheless, being a radical posture, deep ecology will be addressed later within a different subheading[184].

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[179] Taylor (2011) 100.
[180] Taylor (2011) 80, 99-100.
[181] Kaufman (2003) 217-8; DesJardins (2013) 132; Engel (2009) 303. Keller (2010) 9.
[182] Goodpaster (1978) 310, 320; Feinberg (1980) 178.
[183] Keller (2010) 9.
[184] Attfield (2009) 98-9; Mathews (Mathews, 2001) 220; Keller (2010) 14.

Thereon, if the fact of conferring moral standing to certain animals was controversial per se, let alone the case of ascribing such a recognition towards a more general category of nonhuman living beings. The ethical objections do not only derive from the lack of a correlative duty among all living beings, or their individualism, or the increasing conflict among the excessive interests at stake within the sphere of the biotic community, among others, but mainly the ontological essence of moral struggle between complete organisms (e.g. humans, plants or animals) and other living agents, organs or parts of organisms (e.g. virus, bacteria, archaea) that would deserve moral consideration under the sole condition of life[185].

In consequence, the proposal regarding the amplification of the limits of moral standing towards the whole living beings neither represents the best ethical support for the legal doctrine of nature as a subject of law. It does not only deal with its controversial character, but also with the fact that it brushes aside the abiotic component of the ecosystem, contrasting severely with the legal scope of the present dissertation. So, the analysis of these postulates will not be developed.

2.1.5 The holistic approach of environmental ethics

The last approach proposed by Callicott consists of *ecocentric ethics*[186]. Indeed, one could affirm that the holistic approach of environmental ethics refers mainly to *ecocentrism*, whose hypothesizes are revolving around the recognition of moral considerability towards the wholes, although Keller proposes a brief digression. Effectively, the author differentiates between what he names '*weak holism*', referring to collectiveness of living beings, from '*robust holism'* regarding the '*wholes in themselves*', what in the end implies an inclusion of the abiotic elements of the ecosystem, i.e. nonliving things[187].

In contrast to the previously addressed doctrines, the inherent moral value does not correspond to an individualistic assignment, but rather to a collective one. In philosophical terms, its importance lies on species, mountains, rivers, or other ecosystems, even the planet, which widely has supported the recognition of legal personhood of rivers, glaciers and watersheds in Colombia, India, and New Zealand, or the bestowal of rights to nature in Bolivia and Ecuador and to certain ecosystems in the United States.

[185] Keller (2010) 15; Callicott (1986) 402.
[186] Callicott (1986) 403ff.
[187] Keller (2010) 15-6.

Therefore, given the numerous coincidences of theoretical elements between the ecocentric perspective and the doctrines of nature's rights, mainly as far as the worldview of the land ethic is concerned, this moral approach will lead the ethical foundations of this study. Thus, its contents and scope will be analyzed in a separate chapter.

2.2 The current legal representation of nature

Just as it occurs in the ethical approach, so the recognition of nature as a legal person can also be addressed from different points of view. Indeed, one could affirm that there is virtually a legal proposal for each ethical way of addressing the moral considerability of nature. From anthropocentrism to ecocentrism, one could find a multiple range of lawful regulations (including soft law) that could fit almost exactly with the respective ethical scope. An exemplificative illustration in Chart # 3.

Chart # 3 Legal Representation of Nature (Exemplificative)

Individualistic insight	
Anthropocentrism (Nature as a set of goods)	***Hierarchical Biocentrism / Psychocentrism (Rights of Animals)***
National Level: - Regulations based on Public Trust Doctrine (specific, USA) - Private Property	***National Level:*** - Rights of Birds (specific, India) - Normative of protection against cruel treatment
International Level: - Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) - European Conventions for the protection of animals for slaughter, farming, experimentation, transport, among others	***International Level:*** - Convention on the Conservation of Migratory Species of Wild Animals (inferred text)
Holistic insight - Ecocentrism	
Ecosystems	***Nature***
National Level: - Ordinances for protection of diverse ecosystems, mainly water resources (specific, USA) - Te Awa Tupua Act (river and water resources, New Zealand) - Court decisions for protection of rivers, glaciers and similar ecosystems (Colombia, India, New Zealand)	***National Level:*** - Constitution of the Republic of Ecuador - Rights of Mother Earth Act and Framework Mother Earth Act for comprehensive development to live well (Bolivia)
	International Level: - Earth Charter (*Soft Law*) - Draft Universal Declaration of Rights of Mother Earth (not in force)

Based on Shelton (2015)

Since this perspective, an outstanding arrangement has been developed by Dinah Shelton, who has gathered some different ways to address the legal personality of nature in four categories, i.e. public trust, animals, ecosystems and the whole[188]. Consequently, being a very useful taxonomy of approaches, the dissertation has been fitted to Shelton's organization. This section, however, will solely encompass the cases of public trust and animals, given that both ecosystems and wholes constitute essential arguments of the hypothesis about the conferral of rights to nature, by virtue of which they will be analyzed in a separate charter.

The question of animals' rights has been emphasized and unfolded in more detail within this section lest the confusion of the proposed theoretical scope. Colloquially speaking, there is an equivocal idea that rights of nature are synonym of rights of animals. So it is necessary to clarify concepts.

2.2.1 Public trust doctrine

In general terms, public trust doctrine corresponds to '[…] *the notion that certain resources are of so common a nature that they defy private ownership in the classical liberal sense* [and herald] *conservationist principles*'[189]. Initially, this doctrine referred to commercial purposes, i.e. to the '[…] *principle that navigable waters* [were] *preserved for the public use, and that state* [was] *responsible for protecting the public's right to the use*'[190].

According to Sax, the employment of this principle, an aspect that used to draw much attention in Roman and English law, brought in question the nature of private property in rivers, the sea and the seashore, i.e. '*highways and running waters*', mainly concerning navigation and fishing[191]. From this argument, and by means of a detailed analysis of abundant case law, Sax applied theoretically the doctrine to the aim of protecting natural resources, coming to design what a considerable panel of authors has termed '*the new public trust*' or, at least its beginning,[192] influencing in this manner seriously the forthcoming judgments. The overall idea seems to be quite simple, just like it was written in the 1971 amendment of the Pennsylvanian state constitution and others later, a provision in force until

[188] Shelton (2015) 1.
[189] Ryan (2001) 479.
[190] Garner (2009) 1352.
[191] Sax (1970) 475.
[192] See principally Ryan (2001) 482-3. Some other updated references in Huffman (2016) 249-56; Ma (2016) 42-3; Babcock (2015) 15-24; Feris (2012) 7-8, among others.

these days and largely quoted in the environmental literature: '*Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people*', meaning, in the end, the state as a kind of steward of natural resources for the benefit of the public[193].

Although it turns out irrefutable the successfully expansion of the public trust as a mechanism of environmental protection in virtually all the United States[194], whose regulations have even come to be included in some state-constitutions, one cannot lose sight of the fact that it is still a domestic experience, not necessarily applicable to international law. Moreover, it continues to perpetuate the anthropocentric idea of humans managing an ensemble of goods to their own benefit, an argument that the doctrine of the recognition of rights of nature denies from the outset.

2.2.2 Some brief antecedents of the legal personhood of animals

This brief compendium is guided by the careful scrutiny developed by Evans[195], although one can find complementary analyses in the works of Keeton, Pastoureau, Duméril, among others[196]. The '*personification*' of animals in law is not a novelty. Indeed, Osenbrüggen dedicated an entire chapter of his book, '*Studies on German and Swiss legal history*' to explain how the idea of the '*personification of animals*' has supported the prosecution and other interventions of animals before courts during ancient and medieval times[197]. His reasoning, following the interpretation of Evans, consisted of equating rights and duties of animals; namely, '[…] *only by an act of personification* […] *the brute can be placed in the same category as man and become subject to the same penalties*'[198].

In consequence, several animal behaviors were criminalized, even with capital punishment, especially when human beings were killed[199]. Concomitantly, animals and servants were endowed with the same rights, as members of the household, which sometimes were also parallel to women's, such as the right to the wergild (also wergeld, or weregild),

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[193] Shelton (2015) para. 7th and 9th; Constitution of the Commonwealth of Pennsylvania (1971) Article I, § 27. <www.legis.state.pa.us/WU01/LI/LI/CT/HTM/00/00.htm> accessed 8 November 2018.
[194] Klass (2015) 439.
[195] Evans (1906) 10ff.
[196] See, for example, Keeton (1930) 117-8; Pastoureau (2004) 45-56; Duméril (1880); Phillips (2013); Dinzelbacher (2002) 405.
[197] Osenbrüggen (1881) 136-49.
[198] Evans (1906) 10.
[199] Osenbrüggen (1881) 139.

which in sum was is a terminology of the ancient Germanic law, comprising '[…] *the amount of compensation paid by a person committing an offense to the injured party or, in case of death, to his family*'[200]. The original quotation corresponds to Grimm: '*in the ancient times, servants were treated like pets, and pets like servants, thus being conferred with certain rights of people, especially in the manner of repentance and wergild*'[201]. However, to avoid any misunderstanding, it is precise to bear in mind that, although women, servants, and animals were–under certain circumstances–equally treated, they were not at the same status of man, who was the head of the family, sometimes the landlord, according to those ancient regulations. In addition, in words of Osenbrüggen, '*personality was also conferred to animals when, in the absence of real human witnesses, they used to appear as evidence before courts*'[202], a practice that however, in Evan's opinion, was not sufficient in itself to explain accurately the origin and purpose of those legal procedures. In ancient times, the personification of animals was oriented to justify their punishment, and not their rights[203].

2.2.3 Animals as commodities within the international legal framework

Unlike the past, contemporary legislation rather tends to regulate and foster animal protection, to the point that one can effectively identify some academic works aimed at encompassing these alternatives even before the seventies[204]. Albeit there is a wealth of proposals to change their status to legal persons[205], including others who more radically suggest extending property rights to them[206], animals are currently being deemed ownership yet, both in international law and the bulk of domestic legislation, save for specific provisions mainly in civil law. Indeed, although the status of animals as things is widely known among authors, particularly in the field of civil law, one can find explicit references about their '*special*' character before the law, which sometimes are more ancient than one

[200] Encyclopædia Britannica (2011) <www.britannica.com/topic/wergild> accessed 15 November 2018.
[201] Originally in German: '*es lag ganz in der anficht des alterthums, nicht nur knechte wie hausthiere, fondern auch hausthiere wie knechte zu behandeln, dem thier alfo gewiffe menfchliche rechte, namentlich in art und weife der buße und des wergeldes einzuräumen*'. Grimm (1854) 670. The quotation also appears Osenbrüggen (1881) 140.
[202] Originally in German: 'Eine Persönlichkeit ist den Thieren auch beigelegt, wenn sie in Ermanglung wirklicher Zeugen als Scheinzeugen vor Gericht aufgeführt werden'. Osenbrüggen, ibid 142.
[203] Evans (1906) 11, 34-5.
[204] Holstein (1969) 771.
[205] Regan (1987) 172-3; Shyam (2015) 266; Shooster (2017) <https://was-research.org/writing-by-others/legal-personhood-positive-rights-wild-animals/> accessed 8 November 2018; Kurki and Pietrzykowski (2017); Wise (2010) 1.
[206] Bradshaw (2018) 809.

could expect. This is the case of Duméril, for example, a writer from the late nineteenth century, who was thoroughly aware of this disjunctive. He upheld the status of animals can be addressed from both points of view. Namely, as objects susceptible of appropriation, and–at the same time–as beings '*endowed with sensibility, capable of feeling pleasure and pain, with affections and hatreds, and appetites to satisfy*', a suggestive anticipation to sentientism[207]. More explicitly, Dinzelbacher accepts that dogs, cats, and certain roosters '[…] *could be invested with a juridical personality*'[208].

In any case, animals continue to be considered as goods, even as commodities. A good sample is the express recognition of property over animals existent in the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), particularly relating to exemptions to trade, in whose text one can read a provision to '[…] *specimens that are personal or household effects*', and the consequent allusions to their owners. Curiously, the CITES is entirely quoted within the decision about the legal personality of the glaciers Gangotri and Yamunotri, by the Indian High Court of Uttarakhand at Nainital[209].

Likewise, other references about animals as goods (including means of production) and the existence of '*owners*' can be found in several regional European instruments. In this regard, it proves obvious to infer that those legal instruments aimed at regulating the production of food or any other outcomes for human benefit entail implicitly the notion of animals like goods or commodities. This is the case, for instance, of the European Convention for the Protection of Animals for Slaughter, focused on minimizing the adverse effects on '*the quality of the meat*'[210]. Similarly, in the European Convention for the Protection of Animals kept for Farming Purposes, for example, animals are those '[…] *bread or kept for the production of food, wool, skin or fur or for other farming purposes* […]', coinciding with the explicit admission that certain animals are used '*for food, clothing and as beasts of burden*', recited in the European Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes[211]. For their part, the European Convention for the Protection of Animals during International Transport, its reviewed version, and the European Convention for the Protection of Pet Animals set forth explicitly

[207] Originally in French: '[animal] *est, de plus, doué de sensibilité; il ressent le plaisir et la douleur; il a des affections et des haines; il a des appétits qu'il cherche à satisfaire*'. Duméril (1880) 5
[208] Dinzelbacher (2002) 421.
[209] Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973) Article VII, para. 3rd, hereinafter CITES; *Lalit Miglani v State of Uttarakhand & others* (2017) 26-35.
[210] Convention for the Protection of Animals for Slaughter (1979) Recital 3rd.
[211] Convention for the Protection of Animals kept for Farming Purposes (1976) Article 1; Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes (1986) Recital 3rd.

the ownership of domestic animals (i.e. mainly those aimed at private enjoyment and companionship) and the possibility of their trade[212].

A singular case concerns, however, the *Convention on the Conservation of Migratory Species of Wild Animals (1979)*, one of the very few instruments, maybe even the only one, in which animals are addressed like '*population*' or 'members' of a species that cross cyclically 'one or more national jurisdictional boundaries', i.e. utilizing a terminology regarding subjects instead of objects of law. Albeit one might perceive a slight anthropocentric tinge in the phrase '[…] *which must be conserved for the good of mankind*', the general trend of the instrument is biocentric, not only considering the determinant recognition that '[…] *wild animals in their innumerable forms are an irreplaceable part of the Earth's natural system*' (curiously included in the same human-centered recital), but also because the entire document is oriented to assign an intrinsic value to animals for their own conservation benefit[213].

2.2.4 Status of animals according to local law

As far as domestic law concerns, animals are considered goods in the majority of countries as well, apart from exceptional instances, such as civil legislation in Austria, Germany, and Switzerland, where they are not things or objects. In this regard, Austrian General Civil Code, for example, sets forth: '***Animals are not things****; they are protected by special laws. The provisions in force for the things apply to animals only if no contrary regulation exists*'[214]. Likewise, German Civil Code declares declares: '***Animals are not things.*** *They are protected by special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided*'[215]. For its part, the Swiss Civil Code sets forth: '*A. Nature of ownership / II. Animals / 1* ***Animals are not objects****. 2 Where no special provisions exist for animals, they are subject to the provisions governing objects*'[216]. Nevertheless, those provisions are merely declarative, owing to the

[212] Convention for the Protection of Animals during International Transport (1968) Article 40(1); Convention for the Protection of Animals during International Transport [Revised] (2003) Article 2(2-b); Convention for the Protection of Pet Animals (1987) Articles 1(2 and 5) and 12 (b-i).
[213] Convention on the Conservation of Migratory Species of Wild Animals (1979) Recital 1st; Article 1, para. 1st.
[214] *Allgemeines bürgerliches Gesetzbuch* (1988) Article 285a, emphasis added. Unofficial translation available in Global Animal Law Project (2018) <www.globalanimallaw.org/database/national/austria/> accessed 5 October 2018.
[215] German Civil Code (2002) Section 90a, emphasis added.
[216] Swiss Civil Code (2018) Article 641a emphasis added.

same rules for things are applicable to animals, especially if in any doubt. Shyam considers these provisions as '[…] *an important step away from the erroneous premise upon which ancient roman laws were built*', despite they are mere declaratory precepts in practice[217]. In addition, these legislative structures leave fauna in a kind of juridical limbo, refusing their status as goods but, in turn, without affirming their legal personality.

By and large, beyond the particularities in each legislation, the current world tendency consists of regulating the possession of wildlife, avoiding the trafficking of species or their parts (e.g. elephant ivory, rhino horn, animal fur, and so forth) just like illegal fishery and finning, criminal conducts of importance even for Interpol[218]. Indeed, a great number of lawmakers around the world has fostered the incorporation of provisions [even criminal ones] against unlawful commercial activities and others, such as abuse, cruelty, harmful research, participation in any kinds of shows, among others, at the statutory level, reaching successfully those goals in the majority of cases. A concise, but accurate, review in Greg Miller[219]. Nevertheless, from late twentieth century, activists and certain sectors of the academy have been promoting a change of the juridical status of animals[220], particularly great apes, towards the recognition of their legal personhood, grounded principally on the conferral of specific rights; but, even though it turns out undeniable that the legislative shifts concerning rights have been somehow carried out in the legal framework, one could cast doubt on the effective acknowledgment of their legal personality. In some measure, it is often difficult to notice if normative advancements in this field are realistic or just rhetorical.

The paradigmatic case has been the Spanish one, whose 2008 parliament passed a resolution banning experimentation and research that hurt simians, just like their possession with commercial ends, or aimed at their exhibition in shows; it has even come to establish that illegal trade, unlawful possession, and abuse of animals are aggravated felonies[221]. In addition, the resolution encompassed the undertaking of actions aimed at protecting nonhuman hominids against abuse, slavery, torture, death, and extinction, by means of the adherence to the '*Great Ape Project*', an international movement, inspired by Paola Cavalieri and Peter Singer, which was created in 1994 to promote the basic rights to life, freedom, and non-torture of nonhuman great primates, such as chimpanzees, gorillas,

[217] Shyam (2015).
[218] Interpol (2014) 56
[219] Miller (2011) 28.
[220] Some examples of authors in note 196.
[221] Proposición no de ley sobre el proyecto Gran Simio (2008) 26; Great Ape Project, Official Translation (2008) <https://proyectogransimio.org/documentos-1/version-en-ingles-de-la-aprobacion/view> accessed 12 November 2018.

orangutans, and bonobos[222]. The semantic closeness of these harmful behaviors to the field of human rights motivated an important reaction from activists and press, who interpreted this legislative step as a granting of rights to simians[223]. Someone even dared to speak about the concession of human rights[224]. From an academic perspective, instead, the feedback was much less intense, given the comments and analyses revolved around generalities more than any specificity[225]. Nonetheless, there were certain authors who assured erroneously the resolution dealt with the recognition of legal personality[226], while others even thought about it as a constitutional amendment[227]. There have been critical positions as well. As a brief digression, for example, it is curious how protection of apes and support of bullfights could concur in the same legislative framework, or how a country wherein there is not wild hominids, the parliament can prioritize the issue of a normative to protect them, among other questioning approaches[228]. With hindsight, if one scrutinizes the resolution text, it is really difficult to conclude to what extent its provisions depicted a real milestone for the acceptance of animals as holders of rights, and consequently as legal people, at that moment. Indeed, the word '*right*' did not even appear within the document, an aspect that could be seen as a mere formality, but illustrates quite well the activist rhetoric. At bottom, the real inconsistency concerned to the fact that the instrument was not really mandatory in practice; it was not a full-blown law, but solely a parliamentary compromise to adapt Spanish legislation to the principles of the Great Ape Project within a year[229], but it never happened[230].

Another older example can be found in New Zealand, where one can infer a similar academic sensation of stark contrast about these legislative achievements, despite the legal reform was actually a given on this occasion. In effect, albeit gorillas, chimpanzees, bonobos, and orangutans could be still property of someone in New Zealand, the use of these '*non-*

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[222] ibid paras. 1st and 4th; Proteção aos Grandes Primatas (2018) <www.projetogap.org.br/en/history/> accessed 9 November 2018.
[223] Glendinning (2008) <www.theguardian.com/world/2008/jun/26/humanrights.animalwelfare#top> accessed 10 November 2018; Roberts (2008) <www.reuters.com/article/us-spain-apes/spanish-parliament-to-extendrights-to-apes-idUSL256586320080625> accessed 10 November 2018; Abend (2008) <http://content.time.com/time/world/article/0,8599,1824206,00.html> accessed 10 November 2018; Nature News (2008) <www.nature.com/news/2008/080702/full/454015b.html> accessed 10 November 2018.
[224] O'Carroll (2008) <www.csmonitor.com/Environment/Bright-Green/2008/0627/spain-to-grant-some-human-rights-to-apes> accessed 12 November 2018.
[225] Eisen (2010) 69-70; Suran and Wolinsky (2009) 1080.
[226] Duck (2009) 168.
[227] Cornell (2015) 2.
[228] Eisen (2010) 69-70.
[229] Proposición no de ley sobre el proyecto Gran Simio (2008) para. 2nd.
[230] Casal (2018) <www.eldiario.es/caballodenietzsche/Carta-Congreso-Diputados-defensa-hominidos_6_744785524.html> accessed 13 November 2018.

human hominids' in research, testing or teaching is currently restricted[231]. Nevertheless, as it was mentioned, the opinions of experts were not concurrent in this case, given that some authors saw the norm like a valid improvement of the living conditions of great apes[232], while others believed the argument about the conferral of rights to fauna, and particularly to great apes, often seems an '*exaggeration*' more than a real progress in practice[233].

In this framework, there is currently an array of references about recognition of legal personality and granting of rights to animals in the environmental parlance, even at the constitutional level, whose assessment requires to be carefully carried out, principally because they are not always consistent with the actual contents of law, or any other normative instrument. For example, Emily Fitzgerald argues that Swiss, German and Indian Constitutions had granted rights to nonhuman animals (dolphins in the case of India) and had declared their legal personality[234], an affirmation widely reproduced by news media[235]. Nevertheless, once one examines the normative instruments it is possible to conclude that this assertion is not correct.

Firstly, the Swiss constitution has been quoted in several documents as one of the landmarks in the field of animal law and its progress[236]. Moreover, it is one of the older legal instruments existent in this subject matter, considering it came into effect in 1992. Evans explains that this successful 1992 reform allowed the regulation of transgenic research, but later a total prohibition of animal research was rejected by lawmakers in 1999[237]. Nowadays, albeit Swiss constitution is quite probably one of the most complete instruments aimed at their protection, animals are deemed goods to use, or even commodities one can import, trade, and transport[238]. They are not definitively subjects of law within the Swiss legislation, but rather objects, even though it contradicts directly the Civil Code[239].

Secondly, there was an amendment of the German constitution in 2002, which meant the incorporation of the phrase '*and animals*' (official translation[240]) or '*and the animals*'

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[231] Animal Welfare Act (1999) Part 6, para. 85th 1.
[232] Kolber (2001) 165-6.
[233] Brosnahan (2000) 192.
[234] Fitzgerald (Fitzgerald, 2015) 350
[235] For example, USA Today (2002) <https://usatoday30.usatoday.com/news/world/2002/05/18/germany-rights.htm> accessed 14 November 2018; Hooper (2002) <www.theguardian.com/world/2002/may/18/animal welfare.uk> accessed 14 November 2018.
[236] Federal Constitution of the Swiss Confederation (1999) <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html> accessed 14 November 2018.
[237] Evans (2010) 239.
[238] Federal Constitution of the Swiss Confederation (1999) Article 80.
[239] See note 216.
[240] Official Translation of the Basic Law for the Federal Republic of Germany (1949) Article 20a.

(according to certain researchers such as Nattrass, Eisen and Evans[241]) into the Article 20 a, implying in general terms that '[…] *the state shall protect the natural foundations of life* ***and animals*** *by legislation and, in accordance with law and justice* […]' (emphasis added). As in the previous case, it is indisputable the transcendence of such a provision in the framework of animal defense, above all considering the period of issuing. Nonetheless, it does not really mean a recognition of rights, let alone of legal personality. If one thoroughly reflects about the theme in the constitutional context, one can notice an overall tendency to deem animals as things, sometimes implicitly and sometimes expressly, such as it occurs in the Article 74 (1.20) that establishes that '[c]*oncurrent legislative power shall extend to […] the law on food products including animals used in their production* […][242], entailing the allusion about animals as the means of nourishment production.

Finally, the case of dolphins in India was a misunderstanding, originated in a circular issued by the Central Zoo Authority, by which the establishment of dolphinariums was banned in the whole country[243]. Effectively, some journalists confused a reference about the intelligence of dolphins, as one of the reasons to think about them as non-human people and the possibility of conferring rights to them, with their factual recognition[244].

Nevertheless, one year later, the Indian Supreme Court paradoxically declared that animals have the right to live with dignity and be treated fairly, coming even to ***expand*** explicitly the human rights to life and liberty, guaranteed by the Indian Constitution, to them[245]. The judgement aimed originally at banning *jallikattu*, '[…] *a popular bull-taming sport celebrated mainly in Tamil Nadu every year, during the Pongal festival, on Mattu Pongal day*', Southern India[246]. It brought about serious outrage in an important number of people, who have been demanding the lift of the ban since then, and the intervention of other public instances, such as the Ministry of Environment or the Tamil Nadu Assembly[247].

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[241] Nattrass (2004) 297; Eisen (2017) 914-5; Evans (2010) 236.
[242] Official Translation of the Basic Law for the Federal Republic of Germany (1949) Article 74(1-20).
[243] Central Zoo Authority of India (2013) <www.moef.nic.in/assets/ban%20on%20dolphanariums.pdf> accessed 14 November 2018; Dvorsky (2013) <https://io9.gizmodo.com/no-india-did-not-just-grant-dolphins-the-status-of-hum-1149482273> accessed 14 November 2018.
[244] For example, Hackman (2013) <www.dailykos.com/stories/2013/7/30/1226634/-India-Declares-Dolphins-Non-Human-PersonsDolphinshows-BANNED> accessed 14 November 2018; Hogan (2015) <www.ecorazzi.com/2015/12/31/india-declares-dolphins-non-human-persons/> accessed 14 November 2018.
[245] Animal Welfare Board of India v A. Nagaraja and others (2014) para. 68th; Constitution of India (1950) Article 21.
[246] Pranav (2017) <www.deccanchronicle.com/nation/current-affairs/190117/all-you-need-to-know-about-jallikattu-and-the-controversy-around-it.html> accessed 28 February 2019.
[247] The Hindu (2017) <www.thehindu.com/news/national/tamil-nadu/Protests-rallies-for-jallikattu/article17029320.ece> accessed 28 February 2019; The News Minute (2017) <www.thenewsminute.com/article/jallikattu-case-supreme-court-closed-here-s-why-56220> accessed 28 February 2019; BBC News (2016) <www.bbc.com/news/world-asia-india-35259793> accessed 28 February 2019.

Consequently, the former repealed the prohibition by means of a notification in 2016, while the latter approved unanimously an amendment to the Prevention of Cruelty to Animals Act, in 2017, favoring the practice of *jallikattu*[248]. Certainly, although the attempts of restricting the activity of *jallikattu* have been empirically unfruitful, having experienced a significant increase in terms of events' number during the last two years instead[249], the Supreme Court decision triggered a series of adjudications dealing with animal welfare. Thereby, some Indian high courts have issued, for instance, the express recognition of the right of birds and other animals '[…] *to co-exist along with the human beings*', or their '[…] *right to live with dignity* [and] *fly in the sky*', avoiding the cruelty of keeping them in cages, among other similar entitlements, whose references are adequately compiled in a governmental report of 2017[250].

Nowadays, if one compares the legal conditions of animal well-being among countries, it is quite probable to find out more similarities than differences regarding what has been proposed in Spain, New Zealand, Germany, Switzerland, among others, given that there is somehow a kind of trend towards the *standardization* of the most problematic animal issues; i.e. abuse, cruelty, trafficking, and so on, human conducts whose regulation and consequent restriction is increasing all over the world. One should have it in mind that speaking about rights while animals are still being deemed things does not allow maintain a coherent discourse in legal terms.

In this sense, a cutting-edge and useful tool to measure and compare the welfare of animals among countries is the '*Animal Protection Index*', an instrument that unfolds online georeferenced data about indicators of policy and legislation, constructed from information by fifty different nations in the whole continents. For example, if one reviews the indicator concerning '*laws that prohibit causing animal suffering either by a deliberate act of cruelty or by a failure to act*' (Notice the close allusion to sentientism) one can find several examples similar to those mentioned in this section, without coming to argue over if they deal with or not to the assignment of particular rights to animals, let alone legal personality[251].

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[248] Ministry of Environment and Forest and Climate (2016) paras. (i) to (iv); Act to amend the Prevention of Cruelty to Animals of 1960 (2017) para. 3rd.

[249] Annamalai (2019) <www.thehindu.com/news/national/tamil-nadu/scarred-yet-untamed/article26039527.ece> acceded 28 February 2019.

[250] S. Kannan v Commissioner of Police and others (2014) para. 3rd; People for Animals v MD Mohazzim and Anr (2015) para. 5th; Law Commission of India (2017) 12-3.

[251] Animal Protection Index (2018) <https://api.worldanimalprotection.org/methodology> accessed 12 November 2018.

To recapitulate, in the same line of the previously addressed ethical approach, the core target of this thesis does not revolve around the prospective international personhood of animals. In either event, it should be said that a proposal in that sense would lead unfailingly to the individualization of beings, contaminating somehow the scope of legality and jurisprudence, such as it already occurred in medieval Europe, wherein–for example–some rats were prosecuted for '[…] *having feloniously eaten up and wantonly destroyed the barley-crop of* […] the French fields of Autun; or a rooster was condemned to death under the strange suspicion of having lain a cockatrice egg[252].

2.2.5 Nature as a subject of law since holistic tendencies

The next stage of legal representation of nature corresponds to the ecocentric view. Unlike Shelton, who divides the approaches of ecosystems and nature as a whole into separate categories[253], it should be also considered pertinent addressing those dimensions together, as in the case of this dissertation, given the same legal sources can be seen as valid references of study for both instances. In fact, it is what exactly befalls in the aforesaid examples of Bolivia, Colombia, Ecuador India, New Zealand and the United States, whose theoretical analysis revolve around the same ecocentric fundamentals. In any case, considering this is the key content of the present research, it is addressing in a different chapter.

[252] Evans (1906) 11-2, 18; Phillips (2013) 9-14, 19-20. By the way, according to the Encyclopædia Britannica, a cockatrice, also known as *basilisk*, was a mythological small serpent in the legends of Hellenistic and Roman times, '[…] *credited with powers of destroying all animal and vegetable life by its mere look or breath*'. Encyclopædia Britannica (1998) <www.britannica.com/topic/cockatrice> accessed 16 November 2018

[253] Shelton (2015) paras. 24th – 34th.

Third Chapter
The human-centered perspective

3.1 The Ethical Western approach of nature

This section concerns essentially the discursive implications resulting from the application of the Western traditional principles upon the relationship between human beings and nature. The theoretical analysis is directly linked with the three ethical research questions regarding the moral influence of property rights over natural resources, the sufficiency of the ethical anthropocentric tenets as a source of international normative, and the prospect of recognizing the moral standing of nature.

In methodological terms, although the enquires have been independently posed for maintaining an organized control of the hypotheses, its isolated approach turns out theoretically inadequate because, as one is going to see below, the three premises are interconnected and explain each other. Therefore, the cross-references among different sections, spread throughout the whole document, depict a didactic endeavor to maintain a comprehensive treatment and an interconnected understanding of the subject matter.

3.1.1 Ethical foundations of the right to a healthy environment

The right to a healthy environment belongs to the third-generation rights–a terminology attributed to Karel Vašák[254]–one of the three categories inspired in the pillars of French Revolution, which are also known as '*solidarity rights*'–*'la fraternité'*–or 'collective rights' in the international arena[255]. Like a full-blown human right, it is enshrined as a set of legally enforceable interests for human sake[256], an aspect that implies the existence of what William Blackstone termed '*correlative duty or obligation*' of guaranteeing the ''[…] *right to a livable environment*'[257]. Ensuing DesJardins' interpretation, Blackstone proposed a deontological defense of a '*safe, healthful, and livable environment*', as an ambit where people could afford the realization of their other basic rights, such as equality, liberty, happiness, life and property, among others, being a human action considered wrong if, and

[254] Wellman (2000) 639.
[255] Taylor (1998) 311.
[256] ibid 337-8.
[257] Blackstone (1973) 55.

only if, the damages to nature were also harmful against other humans[258]. Under this perspective, nature's protection has been seen as a question of utmost care only whether the exercise of other human rights is in jeopardy, and no other way around. Thus harms against nature, without any injured person, are morally–and even legally–meaningless and useless.

Moreover, this humanistic outlook '[…] *came to emphasize human rights*' because environmental devastation entails somehow a violation of those rights and a potential risk for the maintenance of the humanity's ends, specially '*dignity*'[259]. For this reason, it is often said that civilizations have historically defined their rights and duties according to precise elementary notions, such as '[…] *equality, justice, dignity, and worth of the individual (or of the group)*'[260]. In this framework, the subsequent step to face up the ecological crisis should be a kind of 'humanization of nature's protection' so to speak. In addition, although there is a series of opinions and approximations to theorize thereon–certainly not necessarily under the idea of 'humanization'–Prudence Taylor has accurately summarized them throughout four approaches, save for the last one, whose scheme has to be set aside from the human rights' theories[261]. A summary follows.

Thereby, the first alternative consists of a 'reinterpretation' of pre-existing *substantive* human rights for incorporating the criteria of environmental quality. Other proposals about the reinterpretation of international instruments concerning to human rights, including the element of conservation to widen their scope, can be reviewed in Cullet and Chapman[262].

The second suggestion by Taylor refers to the invocation of procedural rules, taken from human rights' instruments, to protect nature before the international system of justice, inferring an extension of procedural human rights to environmental protection, given that it implies the application of normative which was not originally thought for it [263]. For his part, Cullet put also forward the use of proceeding rules of human rights, but along with environmental ones, for forming '[…] *a body of very effective technical rights*'[264]. Thereon, Gormley anticipated them through a telling essay in 1990[265].

The third option is one of the most progressive arguments, according to Taylor, and entails the explicit recognition of a human right aimed at a '[…] *safe, healthy or sustainable*

[258] DesJardins (2013) 102-3.
[259] Rolston III (1993) 254, 256
[260] Marks (1981) 437.
[261] Taylor (1998) 338ff.
[262] Cullet (1995) 25; Chapman (1993) 222-4.
[263] Taylor (1998) 343-5.
[264] Cullet (1995) 25.
[265] Gormley (1990) 85.

environment', regardless whether it already exists in customary or positive international law, as it indeed occurs, for one, in the case of the Convention on Climate Change, where there are explicit references to '*sustainability*' and '*public health*'[266]. However, at present there is not any international binding instrument in force manifestly related to the right to a healthy environment, although there are explicit provisions thereon in domestic law, mainly at a Constitutional level[267].

Finally, the fourth proposal consists of the recognition of nature as a holder of rights, which obviously does not give room to the notion of a healthy environment as part of the human rights' scope, so it is beside the point, at least for now. In this sense, one can find a proposal in the Draft Universal Declaration of Rights of Mother Earth.

Summing up, the notion of rights to a healthy environment has been deeply rooted on anthropocentric principles, where humans are bestowed of intrinsic value, meanwhile nature has only merited an instrumental recognition of importance, stance commonly denied by environmental ethicists, as Brennan and Lo suggest, but shared by other green philosophers, such as John Passmore or Bryan Norton[268]. In this context, for instance, it turns out plenty explainable the existence of contemporary studies devoted to the contrast between arguments pro the emission rights of greenhouse gases to the atmosphere, understood as a means to meet human needs, and environmental rights, above all when the satisfaction of those needs is in dispute[269]. In the end, as Rolston III points out, the Western traditional principles of ethics developed much more before than modern biology[270].

In this point, it is worth it to pose, as DesJardins did it, if '[c]*an the dominant ethical traditions provide the resources to resolve environmental controversies?*'[271] Beyond a potential response, perhaps is more important, methodologically speaking, a conceptual approximation about the ethical elements at stake, highlighting especially the role and locale occupied by nature within the recognition of moral considerability, the methodological issues involved, and the core characteristics attributed to natural resources, since an anthropocentric insight.

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[266] Convention on Climate Change (1992) Articles 3(4) and 4(f).
[267] Borràs (2016) 115.
[268] Brennan and Lo (2015) § 4th <https://plato.stanford.edu/archives/win2016/entries/ethics-environmental/> accessed 19 September 2017; Passmore (1974) 101-2; Norton (1991) 226-7.
[269] A critical view in Adelman (2016) 419-20.
[270] Rolston III (1993) 253.
[271] DesJardins (2013) 101.

3.1.2 When did the ethicists begin to speak about anthropocentrism?

The term 'anthropocentric' has been quite often used by environmental scholars to identify the traditional Western philosophy[272]–from Aristotle to Kant and so forth–just like other contemporary tendencies, such as the moral theory about human 'future generations'[273]–promoted by the very Brundtland Commission[274]. However, methodologically speaking, the expression does not really represent any theory or current of thought in particular, but rather the classical ethics of the last twenty-five centuries[275]. Indeed, pursuant to Nelson and Ryan, the first written reference dates from barely 1967, when the well-known work: *The Historical Roots of Our Ecologic Crisis* was published by Lynn White Jr., albeit one can locate an even earlier mention in a 1911 essay by George Santayana[276]. Later, personalities such as Næss, Rolston III, and Passmore[277] (although the latter from a modern anthropocentric insight) triggered its utilization by other early remarkable thinkers, becoming it more and more popular within scholar circles, curiously instead of the older expression 'homocentric', used previously by Clarence Morris in 1964[278].

Thenceforth an increasing inclination to avoid sympathies for Western tradition's principles, among environmentalists, has often embodied in a highly critical vision about the anthropocentric contents[279]. Sometimes it would seem as if they were designing a completely independent discipline of moral philosophy and not only nourishing a branch of applied ethics. By the way, there are currently still several documentary compilations in which environmental ethics is solely deemed as a field of applied ethics[280]. It has not occurred altogether, at least when it comes to moral standing, due to there are philosophers who are defending traditional principles yet[281] and others who still should pose their methodological questions on aspects like values or actions[282], cornerstones of classical ethics.

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[272] Keller (2010) 59-62.
[273] DesJardins (2013) 17, 77-8; Jamieson (2008) 155.
[274] United Nations (1987) 39-53. Hereinafter Brundtland Report.
[275] Keller (2010) 1.
[276] Nelson and Ryan (2017) <www.researchgate.net/publication/283349553_Environmental_Ethics> accessed 12 September 2017; White (1967) 1203; Santayana (2009) 539.
[277] Næss (1973) 96; Rolston III (1975) 97, 104-5; Passmore (1974) 12, 20, 21.
[278] Morris (1964) 189.
[279] Brennan and Lo (2015) § 4.
[280] See, for instance, Petersen and Ryberg (2016) <www.oxfordbibliographies.com/view/document/obo-9780195396577/obo-9780195396577-0006.xml> accessed 19 September 2017; Frey and Wellman (2006); Cohen and Wellman (2005).
[281] Passmore (1974) 186-8; Norton (1991) 237-43; Grey (1993) 463ff; Beckerman and Pasek (2001) 193-9.
[282] Brennan and Lo (2015) § 4.

Interpreting Keller's reflections, it is worth it to say that all philosophical contents are somehow anthropocentric in the end, even its criticisms, given that existing theories and tendencies revolve repeatedly around human beings–including their place in nature and their role in life as important premises. In this framework, human being arises as the only one who deserves moral consideration, setting aside all the other living species and natural abiotic resources, because they are not simply capable to gather the basic characteristics required to be it. In other words, it proves to be quite challenging to carry out an ethical evaluation of natural world in terms of values, hierarchy, dualism, mechanistic functioning or community membership, among the most recurrent peculiarities mentioned in academic lectures, books, workshops and other similar intellectual works, from an exclusively human-centered perception[283].

3.1.3 The traditional dichotomy between humans and nonhumans

Despite that Anthropocentrism concerns Western philosophical tradition to a large degree[284], this section is especially focusing on–although not exclusively–the human moral standing and the subsequent implications connected with the relationship between people and nature. It contains neither a profound historical appraisal nor an analysis in detail about authors, theories or schools of thought, because there is already a series of brilliant and updated writings in this matter, published by recognized philosophers, whose works could be reviewed and taken as an accurate academic reference anytime. Thereby, there is a precise compilation of monographs and other academic publications about Environmental Ethics by Nelson and Ryan[285].

Since the insight of Western traditions, where Aristotelian and Thomistic philosophies have been principally setting the pace, the idea of recognizing nonhumans like moral beings has been an hypothesis ***simply unacceptable***. Humans are the only beings who deserve moral status, thanks they have been endowed of an intellect–or even a soul[286].

Aristotle said that '[…] *who is to govern ought to be perfect in moral virtue, for his business is entirely that of an architect, and Reason is the architect* […]'[287]. In a similar vein, the duality between rationality and irrationality is also present in the work of Saint

[283] Keller (2010) 1.
[284] Attfield (1983) 201.
[285] Nelson and Ryan (2017).
[286] DesJardins (2013) 99; another critical view in Scott (1990) 4.
[287] Ellis (1895) 33.

Thomas Aquinas, under an alike interaction of dominion. God rules the others by means of intellectual creatures–Aquinas wrote as the title of the 78th chapter in the Book III of his renowned '*The Summa Contra Gentiles*'[288]. In contrast, the nonhuman world was undoubtedly considered an assortment of goods that nature supplies instrumentally to meet the human demands. According to Aristotle, plants and animals were created to provide nourishment, attire, and other advantageous means of subsistence to humans, focusing on the fact that as nature '[…] *makes nothing either imperfect or in vain, it necessary follows that she has made all this things for men* […]'[289]. To him, human activities such as hunting, fishing, farming and alike were natural mechanisms to acquire property, comparable '[…] *with the variety of modes of nurture among animals* […]'[290]. In the same (virtually words) sense, Aquinas stated that '[…] *it is not sinful in itself to make use of either plants or of the flesh of animals, whether for food or for any other purpose useful to man* […]', just like '[…] *the use of a horse is riding*'[291]. On the contrary, rational deliberation was involved in using material things, which allowed the activation of the will under the principle of action-and-choice, interestingly leaving room to render that useless motives could be considered morally wrong to him–behavior that could lead to cruelty against other humans, conforming to Keller's interpretation[292]–, albeit also one could deduce that animals and plants were deemed mere things for human benefit, explicitly '[…] *intended for man*'[293].

Thereafter, modern thinkers underpinned the paradigm of human superiority over nature, mainly concentrated on the conception of nonhumans as mere material objects, unable to merit moral considerability under a philosophical scheme. Francis Bacon, for example, believed that '*human power*' and '*human knowledge*' trailed a common path in the practice of 'transformation' of natural elements; therefore, man could control the procedure to change the color of metals, the opacity of rocks, or the biological structure of plants, among others in order to materially ameliorate the human conditions; which clearly exemplifies an instrumental view of nonhumans as goods, where man exerts dominion over nature in terms of knowledge[294]. '*His power of action is limited to what he knows*', Vickers explains, and [n]*o force avails to break the chain of natural causation*[295].

[288] Aquinas (1928) 110ff.
[289] Ellis (1895) 23.
[290] Mathie (1979) 19-21.
[291] Parel (1979) 93
[292] Keller (2010) 60.
[293] Aquinas (1928) 69.
[294] Bacon (2010) 65-6; Keller (2010) 60.
[295] Vickers (2008) 139.

To René Descartes, animals were machines comprised by sophisticated internal organs that allowed them moving like clocks, particularly incapable of expressing their thoughts and acting guided by reason, such as humans do[296]. In the '*Cartesian dualism*' of body-mind, animals appear as insensitive[297] engines feeling no pain and consequently deserving no moral standing[298]; argumentation that once again constitutes a sharp–perhaps more severe than others so far–simile between nonhumans and material things within the philosophical thought. Additionally, as part of an interesting analytical view, John Cottingham holds that Descartes' proposition in that '*animals are totally without feelings*' is false, arguing there is a lack of evidence to reach such a conclusion, derived from the vagueness and ambiguity of the doctrine of '*bête-machine*'[299].

Bacon and Descartes share two common tendencies in theoretical compilations: a rejection of the '*scholastic philosophy*' and the so-called 'mechanical view of nature', which is usually complemented with the Newtonian approach about the godlike operation of all parts of biota, methodologically understood under the deterministic laws of physics and the mathematical precision[300].

The conjunction between the concepts of property and natural resources does not probably appear so much stout in any other classical tracts just as it does in 'Of Property' by John Locke, where God is who had '[…] *given the world to men in common,* [and had] *also given them reason to make use of it to the best advantage of life and convenience*'. In the Locke's state of nature, animals (beasts) and plants (fruits) are spontaneously produced in land (earth) for the human welfare. All these resources are *commons* that do not belong to anyone in particular. They rather are owned by the whole mankind until somebody can individually seize them by acquiring their private ownership. This appropriation process strings from a mixing between those natural resources and human labor, which is not rendered only as a value added but as the key factor to exclude others from common right and a means to confer private dominion over nature: '[…] *the unquestionable property of the laborer* […]', Locke affirms[301]. The only restriction is the condition of leaving at least enough and as good resources for others[302], a clause based on the 'theory of justice in acquisition' that was termed by Robert Nozick as '*Lockean Proviso*'. If there is a violation

[296] Descartes (2009) 71-4.
[297] Bekoff and Meaney (1998) 131; Nash (1989) 17.
[298] Keller (2010) 60.
[299] Cottingham (2008) 163-4.
[300] Schofield (2015) 5-6; Keller (2010) 59-60.
[301] Locke (2003) 111-2.
[302] Roark (2013) xiv-xv; Bader (2010) 85-86.

of this clause, which is not properly compensated to the disadvantaged, Nozick states, will be a cause of its illegitimacy[303]. Certainly, albeit Locke's ideas caught on so much among philosophers to the point of having been crucial fundamentals for the modern conception of private property[304], they have also brought about acid criticism amongst environmentalists, who have argued that '[…] *no conception of property rights is so strong that it ethically overrides all other environmental values*'[305].

From another outlook, one of the uppermost philosophical contributions of Immanuel Kant on environmental ethics is undoubtedly his approach of indirect responsibilities towards future generations and nonhumans, based on his belief that humans could not '[…] *be indifferent even to the most remote epoch which may eventually affect our species, so long as this epoch can be expected with certainty*'[306]. To him, humans have the obligation to show their 'humanity' exclusively towards mankind, because they are ends in themselves while animals are merely means without *self-consciousness,* whom only deserve indirect duties. His instrumental sight is reinforced with the idea that humans should practice kindness to animals in order to avoid fostering habits of cruelty, because '[…] *who is cruel to animals becomes hard also in dealing with* […]' people, reasoning that intersects with Aquinas'[307]. In context, Kant's philosophy is thoroughly anthropocentric, to such an extent that being even part of the '*ratiocentrism*'–in words of Keller–where only rational beings are morally worthy and only humans are rational creatures[308]. In the Kantian sense, nature is essentially a set of things that could '[…] *arouse inclination, and if they are animals (e.g., horses, dogs, etc.), even love or fear, like the sea, a volcano, a beast of prey; but never respect*', because '[r]*espect applies always to persons only – not to things*'[309].

John Passmore is the only thinker, cited as part of this succinct compilation, who had written specially about environmental ethics until 1974, when his influential historical book, '*Man's Responsibility for Nature*', came out arousing an enthusiastic interest among his colleagues about the ecological crisis, stemmed from the action of man, the '*ruthless despot*'[310]. However, his '*not entirely wrong-headed*'[311] inquiry with respect to the Western

[303] Nozick (1993) 178-9.
[304] Keller (2010) 61; DesJardins (2013) 235-6; Tuckness (2016) § 3 <https://plato.stanford.edu/archives/spr 2016/entries/locke-political/> accessed 4 December 2017.
[305] DesJardins (2013) 236.
[306] Passmore (1974) 77-8; DesJardins (2013) 99; Kant (1971) 50.
[307] Kant (1963) 239-240.
[308] Keller (2010) 61.
[309] Kant (2009) 123.
[310] Brennan and Lo (2015) § 1; Passmore (1974) 37.
[311] Quoted also by DesJardins (2013) 102.

necessity of a '[…] *new set moral of principles to act as a guide in its relationships with nature* […]'[312] contrasted with his slant to advocate the traditional tenets of Western philosophy and religion, which were–to him–enough sturdy to justify a response against ecological depletion[313], an injury to present and future generations[314]. This 'ambiguity' has been a commonplace in his intellectual production along the years, even in regard with his very categorization. Keller, for instance, classifies Passmore's work within the no anthropocentrism section, claiming that a careful reread of his writings–in particular of '*Attitudes to Nature*'–allows noticing he '[…] *strays significantly from his resolutely anthropocentric perspective in Man's Responsibility for Nature*'[315], while others have catalogued him as a human-centrist principally because of his utilitarian viewpoint[316]. Instead, concerning morality, it could be said that Passmore did not believe in moral standing of natural world, given that he was aware '[…] *that men could do what they liked with animals, that their behavior towards them need not be governed by any moral considerations whatsoever* […]' according to Christian teaching[317]; and although he came to recognize that humans, fauna, flora and even biosphere were part of an ecological community, this was not '[…] *the sense of community which generates rights, duties, obligations; men and animals* [were] *not involved in a network of responsibilities or a network of mutual concessions* […]'[318]. To him, natural resources were not fellows of humans because they were still '*strange*', '*alien*', even from a 'naturalistic' approach[319].

Another interesting anthropocentric version of Western morality can be obtained from the Church, which having been ruled by the Judeo-Christian traditions during the last two thousand years, came to be deemed as the '[…] *chief custodian of ethics* […]'[320]. In general terms, its theological [not exactly philosophical] disquisitions about the relationship between humans and nature have revolved around the '*stewardship doctrine*', based on the divine guideline '[…] *to cultivate and care for* […] *the Garden of Eden* […]'[321]. Although the aforementioned quoted phrase corresponds to the official document available in the Vatican Web Site, one can find alternative translations of the same verse in other editions of the

[312] Passmore (1974) 186.
[313] Passmore (2010) 109.
[314] Passmore (1974) 187.
[315] Keller (2010) 91.
[316] See Attfield (1983) 201ff; DesJardins (2013) 101-2; Nash (1989) 156.
[317] Passmore (1974) 112.
[318] Passmore (2010) 109.
[319] ibid
[320] Nash (1989) 88.
[321] The New American Bible (2002) Genesis 2:15.

Bible, whose implications could lead to diverse quite provocative interpretations. Indeed, after the rough same sentence: '*And the LORD God took the man, and put him into the Garden of Eden* […]'[322] one can read e.g. '*to dress it and keep it*'[323]; '*to work it and keep it*'[324]; or '*to till it and keep it*'[325]. A compilation of these and other versions in Bible Hub[326]. To Lynn White Jr., coupled with other American theologians, it deals with an instruction to humankind to take care of the rest of the godlike creation, but also as a reinterpretation of the human power to subdue the earth and have dominion over everything what exists upon land, air and sea, at the behest of God, biblical verse whose detractors have caustically criticized, attributing it the thoughtless exploitation of nature[327]. In *Laudato Si*, Francis recognizes the Church's misinterpretation[328] and calls for a new and contextual reading of Scriptures, by means of an accurate hermeneutic[329]; to some extent it seems like he takes for granted that '*Since the roots of our trouble are so largely religious, the remedy must also be essentially religious* […]', just as White warned at his time[330]. Nevertheless, the essence of Judeo-Christian comprehension about the relationship God-human-nature keeps its theocentric and anthropocentric trends. Once again in *Laudato Si*, for example, albeit there is an explicit acknowledgement of nature as valuable in itself before God's eyes, and several argumentations against the consequences of a ***tyrannical, misguided, excessive or distorted anthropocentrism***, natural resources are is still considered as earth's goods that humans should use responsibly. In addition, there is an explicit rejection to relocate the Judeo-Christian paradigms within a biocentric framework, despite that nature and humans are 'creatures of God'. Between the lines, there seems to be still a firmly rooted comprehension about humans as the only moral agents in the Western traditions of Catholic Church. Complementarily, the multiple mentions of future generations throughout the whole text accounts for its consistent human-centered character[331].

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[322] ibid Genesis 1:28.
[323] The Holy Bible: Old and New Testaments, King James Version (2008) The First Book of Moses: Called Genesis 2:15.
[324] The Holy Bible: English Standard Version (2007) Genesis 2:15.
[325] New Revised Standard Version Bible (1989) Genesis 2:15 <www.biblestudytools.com/nrs/genesis/2.html> accessed 14 December 2017.
[326] Bible Hub (2004) <http://biblehub.com/genesis/2-15.htm> accessed 14 December 2017.
[327] White (1978) 108-9. See also Nash (1989) 95-6;
[328] Francis uses as reference the translation of the verse 2:15 in which it is read: '*to till it and keep it*'.
[329] Francis (2015) para. 67th.
[330] White (1967) 1207.
[331] Francis (2015) paras. 22nd, 68th, 69th, 95th, 109th, 116th, 118th, 119th, 122nd (emphasis added), 159th, 160th, 162nd, 169th, 190th, 195th.

One last review definitively concerns to the contemporary theory of future generations, but it will be tackled in a separate section, given its current importance, predominantly under a rights-based ethical framework.

As one can notice, the notion of moral considerability is deep-rooted in Western traditions along the history of thought, which implies that it is relatively easy establishing the limits of morality, or moral value, around human beings in an exclusive fashion, and also excluding all the nonhuman world from the moral sphere. Ergo, beyond any interpretation, *humans are the only beings who really matters to anthropocentrism*. Besides, from Aristotle to Francis the underlying perception of 'property' around the nonhuman world, particularly used to speak about the condition of animals, plants or land, is somehow ubiquitous along the Western history of moral status. Human-centered thinkers have inevitably defined natural world as mere things to be possessed by humankind. Certain expressions, such as dominion, ownership, appropriation, make use of, belong to, stewardship, and so forth– within the philosophical parlance–could give enough evidence, although it is also possible to find explicit references in international legal instruments currently in force.

3.1.4 The expansion of moral borders as a process of intuitive analogies

At first glance, the image of humans in the center of nature, either governing it or taking care of it, as an archetype of anthropocentrism could be riskily simplistic and constitute a false premise to address the ecological crisis from a questioning worldview. A strong criticism should be built on basis of its theoretical and pragmatic weaknesses, and even rhetorical ones so to speak. In this sense, it seems clear that moral standing was not an immutable essence of all human beings in its origins, neither at all time nor everywhere, at least in an egalitarian way. Hierarchically, it was only merited by freemen not slaves, by men not women, by adults not children, and more recently by alive people not future generations.

The history of knowledge is an evidence. Just to remember, Aristotle deemed freemen held a different category than slaves', women's and children's, occupying a superior locus over them, founded on their lacking determination, weakness, and imperfection respectively. Besides, there neither was equality in regard with their moral virtues, due to they were connected directly to their position in the family or in the public sphere. Everybody possessed 'reason' but only freeman's was complete in an Aristotelian sense; the '[…] *others want only the portion of it which may be sufficient for their station* […]' he said. To him, slaves were mere things, '[…] *one of those things which are by nature what they are* […]'.

Moreover, he believed a slave was '[…] *a particular species of property* […]' that could be used or employed in what the owner wanted. Likewise regarding women, Aristotle remarked that humans were endowed of 'courage', but '[…] *the courage of the man consists in commanding, the woman's in obeying* […]'. In another vein, children had incomplete virtue, which '[…] *is not to be referred to himself in his present situation, but to that in which he will be complete* […]'[332]. In sum, all these statements configured a hierarchical conception, where the higher was always the ruler and the others were the ruled[333].

Over the years, thinkers and activists have been enlarging the bounds of morality from their own action fields, in order to include new subjects of recognition and endow them with the same virtues and rights that their historically 'superior' fellows held. Slavery has been the prime example. As it was mentioned, it historically passed from having been a generally accepted social practice to a criminalized activity, to the point of provoking a civil war[334]. Therefore, there has been an actual expansion of the morality's limits in this particular case.

Something similar could be said about women, starting from the criticisms against the classic asymmetric vision of male's and female's moral virtues. Mary Wollstonecraft wrote in 1790 that virtues and knowledge of both sexes were equal in nature, and the only scientific demonstrable difference could be the male physical strength[335]. Later, her ideas were debated, reinforced or complemented by other authors, such as John Stuart Mill, Catherine Beecher, Charlotte Perkins Gilman, and Elizabeth Cady Stanton, whose works are usually quoted like the earliest approaches to feminist ethics[336]. Although the female situation in society is still unbalanced in regard with sexual violence[337], employment opportunities[338], political participation[339], among other inequalities[340], it can be said that women are currently part of the classic moral considerability, due to all those discriminatory behaviors are ethically condemned at the present day. It is another case of moral frontiers' extension, in which it is enough to glance at contemporary feminist literature[341] and social activism to realize that discourses against male chauvinism and anti-sexism are really powerful and overwhelming. For instance, in the beginning of 2017, the marches anti-Trump

[332] Ellis (1895) 21, 33-4.
[333] Clayton (2017) § 7(e) <www.iep.utm.edu/aris-pol/> accessed 27 September 2017.
[334] Supra § 2.1.
[335] Wollstonecraft (1833) 40-1.
[336] Tong and Williams (2009) § 1.
[337] United Nations (2015) 49-52.
[338] Cotter (2016) 15-36.
[339] Healey (2004) 1-2.
[340] An ethical compilation in Cudd and Jones (2006) 102.
[341] Some compilations of works, for example, in: Tong and Williams (2009); Held (1995); Schott (2003).

administration in the United States of America received a wide press coverage by national and international social media. Even Time magazine decided to feature the '*pussyhat*', a symbolic knitted red hat used by protesters, on its front cover. This image was retweeted more than ten thousand times[342]

Likewise, there is an enlargement of the moral boundaries of childhood. These days, no theorists defend the ancient Aristotelian perception about children as immature specimens who only had the expectation to reach the maturity with '[…] *the structure, form, and function of a normal or standard adult*'[343], neither the enormous power of '*life and death*' conferred through the Roman *Patria Potestas* to fathers, under which they could even sell their children[344]. As Butler affirms, children's moral status is not in seriously question at present, beyond the varied opinions about its scope and meaning, due to infants and adolescents count on their own moral interests and needs[345].

As one can see, it has been necessary embarking on a journey, characterized by unsteadiness, long-standing periods, and complexity, in order to include an increasingly number of members in the circle of moral considerability, largely grounded on the recognition of analogous rights, not only in favor of slaves, women and children–who probably are the milestones but certainly not the only ones–but also towards other human groups, such as natives, workers or blacks, among others[346]. Indeed, it even could be said that the borders of morality are still in progress of expansion towards other new fellows at the present day, such as fetuses and embryos[347], whose moral status and their own existence have been cast doubt on through the burning issue of abortion, a controversial dispute between the recognition of its rights and women's ones. Another relevant set of surrounding philosophical disquisitions have referred to future generations[348].

Epistemologically speaking, the gradual expansion of moral thresholds have not pursued strictly a specific methodological pattern, but rather it seems to have stemmed spontaneously, as result of multiplicity of variables (culture, custom, society, science, and so forth) that have influenced the philosophical discourse to a large degree. In a certain way,

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[342] Bain (2017) <www.independent.co.uk/news/world/americas/feminism-donald-trump-pussy-hat-protest-washington-women-a7557821.html> accessed 29 September 2017).
[343] Matthews and Mullin (2018) § 1.
[344] Maine (1908) 122.
[345] Butler (2012) 196.
[346] Nash (1989) 7.
[347] Specific theoretical reflections in Lee and George (2005) 13ff; Little (2005) 27ff; Little (2006) 313ff; Payne (2010); Chervenak and McCullough (2014).
[348] See, for instance, Baier (2010) 16; Attfield (1991) 88-114; Narveson (1967) 62ff.

the heterogeneousness of these elements conveys the impression of a process guided more by intuition or random than by rationality or any kind of scientific method.

As early as in 1871, Charles Darwin himself perhaps was already aware of it when stated that the expansion of morality towards other fellows was founded in ***social instincts and sympathies***, probably two of the most intuitive human sensations. To him, human's '[…] *sympathies became more tender and widely diffused, so as to extend to the men of all races, to the imbecile, the maimed, and other useless members of society, and finally to the lower animals,* [he said] *—so would the standard of his morality rise higher and higher* […]'[349]. And Darwin was not alone. Indeed, three years before his '*The Descent of Man*', the historian William Lecky affirmed that the ***benevolent affections***, an equivalent conception to 'sympathy', '[…] *embrace merely the family, soon the circle expanding includes first a class, then a nation, then a coalition of nations, then all humanity, and finally its influence is felt in the dealings of man with the animal world*'[350]. Perhaps Lecky truly anticipated Darwin about the expansion of morality and its bedrocks, indeed there is evidence of a quotation in which Darwin recognizes explicitly his coincidence with Lecky[351], but given the magnitude of his works, the influence of Darwinism on moral standing has been undeniable and his postulates turned out quite more spread. Therein, Nash holds that the activist Henry Salt preferred to quote Lecky instead of Darwin to back up his convictions about the process of liberation and ensuing concession of rights, which also starts from vague sympathy[352].

If one is traced much more back, almost a century before Darwin and Lecky, one can glimpse an analogous–although somehow vague–idea in a Jeremy Bentham's work, in which he compared the slaves' status in France with his willingness to recognize animals and humans under a same condition: their capacity to suffer. '*The day has been* [Bentham affirmed] *in which the greater part of the species, under the denomination of slaves, have been treated by the law exactly upon the same footing* […]'. His analogy about the blackness of the skin as an insufficient reason to distinguish blacks from other races, with the number of legs or the hairiness in order to avoid any discrimination between humans and animals represents the expansion of morality, according to the same aforementioned pattern: '*from colonists to slaves to nonhuman beings*', Nash complements[353].

[349] Darwin (1981) 103 emphasis added.
[350] Lecky (1913) 103 emphasis added.
[351] Darwin (1981) 104.
[352] Nash (1989) 31, 45.
[353] Bentham (1879) 311; Nash (1989) 23.

Later in 1892, under a comparable structure of reasoning, Henry Salt affirmed that '[…] *we **must** extend our sympathy and protection* […]' equally to wild and domestic animals, '[…] *as in the past it has been gradually extended to savages and slaves* […]'. However, it is perhaps more significant to emphasize the connection between the morality and the concession of rights, which Salt identifies explicitly beneath the label of the Roman '*jus animalium*', giving emphasis to its legal and moral independence concerning to the rights of property, distinction that is ***of utmost importance*** to him[354]. In parenthesis, the moral precept of '*jus animalium*' implies '[…] *that animals possessed what later philosophers would call inherent or natural rights independent of human civilization and government*'[355]. In addition, Salt believed the concession of rights was a three-phase process, where the inception is the awakening of a ***sense of affinity***–another equivalent to the Darwinian sympathy–, subsequently there is an insurrection against the tyranny, and finally comes the concession of rights[356]. It would be worth it to say the term '*tyranny*' could be seen also as a reference to Bentham, who also used it to illustrate a potential refusal to grant rights[357].

Definitively, although it could not be said there has been a standard or a systematic method to justify the inclusion of new members into the sphere of morality, and this insertions have been guided more by feelings essentially intuitive–such as *sympathy*, *benevolence* or *affinity*–than any other reasons, as it was already mentioned, similar philosophical configurations have gone arising in order to draw a recurrent analogy of slavery and its succeeding abolition process as a valid model for moral recognition. Feminism is quite likely the best example in which one can notice a linkage of argumentative analogies, albeit not necessarily they follow a sequential path. Indeed, a large number of authors have made explicit comparisons between slavery and the living conditions of past-and-present women, as a means to reinforce their thesis about political, economic, and social, equality of sexes[358]. Darwin himself came to draw an analogy with women's situation among barbarians, whose wives were '[…] *commonly treated like slaves*'[359]. Later, feminism has been in turn the inspiration for environmentalists through the parallelism between the exploitation of femininity and environment as the common point[360]. Even the image of

[354] Salt (1894) 36 (emphasis added), 89.
[355] Nash (1989) 16-7.
[356] Salt (1894) 16 emphasis added.
[357] Bentham (1879) 283.
[358] See, for example, Stewart and Sklar (2007) 55ff.
[359] Darwin (1981) 90.
[360] See, for example, Nhanenge (2011) 166-7; Gaarder (2011) 19-40; Jiggins (1994) 1-23; Nash (1989) 144, endnote # 53.

'tyranny' has been crucial to illustrate the analogy, in which the role of tyrant has been played by humanity, while nature has been the slave, directly alluding to the liberal American perspective[361]. Namely, just like the recognition of moral considerability toward slaves, in the same terms as their masters, allowed ending human slavery, the acknowledgement of nonhumans as human fellows will enable ending natural slavery.

Much more recently, although ensuing quite an akin reasoning, Peter Singer, who precisely avowed that his distinguished book, '*Animal Liberation*'–whose title denotes a direct reference to abolitionism–was '[…] *about the tyranny of human over nonhuman animals*', also described the enlargement of morality from families and tribes to nation and races and ultimately to all human beings, under the influence of another intuitive sense, '*altruism*', as the immediate antecedent to broaden the '*moral circle*' to the next prospective members, animals. In his utilitarian view, where animals and humans deserve alike moral considerability, given their '[…] *capacity for suffering and enjoyment is a prerequisite for having interests at all* […]', the analogy has been so explicit that he uses the term '*speciesism*', in a parallel connotation to 'racism' or 'sexism' to explain the unequal relationship between humans and nature. Singer states that '[t]*he analogy between speciesism and racism applies in practice as well as in theory in the area of experimentation*', a '*blatant*' and '*painful*' experimentation in fact[362]. Albeit it is not the only case, Peter Singer's work represents a radical position concerning to exceed the traditional limits of moral considerability based on the comparison with slavery, transcending the contents of anthropocentrism and entering into new taxonomies, or even branches of environmental ethics, with the aim to reach '[…] *the extension of moral standing and/or moral rights from human beings inclusively to wider and wider classes of individual nonhuman natural entities*'[363].

This approach has been so-called ***extensionism*** and has been widely employed in the environmental parlance of ethics and philosophy[364]. Along with Singer, Professor Christopher Stone is probably one of the most notable thinkers who have adopted the extensionism as a means to strengthen his postulates about the recognition of moral and legal considerability of nature, coming even to affirm that '[t]*he history of the law suggests a parallel development*', what it is plenty demonstrable through the chronological recognition

[361] Bentham (1879) 283; Nash (1989) 199ff.
[362] Singer (1991) i, 7, 83; Singer (2011) 120.
[363] Callicott (1986) 392.
[364] Kaufman (2003) 83 emphasis added; Nash (1989) 3ff; DesJardins (2013) 105; Keller (2010).

of human rights and the enactment of the corresponding international legal instruments (See chart # 1). Besides, from the standpoint of a holder of rights, Professor Stone explained that lawyers '[…] *have been making persons of children although they were not, in law, always so',* while in turn he gathered prisoners, foreigners, women, mentally ill people, blacks, fetuses and Indians under the category of what once was '*unthinkable*' and along the history has gone becoming morally, and above all legally, feasible[365].

Nonetheless, for the time being it proves necessary to particularize the use of the word 'extensionism', given its sturdy connotations towards moral status of nonhumans, especially animals, mainly since the publication of '*Animal Liberation*'. What has been exactly denoted through these pages is '*anthropocentric extensionism*'[366], whose characteristic entails the application of traditional Western tenets of *humanism* exclusively to the forthcoming ***human peers***, including future generations[367], because the limits of anthropocentric morality begins and ends only with human beings. In this sense, one should recall natural resources are seen as mere goods under this human-centered view.

3.1.5 The future generations

From a philosophical perspective, the relationship between present and future generations is often posed as a question of correlative rights and duties. However, the fact that one of the participants not exist yet raises a series of epistemological contradictions that should be currently still discussed, despite the issue has been revolved around the environmental debates for more than thirty years. In that regard, considering the main objective of this research, the moral considerability of future generations constitutes the key aspect to pay close heed.

Therein, the main discussion about the moral status of nature does not really avert significantly from its anthropocentric relationship with humans. Indeed, when philosophers raise the classic inquiry about the existence or not of a human '[…] *ethical obligation to help posterity to meet their needs* […]'[368], the initial obstacle one ought to cope with is how to understand moral considerability of future generations, but not necessarily from nature's perspective, because nature is still a mere resource within the notion of sustainability.

[365] Stone (1972) 450-1.
[366] DesJardins (2013) 105.
[367] Callicott (1986) 393-5.
[368] DesJardins (2013) 77ff.

Nevertheless, following Ernest Partridge, the recognition of posterity as an agent worthy of moral consideration, and the consequent existence of present duties towards it, would not imply solely a mere extension of the borders of morality, as it has come about through slaves, women or children, but also the elucidation of several ontological and epistemological issues that could be currently seen as incongruences. Thus, the empirical absence of future people makes him wonder, for example, if there are really duties in favor of non-existing beings, or what would be considered their rights, or who would have the moral obligation to act today on their behalf[369].

By and large, Partridge casts doubt on the real necessity of accurate recognition of rights in favor of inexistent people, somehow as an allusion to the '*argument from ignorance*', referred to the poor knowledge that present generations have in regard with future people and their needs[370]. Namely, he criticizes the argument that present generations thoroughly ignore oncoming needs, even calling it an '*ignorance excuse*'. According to him, humanity has enough information about future generations, i.e. they will be humans, moral agents, sentient, and self-conscious; they will require an ecosystem to be sustained, a set of stable social institutions, and a body of knowledge and skills. An opposite argument could be find in Golding, to whom forthcoming people '[…] *comprise the community of the future, a community with which we cannot expect to share a common life*', let alone knowing what to desire for them[371].

Either way, the moral considerability of future generations has often appeared like a new extension of moral thresholds to those humans who have not been born yet[372]; namely a sort of the aforementioned anthropocentric extensionism, which could derive into a relationship among equals, endowed–albeit not in all cases–of correlative rights and duties.

Therefore, it is inevitable that future generations should be considered fellows of alive human beings, in order to be granted of rights. If it does not occur, whatever it be the theoretical framework employed to support that recognition, there would not be any valid reason to do it. In other words, following almost exhaustively Partridge's categorization[373], either through *libertarianism*, *utilitarianism*, *communitarianism*, or *deontological views*, among other tendencies, it turns out indispensable to count on an explicit acknowledgement

[369] Partridge (2001) 378-9.
[370] In deep, see Norton (2010) 534-45; DesJardins (2013) 78-9.
[371] Golding (1972) 97-8.
[372] Callicott (1986) 392.
[373] Partridge (2001) 378-83.

of moral considerability towards future generations if one pretends to grant an extension of rights to them.

More specifically, *libertarianism* implies the privatization of resources, assigning future values to existent assets with the aim of being negotiated in future markets. This kind of resource speculation is based on the idea that a suitable subrogation of interests, namely also rights, can be carried out more accurately when the natural resources' property is in private hands. The thesis consists of believing that no rational owner is going to degrade the economic value of his/her own property and, therefore, he/she will be the best 'protector' of future interests[374].

For its part, *utilitarianism* bears upon the discount of the overridden interests from future people. According to DesJardins, when the interests of present generations take precedence or are higher than future's ones, it would prove to be reasonable discount the surplus from them, applying an akin principle to the economic discount of a present value of a future payment. This notion is predicated on Jeremy Bentham's '*felicific calculus*', which is somehow a method that describes '[...] *the elements or dimensions of the value of a pain or pleasure*', explains James Crimmins, in terms of its '[...] *intensity, duration, certainty or uncertainty, and its propinquity or remoteness*'[375].

Likewise, *communitarianism* comprises a shared membership between the present community and the upcoming generation. Essentially, Avner De-Shalit invokes the existence of a transgenerational community, which extends from the present to the future, with mandatory implications in regard to the obligations among its members, as if they were parties of a contract. Then, it is not rare he reinforces his approach through contractarian theories and '*hypothetical contract*', especially from Gauthier and Rawls. De-Shalit also holds that '[...] *the constitutive community extends over several generations and into the future, and that just as many people think of the past as part of what constitutes their 'selves', they do and should regard the future as part of their 'selves'*'[376].

Finally, *deontological views* correspond to the recognition of '*uncorrelated or imperfect duties*' toward the next generations. Although Richard De George recognizes certain duties towards posterity, he is one of the philosophers who denies the existence of any kind of rights as a counterpart. He even states that future generations do not exist in practice, so they

[374] Partridge (2001). A deeper explanation in Martino (1982) <https://reason.com/archives /1982/11/01/inheriting-the-earth> accessed 8 February 2018.
[375] DesJardins (2013) 81-2; Crimmins (2019) § 3.2 <https://plato.stanford.edu/entries/bentham/> accessed 2 March 2019. See also: Parfit (1984) 158-63; Attfield (1991) 91-5; Beckerman and Pasek (2001) 108.
[376] De-Shalit (1995) 14-7; Gauthier (1977) 130-64; Rawls (1971) 11-7.

cannot claim the same rights as present generations. For his part, Partridge affirms that one cannot refuse subjectively the whole sphere of future people's rights. He emphasizes the differences between the two kinds of rights: active and passive ones. The former, i.e. the rights to act or omit (e.g. liberty to go wherever one wants) could be hypothetically discarded, while the latter, i.e. the human being's inherent rights (e.g. not being deprived of opportunities or keeping one's reputation undamaged) could not. Those kinds of rights are in turn based on Feinberg's categories of '*in rem*' and '*in personam*' rights[377].

On the other hand, nature's moral status follows a completely different approach, even in the international parlance. Indeed it is enough to take a glance at the core concept of sustainable development to notice it. Beyond the widely known '[…] *development that meets the needs of the present without compromising the ability of future generations to meet their own needs* […]', defined by the Brundtland Report, the essence of the moral standing of nature is unequivocally exposed in several passages throughout the whole document, when it refers–for example–to the scope of '*the exploitation of resources*', such as air or water, so-called '*free goods*'; or when the proscription of commandeering those same free goods is been promoted, due to unequal access to the resources. In nearly every section of '*Our Common Future*' there is a reminder about the existence of an available stock of goods, which not only should be protected from depletion, but also stored for the future. The word '*stock*' appears indistinctly used for renewable and nonrenewable resources in several paragraphs[378].

More or less the same inferences have been developed by several philosophers, even those theorists who could be deemed somehow the forerunners of the future generations' theories or, at least, its most remote antecedents, and who wrote at the Stockholm Declaration's time or even prior to the Brundtland Report's[379]. Therein, it has been already said that Immanuel Kant, in a certain sense adherent of the storing for posterity, looked at natural resources as things[380]. Likewise, Paul Ehrlich, who attributed bulk of the environmental devastation to the uncontrolled population growth and was one of the pioneers in using the term "future generations" amid a somewhat aggressive speech, also

[377] De George (1979), 95; Partridge (1990) 58-9; Feinberg (1980) 130ff.
[378] United Nations (1987) paras. 1st, 11st, 12nd, 14th, 15th, 24th, 35th, 36th, 57th, 58th and 59th.
[379] Declaration of the United Nations Conference on the Human Environment (1972) 3-5. Hereinafter Stockholm Declaration; DesJardins (2013) 77.
[380] Kant (1971) 50; Kant (2009) 123.

thought in natural resources as goods in stock. An explicit example can be found when he suggests ironically the purchase of '*natural resources stocks*' before the prices increase[381].

Another well-known author, Barry Commoner, whose insights have been also analyzed from holism[382], brought into question the belief that population's increase and even affluence were the central causes of environmental crisis, instead of the changes in productive technology and subsequent industrialization. Using the case of Lake Erie as an example, he explains this kind of '[…] *human intervention* […] *is wholly responsible for the present deterioration* […] *and for its grimly uncertain future*'. Although there is not an explicit allusion about nature's moral standing in his work, one can infer he thinks of natural resources as inputs (what means goods) to satisfy basic human needs–which enables also to ***produce*** people–and to yield a wide range of technological and industrial devices[383].

Among the most reputable thinkers, it is impossible to leave out Joel Feinberg, whose influential essay, '*The Rights of Animals and Unborn Generations*' proved to be an inspiring milestone for contemporary debates about moral standing, and for the recognition of a correlative relationship between present generations' duties and future generations' rights. Similarly, as far as nature is concerned, ensuing his own stance about 'interest principle', he curiously saw animals like holders of rights despite he thought they were objects, albeit not ordinary things such as rocks, buildings, or lawns[384].

Theoretically, the concept of '*future generations*' has been a precept in unceasing construction, with significant contributions from different disciplines, but mainly from normative and applied ethics, without necessarily departing from the original query about the current obligations towards forthcoming people. This intergenerational relationship, in terms of moral compulsions and responsibilities, has entailed a persistent reproduction of anthropocentric tenets in regard with nature's moral standing, whose scope is still spinning around the definition of things or goods. Gregory Kavka, for example, who firmly believed in moral standing of upcoming generations[385], to the point of dispensing '[…] *equal weight to the interests of present and future persons*'[386], did not understood nature under the same conditions. To him, natural resources–such as air, water, or fertile land–were mere goods existing people are obliged to supply towards their descendants, as an analogy–explains

[381] Ehrlich (1968) 149-50.
[382] Jamieson (2008) 2.
[383] Commoner (1974) 105, 113 (emphasis added), 173-5, 244-5. A complementary reading of Commoner in DesJardins (2013) 77 and Keller (2010) 416.
[384] Feinberg (1980) 159, 161, 167.
[385] Cochrane (2018) sub-s 1.a <www.iep.utm.edu/envi-eth/> accessed 6 February 2018.
[386] Kavka (1981) 110.

Attfield–of the aid offered by a rich individual or group to strangers in despair due to the scarcity[387]. Beneath this idea, it is inevitable to think about a certain sense of intergenerational charity. At any rate, there is a wide spectrum of criteria like his amongst much of the most respectable promoters of future generations' thesis, in the ethical field. For example, Mary Williams opens her article with a clear differentiation between interest-bearing resources (e.g. species of crop, fish, draught animal, topsoil, and so on) and exhaustible ones (e.g. fossil fuels), according to their capacity to generate energy available for future consumption, which reveals undoubtedly her tendency to appreciate natural resources as things[388]. For his part, Brian Barry understands the obligations to the future as a question of intergenerational justice. Indeed, his reasoning is often analyzed altogether with John Rawls' one[389]. In his discourse, nature seems to stay invisible within the obligations owed to forthcoming people, mainly due to he admits the consumption of nonrenewable resources in the present, although it could mean a disadvantage for the next generations[390]. To him, natural resources in itself are less important than an equal opportunity to use them, even if it means a compensation of its 'productive capacity' towards the future[391]. This is the essence of justice, which could be inferred as an instrumental sense of nature's value. To round out these criteria, it proves interesting to allude to Nel Noddings' argumentation, one of the advocates of an ethics of care to future generations, who recognizes surreptitiously a certain moral considerability to animals, appealing to a popular saying among farmer people: '*if you are going to eat it, don't name it*', because the name grants a somehow '*special status*' that humans cannot ethically betray. Even though this metaphor could imply a different level of animals' morality, Noddings himself acknowledges a 'one-sided' affair with them, given that while humans are able to take care of them; conversely, animals are not in return. In fact, there is an explicit reference to raise animals for food as an option in front of vegetarianism, which reveals again a mere sense of resources to meet needs. By the way, plants do not share this status with animals, due to the former seems to have a hierarchically lower position than the latter[392].

Summing up, once again the relationship between humans and nature appears governed by the Western traditional principles, under a graded scale of values where subjects are above

[387] Attfield (1991) 90.
[388] Williams (2004) 21ff.
[389] See, for example, Beckerman and Pasek (2001) 29.
[390] DesJardins (2013) 84-5.
[391] Norton (2005) 317-8.
[392] Noddings (2013) 154-60.

objects. Current and next generations are clearly integrated by humans, and only by them. Nonhumans are not definitively part of the generations to whom certain duties are owed, or whose interests will be discounted, or who will share a community membership, and so on. In no section of the academic parlance, whatever it is the theoretical approach, nonhumans are included in either present or future generations. They are rather part of the resources or things which are owed to future people. Moreover, they are considered mere goods, often even objects of property. Therefore, conservation, protection and respect of nature are not the pillars of environmentalism, for the own sake of nature, from a perspective founded on rights of future generations. Rather, these theories are oriented to guarantee the access of forthcoming people to natural resources. The limits of human consumption does not lie on ecological reasons but rather in storing resources, in order humans can continue to consume *ad infinitum*.

3.1.6 Characteristics of who deserves moral standing – a traditional view

As it has been reiteratively mentioned, determining who merits moral considerability turns out to be relatively simple from an anthropocentric point of view, beyond the historical swings of its limits, given that human beings have definitely played the key role–and very often the only one–in the moral scene during more than two thousand years. The few existing endeavors for incorporating nonhuman entities into the moral status before the early 1970s could be considered barely skirmishes in the great philosophical battle for moral and legal recognition, at least until then. From there on, conditions of history has been changing.

In any event, following David Keller, there are essentially five features one can analyze to understand the position humans occupy in the environment and the relationship with nature under the outline of anthropocentrism. They are: hierarchy, dualism, mechanism, intrinsic value, and community membership[393]. Before examining each characteristic, however, it is worth it to emphasize that property rights constitute a transverse beam to all of them, either directly or indirectly. In effect, as it will be seen in more detail afterwards, the implications of moral inferiority, lack of reasoning, deterministic functioning, instrumental value, and incapability of being part of a community, lead to support the idea of nature as a series of goods or commodities, useful to meet human needs, and therefore, susceptible of private appropriation. An illustration in chart # 4.

[393] Keller (2010) 59.

Chart # 4 Characteristics of anthropocentrism

Features	***Implications***	***Empirical examples***
Hierarchy	Humans are superior than nature	Humans are owners of nature
Dualism	Moral agents: body and mind	Nature is a set of goods, even commodities; it does not have reason.
Mechanism	Nature is a system of inanimate particles that operates deterministically, without will	Nature is a set of goods without will.
Intrinsinc value	Humans are important by themselves, nature has only instrumental value	Nature is important as far as it meets human needs (food, attire, housing)
Community membership	Members of community posess intrinsinc value	Nature is excluded of the community, it is a set of goods.

Based on Keller (2010) 59.

By and large, humans have been hierarchically above nature in the anthropocentric prospect, what in a certain way facilitates the analysis of their mutual interconnections in terms of dominance, property, care, or other similar states where humans are located in a position of superiority. Keller illustrates quite well this graded structure, through the classic works: '*The Great Chain of Being*'[394] and '*The Summa Contra Gentiles: Creation*'[395], demonstrating not only the unbalance affair between both of them, but also the existence of nonhuman categories, ranked in different levels; namely vertebrates, invertebrates, plants, micro-organisms and nonliving beings in the bottom[396]. However it is not the only case, given that the distinction between agents and patients, as somehow different categories of beings, has also been discussed in the philosophical literature, especially within the field of moral status. Indeed, Evelyn Pluhar states that '*moral agents*' are '[…] *capable of understanding and acting upon moral principles,* [and] [p]*rovided that* [they] *do not act under duress,* [they] *are responsible for what* [they] *do*'; what implies the existence of exercisable rights and enforceable duties before other agents. Besides, their moral considerability endowed them a value that allows being ends in themselves and not only a '[…] *means to further others' purposes*', what evokes a certain sensation of supremacy[397]. Certainly, '[…] *only rational human beings can be moral agents,* [in the Western traditional parlance,] *for they must hold responsibility for their actions*'; while '*moral patients*' are mere

[394] Lovejoy (1957).
[395] Aquinas (1956)
[396] Keller (2010) 59.
[397] Pluhar (1988) 33.

'[…] *marginal human beings, such as children and brain-damaged people,* [who] *are not regarded as having moral responsibility for their behavior*'[398]. Accordingly this dichotomy between ends and means, or reasons and feelings, or intrinsic and instrumental values, quite well spread in the ethical literature, marks a hierarchical status which denotes a difference even among humans. This distinction, although with diverse scopes, appears also in Feinberg's and Regan's works, concerning the debate of animal's moral considerability[399].

The second peculiarity is related to the so-called '*substance dualism*', mostly aimed at the contrasts between mind and body, and whose modern version is predicated in Descartes' work[400]. In his sixth meditation, the author refers to the '*real*' distinctions between human's body and soul/mind (both terms are synonyms to him), starting from the idea that the former is completely divisible (i.e. arms, legs and other parts could be cut off), while the latter is by its nature the opposite, that is to say indivisible (i.e. mental faculties such as willing, conceiving, perceiving could not be separated and indeed they act as a whole). The bulk of authors recognizes in this distinction the core of dualism, given that it suggests the possibility of disaggregating both substances, so that mind can exist without body, which is at the same time a justification for an '*after-life*', for the *'immortality of soul*'[401]. In this sense, although Marleen Rozemond admits this generalized tendency, she does not share it. She rather states that the conception of substance and the interconnections between its nature or essence and its properties are more important to understand accurately the dualism, despite she emphasizes the question of the immortality of soul. Therefore, as a conclusion drawn by Rozemond from the case of animals, dualism suggests a sense of human superiority, well-matched with hierarchy, not only because it offers to humans the possibility of transcending time, but also due to nature does not possess any mind[402], as it can be inferred from Descartes' own words: '[…] *this proves not only that the brutes have less Reason than man, but that they have none at all* […]'[403].

The notion of a mechanistic functioning of nature is the third important element for anthropocentrism, where Descartes represents the main source of its development, albeit Isaac Newton has also played a significant role with his contributions[404]. As it was

[398] Bunnin and Yu (2004) 447.
[399] Feinberg (1980) 162-3; Regan (1983) 151-6
[400] Robinson (2016) sub-s 2.3 <https://plato.stanford.edu/archives/fall2017/entries/dualism/> accessed 14 February 2018.
[401] Descartes (1901) 215-6, 264, 270, 276.
[402] Rozemond (1988) 1-3, 42;
[403] Descartes (1901) 189.
[404] Keller (2010) 59.

aforementioned, animals–and also men in their '[…] *purely animal nature*'–are '*perfect machines*' which forms part of the '*stupendous mechanism of the world*'[405]. This view is shared by Newton, for example when he compares argumentatively the so-called 'uniformity' existing in the operation and the configuration of both the planetary system as the animals' bodies[406]. However, the key issue in the relationship people-nature is related once again to the human supremacy, expressed in the rational soul that allows them to preside alone like '[…] *an engineer in the midst of this vast machinery and govern the conduct of the body by the dictates of wisdom and virtue*'[407].

The fourth aspect, and the more significant one in terms of the nature's moral status, is perhaps the contrast amongst intrinsic and instrumental values, because '[…] *values in nature are always "anthropocentric", or at least "anthropogenic" (generated by humans)*'[408], what confirms the recurrent idea of a ranked relationship between people and nature. In this sense, an inherent or intrinsic value is what someone or something '[…] *has "in itself," or "for its own sake," or "as such," or "in its own right."*'[409]. DesJardins explains that there is a current doctrinal debate about the contents and scopes of the words inherent and intrinsic, in which the difference is the participation of an evaluator able to confer the inherent value to the object, while in the case of intrinsic value it is not necessary. To illustrate the distinction, he uses a quite clear comparative example of children vs. a family heirloom; namely, humans vs. goods. Children are valuable in and by themselves, meanwhile the heirloom needs the familiar recognition to be valuable in practice. To outpace the divergence, he opts for the so-called '*emerging consensus*'[410], proposed by Susan Armstrong and Richard Botzler. However, a deeper analysis about these themes would be useless in the present case, given that humans are valuable in both ethical scenes. As DesJardins states, '[…] *to have inherent value is to have value independent of interests, needs, or uses of anyone else* […] *is to have value in and of oneself* […]'; namely it is an end in itself, and not merely a means to some end[411]. From anthropocentrism, human beings are quintessential worth by themselves.

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[405] Sewall (1901) xii.
[406] Newton (2010) 72-3.
[407] Sewall (1901) xii.
[408] Rolston III (2012) 113.
[409] Zimmerman (Zimmerman, 2019) § 2 <https://plato.stanford.edu/entries/value-intrinsic-extrinsic/> accessed 5 February 2019.
[410] Armstrong and Botzler (1993) 53.
[411] DesJardins (2013) 113, 146

On the other hand, according to Korsgaard, instrumental or extrinsic values are usually understood by contrast with intrinsic ones, namely as valuable for sake of something else. She explains there are serious implications derived from equating extrinsic and instrumental values in only one category, but if it is the case, one is obliged to speak about 'means or instruments'. At any rate, similarly to the divergence between intrinsic and inherent values, it is not worth it to address in deep the issue, at least under an anthropocentric outlook[412]. Being a function of usefulness, various thinkers tend to assign instrumental values to objects, such as currency like a means of payment[413]. Thus, they are means, tools or instruments to reach an end, which is commonly the people's welfare from a human-centered perspective. For instance, if eating, drinking or dressing and so on are needs that contribute to general human welfare, the sources of nourishment, refreshment or attire will be the instruments to obtain it. For this reason, it is not rare that certain anthropocentrists, guided by Lockean premises, consider nature instrumentally, i.e. as a set of economic goods or resources[414], which places ecological balance systematically in jeopardy, considering that, like an instrument, nature could be replaced, discarded or ignored at any time.

Finally, according to Keller, the belongingness to the moral community corresponds exclusively to human beings from the anthropocentric angle. Natural world is just excluded. The conclusion is quite simple and logical, if one interconnects the aforementioned peculiarities altogether, in particular the quality of intrinsic value to deserve moral considerability. Humans are ends and nonhumans are mere means, so humans deserve a moral recognition while nature not[415].

3.1.7 Conclusions

The theoretical analysis of this section was aimed at replying three initial inquiries. Firstly, how significant the discourse about property rights concerning the approach of natural resources turned out within the ambit of ethics, secondly if the traditional tenets were enough to provide ethical support to law and justice in order to cope with the environmental crisis, and finally, how viable the expansion of the human moral limits would be in order to include nature within them.

[412] Korsgaard (1983) 170-1.
[413] DesJardins (2013) 130.
[414] Locke (2003) 77-81.
[415] Keller (2010) 59

In that regard, although the three questions could be separately replied in principle, they are irremediably joined because they explain each other. In fact, as it was mentioned, this was the key reason why their approach was carried out in a comprehensive manner. In either event, assuming the risk of being repetitive, the results of the reflections will be presented by separate, so that one can count on an organized and methodical evaluation of the research questions.

Therefore, as far as the influence of the property rights within the traditional ethical parlance is concerned, the discursive analysis shows in a quite plain manner that natural resources were deemed as goods, even as commodities, no matter the current of thought or the historical period in question. In effect, from Aristotle to Kant, the same conceptual structure in which nature is the source of nourishment, attire, and dwelling, among other human demands, repeats over and over again.

The traditional ethical interconnection between humans and nature along the years has been strongly based on the use of natural resources for the human benefit–thus '*for human sake*'–is a recurrent phrase, which denotes an unequivocal sense of ownership. It is sometimes explicit, such as in Aristotle, who came even to associate pretty clearly the process of acquiring property rights with human activities of utilization (e.g. hunting or fishing) or it is simply tacitly addressed as it occurs, for example, with the control of natural processes (e.g. mineral crystallization of gemstones) elucidated by Bacon. Of course, the icing on the cake is represented by Lockean ideas about the process of private appropriation.

On the other hand, the second question about the sufficiency of anthropocentric principles to face today's ecological challenges could be responded by means of more contemporary perspectives of traditional ethics. In that sense, from the 1970s on, the idea about the '*responsible use*' of natural resources spread among the defenders of traditional tenets, where Passmore and the Catholic Church, among others, can be mentioned. Nonetheless, albeit their assertions were, are in fact, much more eco-friendly, the essence continues to be basically the same. Natural resources are goods to use for human sake, certainly with more responsibility, but goods in the end. Furthermore, there is a fallacy revolving around this argument, considering it promotes the protection of nature for continuing to utilize it as a kind of supplier of goods and services. The detractors of anthropocentrism employ precisely this circular argument to uphold the absurdity of attempting to solve the environmental dilemmas by means of what is considered as the cause. In other words, it is difficult to think about the depletion of natural resources could diminish following this logic of consumption.

In a similar vein, the comprehensive structure of the human right to a healthy environment illustrates quite well the somehow dogmatic sense of anthropocentric principles governing the exercise of rights and the scope of the law. Indeed, it does not deal only with the semantic connotation of the expression 'human right' preceding the notion of the environment (which in a certain way turns out symbolic in itself), but it goes beyond, reaching even the teleological meaning of the right; i.e. protection of nature for sake of humans, not for sake of nature itself. In essence, the protection of the human right to a healthy environment involves the possibility of guaranteeing another set of human rights because– one more time–nature is a source of food, clothing, and housing, among others.

Lastly, regarding the inquiry about the likelihood of extending the borders of moral considerability from humans to nature, it should be said it does not seem to exist the appropriate conditions to put the topic on the table yet. In addition to the shared idea of deeming natural resources as things, another common affirmation by the authors consists of the fact that only humans deserve moral standing, once again, no matter the ethical tendency nor the historical period. It has been mentioned the authors are still intensely discussing about the human nature and moral recognition of fetuses and embryos, so they are hardly going to include animals, plants or even ecosystems into the ethical debate.

In this state of affairs, it has turned out pretty understandable that the environmental debate, from an anthropocentric angle, have tended toward the recognition, or at least the discussion, of future generations as subjects of moral status because they are expected human beings, who are clearly meeting the ethical conditions needed to be included into the circle of morality. Therefore, the protection of nature will make sense in terms of constituting somehow great storage of goods and services to favor the newcomers, to their own benefit. But even so, one has to bear in mind there are still philosophical deliberations about the character and the moral compliance of this human duty from the current people to the forthcoming ones.

It is worth it to clarify that it does not mean, however, that the philosophers have not employed this mechanism of extension of moral boundaries to include animals, plants and other beings or set of beings into the circle of moral standing. Certainly, one can find examples mainly regarding sentientism and biocentrism, although these theoretical trends are addressed from a non-anthropocentric outlook.

To conclude, methodologically speaking, although the discursive analysis of the healthy environment, conceptualized as a human right, could be enough to determine the anthropocentric character of traditional ethics, the hindsight of different philosophical

currents of thought has been very useful to corroborate the existence of similar theoretical patterns along the history of moral philosophy.

3.2 The anthropocentrism of international law

The analytical structure of this section is designed essentially to supply the theoretical elements that allow responding the three research questions regarding the anthropocentric character of the international legal framework, currently in force. Namely, it deals with the discursive evidence about the influential preeminence of property rights over environmental protection, within both the binding and non-binding international instruments. Additionally, it aims at identifying the existence of satisfactory legal measures to combat environmentally harmful actions based merely on ownership's grounds. To close, it will be addressed the specific reasons in which the recognition of nature as a subject of law could be supported.

3.2.1 Human rights and environmental protection

In the ambit of international law, speaking about environmental protection means speaking about human rights, principally if the issue is going to be discussed before an international tribunal. This interconnection is known in the international parlance like the '*right to a healthy environment*', whose scope is profoundly engaged on anthropocentric principles. However, although there is profuse environmental literature regarding this subject matter, it is difficult to find explicit references and its practical implications within the different instruments of international law.

Therefore, this legal analysis sets off from the scanning of the international instruments–particularly those referred to the defense of human rights and environment–in order to verify if they correspond to an anthropocentric outlook, mainly supported on the idea that natural resources are goods to protect for the sake of people. The purpose is to demonstrate how biotic and abiotic factors are not valuable only by virtue of their own existence before law, but rather as goods–or even as commodities–robustly associated to property rights[416].

Analyzing the interconnections between environmental protection and human rights within the international legal framework, currently in force, entails at least a couple of hindrances: number and purview. Effectively, the enormous quantity of conventions and

[416] Borràs (2016) 113-4.

other agreements about both topics, a little more than one hundred altogether, makes difficult an exhaustive analysis, besides due to not all of them are relevant to the specific area of action of the right to healthy environment, core matter of this section. In addition, in terms of scope, the bulk of international agreements about environmental issues are quite heterogeneous. Indeed, whilst some of them encompass concerns of global character, such as climate change or public participation; others embrace much more concrete ranges, like specific ecosystems (air, water, soil), resources (ozone layer, biodiversity, watercourses), potential harmful actions or events (movement of hazardous waste, industrial accidents, illegal trade), and environmental impacts (desertification, pollution), among others. Much of the times, two or more topics even appear overlapped. Under these circumstances, the best option to minimize repetition and facilitate the analysis seems to be the chronological selection of the most representative instruments in the international scale, following no methodology in particular more than the lists published by the United Nations, for example, in its Web Site about the Treaty Collection or other sources by experts on the subject[417].

3.2.2 The International Bill of Human Rights[418]

Although the foundational instruments of human rights, so to speak, do not make any explicit reference about the right to healthy environment, they are usually mentioned in different academic ambits and analyzed as the starting point of the international legal system in this matter[419]. The document *par excellence* is the ***Universal Declaration of Human Rights***; which includes provisions related to the right to live, undeniably linked to the environmental rights, and some others rather oriented to the human welfare, such as the adequate standard of living for the health and well-being. The entire system works out around the conception of human *inherent dignity* as its main reference framework, just like it appears in the very preamble[420]. The notion of '*dignity*' lies in the very roots of human rights to healthy environment, as it was aforementioned, to the point that it is alluded repeatedly in numerous international agreements. Maybe that is why Holmes Rolston III affirms that '[…] *the*

[417] For example, Zartner (2014) 12-3.
[418] '*The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols*'. United Nations (1996) 1
[419] In deep, see Leib (2011) 46ff. See also Taylor (1998) 315; Borràs (2016) 116; Marks (1981) 440; Cullet (1995) 31; Chapman (1993) 223-4; Gudmundur and Ovsiouk (1991) 22-3; Schram (1992-1993) 144-6; Fung (Fung, 2006) 112.
[420] Universal Declaration of Human Rights (1948) Articles 3 and 25(1), Preamble, recitals 1st and 5th.

concept of rights that has worked so well to protect human dignity is a hallmark of recent cultural progress'[421]. Undoubtedly it is a compendium of anthropocentric principles and statements thoroughly slanted towards human sake, aspect evidently understandable if one bears in mind the post-war period in which it was adopted[422]. It is worth it to remark that property rights[423] are included in the body of the text, what laid them on the core of the international arena, mainly due to the significant moral and political influence the Declaration exerts worldwide.

Neither the right to healthy environment nor the right of property appears explicitly in the binding instruments of 1966, although one could locate certain characteristics within their texts that reveal noticeably their anthropocentric bias.

Thus, the ***International Covenant on Civil and Political Rights*** provides the '*inherent right to life*', connected with the protection of public health, albeit not under the structure of a right, but rather as a curious restriction to several liberties, such as mobility, religious manifestation, expression, peaceful assembly and association. Once again, the general framework is the '*inherent dignity*' of people, as a robust validation of anthropocentrism. Moreover, when the Covenant provides that '[n]*othing* […] *shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources*', it is quite probably one of the first times in the international legal context one can identify a hierarchical relationship between humans and nature, subtly addressed around the notion of property rights, without even mentioning them. Indeed, the use of the expression '*natural wealth*' has a clear economic connotation, along with the guarantee of peoples to freely '*dispose*' of '*their*' natural resources '*for their own ends*'[424]. It would be useful to recall that the exclusive rights to possess, to use, and to '*dispose*' conform the notion of 'ownership', in the legal parlance[425]. In another way, Susana Borràs states that Article 6 '[…] *expressly identifies the need to improve the environment as a requirement for the proper development of the individual*'[426]. However, this sense is not clearly perceivable from a simple reading of the passage. One would perhaps draw a similar conclusion by means of a more flexible than literal interpretation about the third recital instead of the

[421] Rolston III (1993) 256. See also Marks (1981) 440; Cullet (1995) 26.
[422] United Nations (2018) www.un.org/en/sections/universal-declaration/history-document/index.html> accessed 13 February 2018.
[423] Universal Declaration of Human Rights (1948) Article 17.
[424] International Covenant on Civil and Political Rights (1966) Preamble, Recitals 1st and 2nd, Articles 1(2), 6(1), 12(3), 18(3), 19(3b), 21, 22(2) and 41.
[425] Gifis (2003) 405.
[426] Borràs (2016) 116; Borràs (2017) 228-9.

Article 6; namely, if the enhancement of environmental circumstances equates with the creation of conditions '[…] *whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural right*'[427], one could maybe speak about the need Borràs refers to. There is rather a general comment about the aforesaid Article 6, formulated by the Human Rights Committee, in which it has been argued the existence of a narrow interpretation of the right to life by states, and suggested the adoption of '*positive measures*' in order to protect this right[428]. Some authors take for granted this comment contains exigencies to improve environmental conditions[429], what could be partially accurate, even though it refers to utterly human-centered actions, such as the reduction of infant mortality, the augmentation of life expectancy, or the elimination of malnutrition and epidemics[430]. One should say '*partially accurate*' given that all these institutional activities would have exogenous components, which only could be handle through environmental parameters. In other words, the realization of the right to life in better conditions is '[…] *inherently dependent on the successful management of the environment*'[431]. Another interesting interpretation derives from the last phrase of the second paragraph of Article 1 that reads: '*In no case may a people be deprived of its own means of subsistence*'[432]. According to Sierra Club, it represents a prohibition of state activities that '[…] *would degrade the natural environment to such an extent that peoples* […] *could no longer provide for themselves*'. The phrase is quoted by Audrey Chapman, as an unpublished Sierra Club's manuscript, although there is evidence this document was distributed during the 44th session of the Sub-commission on Prevention of Discrimination and Protection of Minorities in 1992. Barbara Johnston narrates how it was submitted to the Sub-commission as one of the contributions to the urgency for examining the relationship between human rights and environmental problems[433]. Nevertheless, given the extensive nature of the legal interpretation, a second opinion could emerge from the same provision, completely opposite, i.e. one could think about an unlimited guarantee of resource's exploitation with the objective of meeting the people's basic needs, which probably suits better to the human-centered essence of the covenant's text. In any event, going back to the recommendation of Prudence Taylor, both

[427] See International Covenant on Civil and Political Rights (1966) Preamble, recital 3rd, Article 6.
[428] UN Human Rights Committee (1982) para. 5th. Also quoted by Borràs (2016) 116.
[429] See, for example, Borràs (2016) 116; Gudmundur and Ovsiouk (1991) 22-3.
[430] UN Human Rights Committee (1982) para. 5th.
[431] Gudmundur and Ovsiouk (1991) 22.
[432] International Covenant on Civil and Political Rights (1966) Article 1, para. 2nd.
[433] Chapman (1993) 223; Sierra Club Legal Defense Fund (1992); UN Commission on Human Rights (1992) 2; Johnston (1994) xi-xiv.

cases could be seen as precise examples of what she termed a '*reinterpretation of preexisting substantive human rights*', aimed at the protection of nature since an anthropocentric outline[434].

For its part, the ***International Covenant on Economic, Social and Cultural Rights*** contains probably closer concepts to the notion of healthy environment, such as physical health or hygiene. Indeed, there is an implicit reference to the quality of environmental conditions, when the Covenant provides the states parties' obligation '[…] *to recognize* [and] *to achieve the full realization of this* […] *right of everyone to the enjoyment of the highest attainable standard of physical and mental health*'[435], given that this specific goal-setting would be unthinkable under an inadequate atmosphere of life[436]. This last provision coincides with the Human Rights Committee's criteria about the necessity of a less restricted interpretation of right to life[437]. To confirm this statement, a little later in the same provision, there is an enumeration of predominantly exogenous measures imposed to reach those required aims, particularly '[…] *the improvement of all aspects of environmental* […] *hygiene*'[438]. In this case, a plainer reinterpretation of this rule looks more feasible than the previous covenant's, above all considering the text of Article 1 in both instruments is identical, and a similar coincidence befalls between the articles 47 and 25 related to the right '[…] *to enjoy and utilize fully and freely their natural wealth and resources*'. In consequence, the extensive interpretation about the necessity of ameliorating environmental conditions as a prerequisite to improve people's living conditions, as much as the potential prohibition to state activities in order to warranty the means of human subsistence would be valid premises in favor of the ecosystem, in the ambit of this instrument. Even so, being fair, the same reasoning would be also useful to argue about the anthropocentric prevalence of property rights over nature with respect to the disposition of natural wealth and resources. Similarly to what occurs in the International Covenant on Civil and Political Rights, property rights are not even mentioned in this instrument's body. For the rest, as before, its human-centered predisposition becomes manifest, mainly through the '[…] *continuous improvement of living conditions*', which often entails '[…] *to achieve the most efficient development and utilization of natural resources*'; for example, to '[…] *improve methods of production, conservation and distribution of food* […]'. It turns out interesting how the first

[434] Taylor (1998) 338. See also: Cullet (1995) 25; Chapman (1993) 223-4.
[435] International Covenant on Economic, Social and Cultural Rights (1966) Article 12, para. 1st.
[436] See the interpretation of Chapman (1993) 224.
[437] UN Human Rights Committee (1982) para. 5th.
[438] International Covenant on Economic, Social and Cultural Rights (1966) Article 12, para. 2nd (b).

time that the expression '*adequate standards of living*' appears in the covenant's text, it is not mostly defined in terms of rights, say for example nourishment, education or health, but in function of goods. Housing could be exceptional but not in the context in which it is enumerated. The instrument reads '[…] *food, clothing and housing* […]'[439]. It is maybe also a contextual issue of the language it is used, not yet influenced by the environmental concerns that began to flourish later in time (early seventies), but it embodies the Aristotelian[440] or Thomistic[441] connotation of plants, animals and other natural useful resources for the human subsistence. One can read between lines the hierarchical relationship between humans and nature, where the former are the holders of rights and the latter is the mere set of goods, source of welfare.

Summing up, beyond the diverse eco-friendly interpretations one could use to promote the conservation or protection of nature on basis of the bill of rights, the literal sense of all these initial instruments is profoundly embodied in the most classical Western traditions. From time to time, one can even feel the Lockean invocation of natural rights, life, liberty and property[442].

3.2.3 Ramsar Convention (1971)

As a starting point, amongst the worldwide binding instruments, the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* was adopted in the Iranian city of Ramsar, during the International Conference on the Wetlands and Waterfowl, carried out between 30 January and 3 February 1971. It entered into force in 1975, being amended by the Paris Protocol, adopted at the Extraordinary Conference of the Contracting Parties, held from 2 to 3 December 1982 and by the Regina Amendments on 28 May 1987. Ramsar Convention is the oldest treaty of the modern era regarding with environmental matters, even a little older than the Stockholm Declaration (1972), one of the recognized cornerstones of sustainable development. Although it is a very concise document, not only due to the number of articles it contains (just thirteen) but also due to it refers only to one specific kind of ecosystem: wetlands; it certainly has exerted an indisputable worldwide influence, by

[439] International Covenant on Economic, Social and Cultural Rights (1966) Articles 11(1 and2).
[440] Ellis (1895) 23.
[441] Parel (1979) 93.
[442] Mack (2009) 3.

allowing the declaration of 2,341 ecological-protected sites, covering more than 250 million hectares, all over the world to date[443].

In general, even though the instrument consists of an administrative tool to include of new areas to its list, as a mechanism to foster the environmental protection, its trend towards an anthropocentric outlook is visible from the commencement of the document, i.e. from the recitals. Effectively, albeit the Ramsar Convention interestingly incorporates–perhaps accidentally–one of the key tenets of biocentrism, the so-called '[…] *interdependence of man and his environment*'[444], seen even as a manner to admit the intrinsic value of nature[445], the reference to the Lockean idea[446] about '*great economic value*' of natural resources appears immediately in the same section, recognizing however the mention of its potential threat of irretrievable loss[447].

Once inside the body of the text, one can infer a slight–almost imperceptible–allusion to the hierarchical character of the relationship between the state sovereignty over natural resources and their conservation; namely between the traditional '[…] *public trust doctrine* […] *based on* […] *the notion that the public possesses inviolable rights in certain natural resources*'[448], a certain kind of protected property over nature, particularly over territory, and the environmental reasons to maintain them unspoiled. In effect, '[t]*he inclusion of a wetland in the List does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated*', even when those states have decided, '[…] *because of its urgent national interests, to delete or restrict the boundaries of wetlands already included* […]' in that list. Of course, the deletion or restriction brings up a compensation, which ultimately will rely, '*as far as possible*', on the states. Thenceforth, the idea of the '*urgent national interests*', represented by the state sovereignty, above the conservation's objectives will be recurrent, being these provisions merely the prelude to the forthcoming disquisitions about the sovereign right to exploit natural resources[449].

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[443] Ramsar Sites Information Service (2018), <https://rsis.ramsar.org/ris-search/?pagetab=3> accessed 7 May 2018; History of the Ramsar Convention (2018) <www.ramsar.org/about/history-of-the-ramsar-convention> accessed 7 May 2018.
[444] Taylor (2011) 116ff.
[445] Borràs (2016) 131.
[446] Locke (2003) 115-8.
[447] Convention on Wetlands of International Importance especially as Waterfowl Habitat (1971) Recitals 1st and 3rd. Hereinafter Ramsar Convention.
[448] Lazarus (1986) 632.
[449] Ramsar Convention (1971) Articles 2(3 and5), 4(2).

3.2.4 Climate Change (1992)

The *United Nations Framework Convention on Climate Change* was one of the agreements resulting from the UN conference on Environment and Development, so-called also Earth Summit, carried out in Rio de Janeiro, between 3 and 14 June 1992[450]. It is probably the key agreement of our time, mainly due to what it has represented within the current world conjuncture. Effectively, being the first time that all nations accorded a set of common measures to face the effects of climate change, the signature of Paris Agreement was breaking news, part of newscasts in prime time, and front page of several renowned newspapers. The most important journals and news agencies worldwide gave it large coverture[451]. Without a doubt, both the widely advertised-by-media signature of the Paris Agreement[452] in 2015 and the USA withdrawal in 2017[453] have succinctly epitomized the transcendence of the global debate about the environmental crisis, where prevails the discursive exchange of beliefs and disbeliefs over the social sphere or the scientific dimension.

In context, although the convention's core aim seems to encompass a purely ecological challenge–one could even say a mere technical goal if the mechanism to determine its success were a quantitative measure of greenhouse gas concentrations–the other objectives imply also social and economic repercussions, through the references about food security and economic development, i.e. the wholeness of components that has been addressed as part of sustainable development, mainly since Brundtland Report. However, it proves somehow to be a contradictory provision, especially if one considers the propensity to encourage a lessened human intervention in favor of the natural resilience of ecosystems, but at the same time warranting the nourishment production and fostering the economic development (growth?). In the convention's words, '[…] *to achieve* […] *stabilization of greenhouse gas concentrations* […] *to allow ecosystems to adapt naturally to climate change,* [but also] *to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner*'[454]. In certain way, the idea about an amelioration of the climate system to continue to produce and develop denotes a circular

[450] United Nations (1997) <www.un.org/geninfo/bp/enviro.html> accessed 4 May 2018.
[451] References in § 1.1.5.
[452] Paris Agreement (2015) References: C.N.63.2016 (Opening for signature) and C.N.92.2016 (Issuance of Certified True Copies).
[453] Communication of the United States of America (2017).
[454] Convention on Climate Change (1992) Article 2.

reference, where the protection of nature and its resilience are important as long as they aim principally at human sake; quite similar to what one can read within the text of the International Covenant on Economic, Social and Cultural Rights[455]. In addition, the Convention's first principle categorically corroborates the semantic hypothesis by providing that the '[…] *Parties should protect the climate system for the benefit of present and future generations of humankind* […]'[456], one of the staple characteristics of anthropocentric view. Another thought-provoking peculiarity bears on the manner how the notion of rights is tackled in the treaty. If one takes pains to thoroughly review the usage of the term, it is not really as frequent as one could assume it is, and there is not any direct reference to '*healthy environment*', despite of this expression had already appeared in 1980, within the IUCN's *World Conservation Strategy*[457]. Indeed, there are only eight explicit references about different kinds of rights, i.e. the right to exploit natural resources, to promote sustainable development, to vote, the concurrent exercise of those rights and the economic justification of actions against the climate change. At any rate, attempting an extensive interpretation, it could be said the right to healthy environment is somehow hidden within the definition of "*adverse effects of climate change*", given the association between exogenous (environment) and endogenous (health) elements that influence human beings; namely the '[…] *changes in the physical environment or biota* […] *which have significant deleterious effects* […] *on human health and welfare*'. To confirm the statement, a similar relationship recurs between public health and environmental quality, considered as components to maintain free from adverse effects of climate change. Continuing with the case of rights, the exploitation of natural resources has deserved special attention in the international debate, representing even an important source of controversy around its pertinence within an environmental instrument. In fact, one of the most relevant aspects to consider ties in with a normative characteristic, given that it is not a provision but a recital, properly speaking, a recital that recalls that: '[…] *States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies* […]', which suggests a discretionary power to make the decision about how, when and where seizing the natural resources, even leaving ecological motives out[458].

[455] International Covenant on Economic, Social and Cultural Rights (1966) Article 11.
[456] Convention on Climate Change (1992) Article 3(1).
[457] World Conservation Strategy (1980) Priority 9, para. 13rd.
[458] Convention on Climate Change (1992) Recitals 8th and 17th, Articles 1, 3(4), 4(1f), 18, 22(2).

3.2.5 Other international instruments in force

The *Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)*, also known as *CITES***,** contains probably one of the most human-centered discourses of the international arena, taking as the first reference its very title. The recognition of a system of trade around biodiversity does not only mean considering flora and fauna as interchangeable commodities, but mainly acknowledging the possibility of fixing prices and paying costs, essential characteristics of property rights, without setting aside the existence of owners. This orientation is completely visible for instance in Article VII, third paragraph, in which there is an explicit provision to '[…] *specimens that are personal or household effects*' or in the subparagraphs (a) and (b), in which it is mentioned the option to acquire, import and export specimens by the owners. Therefore, plants and animals are legally protected by their quality of goods. There is not really any allusion to is quality of living beings[459].

The *Convention on Biological Diversity* is probably one of the first remarkable international instruments in environmental subject-matter, in which there is an explicit mention about the 'intrinsic value' of nature, in contrast to what used to occur in the traditional Western parlance. Indeed, the first sentence of the preamble begins by this recognition. However, it contradicts the key principle of the whole convention, which is not directly based on the protection or conservation of resources, but rather in the acknowledgement that States have '[…] *the sovereign right to exploit their own resources pursuant to their own environmental policies* […]', and undoubtedly in accordance to their restrictions. There is a clear parallelism with the Convention on Climate Change. Nevertheless, it cannot be denied the prevalence of an extractive perspective over a conservationist one. Furthermore, as in the previous case, there is awareness about the 'importance' for meeting human needs of growing world population, such as food or health, among others[460].

One of the clearest allusions to anthropocentrism is probably located in the first affirmation of the *U. N. Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa*, of 1994, in which one can read that '[…] *human beings in affected or threatened areas are at the centre of concerns to*

[459] CITES (1973) Article VII.
[460] Convention on Biological Diversity (1992) Recital 20th, Article 3.

combat desertification and mitigate the effects of drought'. Consequently, it is not strange that the objective of battling against desertification and drought is aimed at the improvement of land productivity and living conditions, among other human needs, instead of being inclusive also with the ecological worries[461].

Although it is possible to identify a greater number of international legally binding instruments within other compilations, they have not been included due to the fact that interactions between the environment and human rights cannot be seen enough clear in their texts, given either their wideness or their specificity, as appropriate. However, it could be stated that all the aforementioned ones would be among the most relevant agreements. In any case, it is worth it to take a glance at the work by Déjeant-Pons and Pallemaerts[462] who have added a couple of additional documents.

Firstly, the *Charter of the United Nations* (1945), whose importance mainly lies on '[…] *reaffirming faith in fundamental human rights, in the dignity and worth of the human person* […]', among other tenets. Despite it does not contain any reference to environmental issues, its foundational nature with respect to the United Nations endorses a worldwide particular legitimacy for the documents based on it, such as Stockholm and Rio Declarations for example[463].

Secondly, the *Convention on the Law of the Non-Navigational Uses of International Watercourses* (1997) contains specific provisions about the uses of watercourses so that it turns out particularly difficult to formulate useful abstractions from them. Rather, it precisely configures a well-defined example of how the U.N. Chapter is used to support an international mandatory convention[464].

Up to this point, the analyzed instruments have been mainly commitments of the international community to their compulsory application. Nevertheless, there are a set of remarkable declarations, resolutions and other similar documents which also support the human-centered discourse, without being legally binding ones.

3.2.6 The discursive essence of soft law

[461] Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994) Recital 1st, Article 2(2).
[462] Déjeant-Pons and Pallemaerts (2002) 47.
[463] Charter of the United Nations (1945) Recital 2nd.
[464] Convention on the Law of the Non-Navigational Uses of International Watercourses (1997) Recitals 2nd and 3rd.

'Soft Law' is a paradoxical expression, used to describe a process of normative creation, which is not mandatory in the international arena, at least in a conventional manner or beyond its very authoritative–often authoritarian–language. It has been sociologically addressed as a phenomenon, structural in its development, diversified in its components, and rapid in its evolution, especially in regard with the increase of the world economy, the state interdependence and the progress of science and technology[465]. Starting from Stockholm, the UN declarations and resolutions are examples.

From the United Nations perspective, the backgrounds of the connection among human rights, dignity and environment are located mostly in two of the most prominent declarations of principles everybody has heard of: the Stockholm Declaration (1972), and the Rio Declaration on Environment and Development (1992). A more detailed review of other instruments would be useless for the purpose of this study, although one could undertake an entire analysis of the discursive dimensions of the existing documents, given its numerous availability[466].

The Stockholm Declaration was the outcome of multiple attempts to promote the diminution of the gap between environmental protection and economic growth[467]. Indeed, this dichotomy was being already debated through several works and events worldwide, coming even to give rise to the very concept of '*sustainable development*', popularized later by the Brundtland Report[468]. For example, it is undeniable the influence exerted in the international environmental field by works, such as '*Silent Spring*' (1962)[469] or '*The Limits to Growth*' (1972)[470], or by certain events, such as the '*Biosphere Conference*' (1968)[471], or

[465] Dupuy (1991) 420-1.
[466] United Nations (2011) <www.ohchr.org/EN/Issues/Environment/HREnvironment/Pages/HRandEnvironmentIndex.aspx> accessed 23 February 2018; Stockholm Declaration (1972) Principle 1st; Rio Declaration on Environment and Development (1992) 1-5. Hereinafter Rio Declaration.
[467] Taylor (1998) 37.
[468] United Nations (1987) 24-5.
[469] Carson (1962).
[470] Meadows and others.
[471] The '*Intergovernmental Conference of Experts on the scientific basis for the rational use and conservation of the resources of the biosphere*', also known as '*The Biosphere Conference*', was the first international forum where the notion of sustainable development was discussed, although it was not the original aim. It carried out in Paris, from 4 to 13 September 1968, and was organized by the United Nations Educational, Scientific and Cultural Organization (UNESCO), with the participation of the Food and Agricultural Organization of the United Nations (FAO) and the World Health Organization (WHO), and in co-operation with the International Union for Conservation of Nature (IUCN) and the International Council for Science (ICSU), by means of its International Biological Program (IBP). The conference was very relevant to the international debate of sustainable development, to the point of having laying the foundations for the creation of the Program 'Man and Biosphere', as it has been recognized by the very UNESCO. See UNESCO (1968) 1-5; UNESCO (1993) 4-5.

the '*Conference on the Ecological Aspects of International Development*' (1968)[472]. Indubitably, one should not set aside either the resolution[473] that U.N. General Assembly used to summon the Conference on the Human Environment in Stockholm or the subsequent U.N. Secretary-General's Report, so-called '*Problems of the Human Environment*'[474]. All these inputs probably contributed to Stockholm Declaration becomes to what it represents nowadays with regard to the rights to a healthy environment, or also termed as '*human environmental rights*', i.e. '[…] *those rights that insure basic human survival*'[475]. By and large, Stockholm Declaration follows an anthropocentric pattern, noticeably marked by a solid sense of correlative 'rights and duties', conceived under Blackstone's formula of the '*livable environment*'[476]. That is to say, as a counterpart of the right, humans bear '[…] *a solemn responsibility to protect and improve the environment for present and future generations*'[477]. There is also here a Kantian connotation about the human obligation, say this '*solemn responsibility*', which does not aim at the protection of nature by itself, but only indirectly[478]. Thus the commitment of defense and enhancement of nature is valid exclusively 'from people to people', just as one can read throughout the whole text, even shaped like a '*duty of all Governments*'[479]. In essence, environmental rights appear in the form of an '*environment of a quality that permits a life of dignity*[480] *and well-being*'[481], which denotes in some way the idea of a scenario, a scenario where humans can exercise entirely their fundamental rights; namely, those Lockean-based ones, such as life and liberty, though it is a right to life characterized by 'adequate conditions', along with another core component of the international human rights law, equality[482]. In any case, there is no explicit connection

[472] The conference carried out in Warrenton, Virginia, from 8 to 11 December 1968, and was headed by prestigious agencies and researches, who addressed topics regarding development programs and their consequences on health, nutrition, productivity, irrigation, environmental degradation, among others. The lectures came out in the well-known work '*The Careless Technology*'. See Farvar and Milton (1972); Sears (1973) 520-1.
[473] In the entire document, one can read a series of preoccupied expressions about the quality of environment and the living conditions of people, aspects argued by the General Assembly for convening the Conference. See United Nations (1968) para. 1st. On the other hand, due to the historical interval when this resolution and other documents (including the Stockholm Declaration) were released, it was often used the term 'man' to refer indistinctly to a neutral gender, such as humans or people. For this reason, certain quotations could appear a little different from originals, given that that usage has been avoided at all in this writing.
[474] The report was requested in the para. 2nd and 3rd of the aforementioned Resolution No. 2398, as an input for the Stockholm Conference. See United Nations (1969).
[475] Johnston (2011) 11.
[476] Blackstone (1973) 55-72.
[477] Stockholm Declaration (1972) Principle 1st.
[478] Kant (1963) 239.
[479] Stockholm Declaration (1972) Proclamation 2nd.
[480] As one can notice, the notion of dignity is in the heart itself of the definition, as usual.
[481] Stockholm Declaration (1972) Principle 1st.
[482] ibid

between the right to health and the environment. Although several interpretations about how to understand the '*adequate conditions of life*' could put forward, there seems to be a generalized agreement about that an accurate parameter would be the access to '[…] *food and clothing, shelter and education, health and sanitation*', and alike[483]. After all, the statement is written and signed by the bulk of nations, so it represents a satisfactory reference. It draws the attention, however, the semantic structure used to incorporate these rights into the document, reason why it could be say they are probably the best example of how the reciprocal relationship between rights and duties works out in the context of the instrument. Firstly, they are not mentioned within the body of the text, i.e. amongst the principles, but merely as part of a proclamation. Secondly, they are not directly enunciated as rights, but rather as factors whose deprivation undermines the people's decent existence in developing countries and causes the environmental problem, i.e. poverty is implicitly the source of ecological detriment, and paradoxically the solution will be development–or maybe just economic growth–so that one has to read between the lines. Lastly, and here is the key point, the response is an obligation 'from people to people', where developing countries '[…] *must direct their efforts to development* […]' and industrialized ones, for their part, '[…] *should make efforts to reduce the gap* [between] *themselves and the developing countries* […]'[484]. In this case, in contradistinction to the rights, this obligation does have been included within the principles, through the statement that reads: '[e]*nvironmental deficiencies generated by the conditions of under-development and natural disasters* […] *can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance* […]'[485]. As one can see, the environmental concern appears only in a marginal fashion, after national priorities have been borne '*in mind*'. Thus, if these national priorities consist of the exploitation of natural resources, in pursuit of development, the protection and improvement of environment will remain in the background. Indeed, according to the Declaration, states have the sovereign right to exploit their own natural resources[486], beyond the environmental restrictions they are obliged to respect in light of international law. It turns out thought-provoking, in any event, seeing how the only enunciation of rights–written in addition to the fundamental ones of the first principle–refers precisely to the conditions of nature's exploitation, what is determinant

[483] ibid Proclamation 4th. See also Johnston (2011) 9; Leib (2011) 78-80; Shelton (2008) 48.
[484] Stockholm Declaration (1972) Proclamation 4th.
[485] ibid principle 9.
[486] Although no mention about property or its legal elements is in the document, the expression '*own resources*' could be construed of significance.

of the anthropocentric sense, present in the whole document. Thereon, the second principle is completely overwhelming, when one reads that '[t]*he natural resources of the earth* […] *must be safeguarded for the benefit of present and future generations* […]', suggesting anew the recurrent idea of a hierarchical relationship between humans and nature, where humans are the bearers of rights and nature is the object of those same rights. Probably there is nothing more Aristotelian or Thomistic than natural resources strictly thought for the sake of people (present and future one); what means to understand nature as a storage of goods, in terms of moral considerability, ***the great human storage***. In effect, the measures oriented to maintain the earth's capacity to produce resources, to prevent their potential exhaustion, pollution or damage, to plan, manage, and control them more rationally, or to exploit them responsibly are human actions designed mainly to favor people's interests, i.e. to count on them wherever and whenever they were required. In this sense, the case of maritime resources is probably the best example because, albeit the instrument calls for measures '[…] *to prevent pollution of the seas by substances that are liable* […] *to harm living resources and marine life* […]', there is an emphasis towards human benefits in the same provision, which relates to the creation of '[…] *hazard to human health* […]', and also to the interferences '[…] *with other legitimate uses of the sea*'[487]. In environmental terms, albeit it would be enough the employment of actions to defend marine life, it has been necessary to highlight the impacts on humans, in particular the 'uses of the sea', which best epitomize the human-centered perspective.

The Rio Declaration of 1992 is much more than a mere ratification of what nations agreed in Stockholm, even though there is an express reaffirmation of principles in the first recital[488]. Its global significance has been recognized, to the point of having '[…] *been endorsed by virtually every nation in the world*'[489] and quoted in practically all of the existent works about the topic[490]. Whether the instrument actually accomplished its original envisions of being an '*ideological umbrella for Agenda 21*'[491], or a real '*Earth Charter*'[492] as one infers from the historical negotiation of the title's wording[493], it did not weaken its

[487] Stockholm Declaration (1972) Principles 2, 3, 5, 7, 13, 17 and 21.
[488] Rio Declaration (1992) Recital 1st.
[489] David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (University of British Columbia Press 2012) 41.
[490] For example, see Borràs (2016) 117; Cullet (1995) 29; Déjeant-Pons and Pallemaerts (2002) 13; Giorgetta (2002) 173; Leib (2011) 5; Sands (2003) 54-7, Shelton (2008) 42; Taylor (1998) 335.
[491] Nanda and Pring (2013) 110-1.
[492] It appears Europe had this expectation. See *Towards Sustainability: A European Community programme of policy and action in relation to the environment and sustainable development* [1993] OJ C138/5 Executive Summary, para. 9th.
[493] Nanda and Pring (2013) 110-1; Kovar (1993) 122-3.

irrefutable influence on worldwide debate about development, economic growth, and sustainability. Essentially, the Rio Declaration is the cornerstone of anthropocentrism at international level, aspect that is signified immediately from the first line in the initial precept: '*Human beings are* ***at the centre*** *of concerns for sustainable development*'[494]. Besides, albeit the 'right to a healthy environment', strictly speaking, does not unfold verbatim in the text, its scope is determined by the entitlement '[…] *to a healthy and productive life in harmony with nature*', alluded in the same paragraph; in concordance with the demands towards states about conservation, protection and restoration of '[…] *the health and integrity of the Earth's ecosystem*'[495]. Barbara Johnston agrees with this assertion, even reassuring that the right to a healthy environment strung from the very declaration[496]. Two state commitments reinforce 'cooperatively' this range of understanding: the restoration of earth's health[497] and the avoidance to relocate territorially harmful activities or substances to environment or human health[498]. At least in this case, the instrument offers the disjunctive to undertake measures to protect separately environment and human health, so that ecological actions does not depend on exclusively human benefits. In the same breath, the first principle refers to the right to have a '*productive life*'[499], which epitomizes a solid association with the production and consumption of commodities and other goods[500], and in fact even with exploitation of resources[501]. Even though it is not so evident in the context, to some extent production often means exploitation[502]. In any case, Rio Declaration does not bring into question production in general, but rather calls for eschewing exclusively '*unsustainable patterns of production*'[503]. Indeed, from a more thorough reading of principle 8 one could infer that accurate processes of production, along with appropriate demographic

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[494] Rio Declaration (1992) Principle 1, emphasis added.
[495] ibid Principles 1 and 7.
[496] Johnston (2011) 15. In the same sense, see Giorgetta (2002) 181-2. Conversely, Sands believes that Rio Declaration '[…] *falls short of recognizing a right to a clean and healthy environment*'. See Sands (2003) 54.
[497] Rio Declaration (1992) Principle 7.
[498] ibid Principle 14.
[499] ibid Principle 1. Déjeant-Pons and Pallemaerts believe the phrase '*productive life*' expresses the apprehensions of developing countries towards a pre-eminence of environmental protection over economic development. Déjeant-Pons and Pallemaerts (2002) 13.
[500] Rio Declaration (1992) Principle 8.
[501] ibid Principle 2.
[502] To Thomas Berry, the expression 'productive' corresponds to the industrial context, where a transformation from raw materials to manufactured products occurs, or where the language of profits and losses had been co-opted to express the use of Earth like a resource '[…] *to be used*, […] *developed,* ***exploited****, dominated, discarded when no longer useful*', as it is held by Jules Cashford, one of his interpreters. Summing up, '[a] *total life process is envisaged within the industrial process*' Berry states. See Berry (1999) 64; Jules Cashford, 'Dedication to Thomas Berry' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011) 3, 7.
[503] Rio Declaration (1992) Principle 8

policies, would be useful '[t]*o achieve sustainable development and a higher quality of life*'[504], effects that later in the text are linked with the eradication of poverty[505], with the economy's growth capacity[506], with the internalization of externalities[507], and even with 'unrestricted' trade[508], all of them entailing an intense economic correlation. This is to say, once again, a chrematistic response '[…] t*o better address the problems of environmental degradation'*[509]*,* albeit more clearly expressed than it was in Stockholm Declaration. In this sense, the matter of trade is, for example, particularly suggestive and contradictory, given that is the solely case in which environmental issues are explicitly subordinated to a specific subject matter[510]. In fact, green standards are so significant that there is even a recognition of potential '[…] *inappropriate and of unwarranted economic and social cost to other countries* […]' derived from their very application[511]. It implies certain tolerance towards an extraterritorial scope of the national policies, with the subsequent effects on international arena. Curiously, speaking about trade, the summit's participants resolved to morally outlaw the application of certain environmental policies, if tending to restrict commerce, to the point that '[u]*nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided*', promoting the use of international consensus in case of transboundary ecological crisis[512]. Likewise, even in case of fiscal instruments, the bearing of pollution's costs are applicable as long as it does not distort '*international trade and investment*'[513]. Then, the question would be in what cases the inclusion of new costs does not alter the prices of goods and services, and consequently the market. The response, surely, refers to the predominance of economic considerations. One of the most controversial aspects bears on the second principle that reads: '*States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental* ***and developmental*** *policies*

[504] ibid
[505] ibid Principle 5.
[506] ibid Principle 12. To Cullet, Rio Declaration allows to infer that economic growth takes precedence over environmental protection, human rights and even development. See Cullet (1995) 29.
[507] Rio Declaration (1992) Principle 16.
[508] ibid Principles 12 and 16.
[509] ibid Principle 12. One should remember that poverty is not eco-friendly, from an anthropocentric view. Indeed, Pearce and Barbier affirm that '[…] *widespread global is also thought to be a major cause of environmental degradation because poor people are often caught in a cycle that forces them to deplete and degrade natural resources, because their subsistence livelihoods are dependent on such exploitation*'. See David Pearce and Edward Barbier, *Blueprint for a Sustainable Economy* (Earthscan 2000) 130.
[510] An interesting analysis about the tensions between trade and environment in Dailey (2000) 331.
[511] Rio Declaration (1992) Principle 11.
[512] ibid Principle 12.
[513] ibid Principle 16.

[…]'[514], which suggests a discretionary power to make the decision about how, when and where seizing the natural resources, even leaving ecological motives out. This principle is verbatim similar to Stockholm Declaration's principle 21, save for the phrase '*and developmental*', which was included in 1992's text, changing thoroughly the sense of the principle. In effect, the scope of the added phrase becomes ambiguous, due to it is quite difficult to figure out what public policy's feature–environmental or developmental–outweighs for who represents the decision maker. As an example, despite that Nigerian law levied the enforcement of international standards for the oil exploitation within its territory, one of the board members of the transnational SHELL U.K. Limited recognized, during an annual meeting in 1997, that the application of '[…] *higher environmental standards could harm local economies*', due to a more expensive operation, '[…] *depriving the local work force of jobs and the chance to development*'[515]. Then, it turns out paradoxical that the disjunctive between environmental and developmental reasons to make a public decision could tilt towards economic aims, under the same discursive influence often used to justify a solely eco-friendly measure. This modification gave rise a series of criticisms and favorable opinions, above all being the result of a dispute between developed countries' reluctance and developing countries' insistence for including the phrase[516]. Finally, the suspicion about a potential forthcoming '*globalization*' of natural resources, such as tropical forests, argued by the latter, gathered in the G77, took precedence over the redundancy advocated by the former[517]. A '*globalizing rhetoric*' would become natural resources in a humanity's common good[518], which could hamper their access in favor of development in the future[519]. In any case, the debate focused mainly on the effect of having reaffirmed traditional sovereignty over environmental considerations or, at least, having put them at the same level. In effect, while some authors saw positively how the Declaration equated environmental and developmental policies and rights[520], others replicated more gravely that the change was a

[514] ibid Principle 2, emphasis added.
[515] Bronwen Manby, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch 1999) 57.
[516] See Ileana Porras, 'The Rio Declaration: A New Basis for International Cooperation' in Philippe Sands (ed), *Greening International Law* (Earthscan Publications Ltd. 1993) 20, 31.
[517] ibid
[518] ibid
[519] Foo and Taylor have a similar interpretation about the developing countries' unwillingness to accept a potential violation of the State Sovereignty over their natural resources and a retrenchment of their development. See Kim Boon Foo, 'The Rio Declaration and its Influence on International Environmental Law' (1992) 2 *Singapore Journal of Legal Studies* 347, 353-4; Taylor (1998) 335.
[520] See Paul Wapner, 'Reorienting State Sovereignty: Rights and Responsibilities in the Environmental Age' in Karen Litfin (ed), *The Greening of Sovereignty in World Politics* (Massachusetts Institute of Technology

'*skillfully masked step backwards*', based inquisitively on a quite similar argument, i.e. the disruption of the '[…] *delicate balance struck in Stockholm between the sovereign use of natural resources and the duty of care for the environment*'[521]. For her part, Leib emphasizes the idea of state sovereignty as a hindrance to the implementation of public environmental policies[522], weighing up a suggestive judge's speech, in which it is affirmed that states should surrender part of their sovereignty in favor of environment and forthcoming generations[523]. In addition, there is a sort of 'neutral position', in which authors do not emit any deep critical comment about the tenet at issue, but rather assume an analytical stance related to the function of state sovereignty over its natural resources, from an insight of customary law[524]. Sands, for example, believes this shift reflected merely an '*instant*' variation in the rule of customary international law, because this added phrase did not appear as part of the Article 3 of the Convention on Biological Diversity[525], whose text is exactly the same as the one of the Stockholm Declaration[526], but–differently to soft law–does possess a binding character in the international law. Likewise, other internationalists have drawn more attention to the transboundary implications of environmental harm in other national jurisdictions[527], as result of the state exploitation of its own natural resources[528]. Summing up, even though the Rio

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Press 1998) 275, 278-9; Lynne Jurgielewicz, *Global Environmental Change and International Law: Prospects for Progress in the Legal Order* (University Press of America 1996) 56.

[521] Marc Pallemaerts, 'International Environmental Law from Stockholm to Rio: Back to the Future?' in Philippe Sands (ed), *Greening International Law* (Earthscan Publications Ltd. 1993) 1, 5.

[522] Leib (2011) 117.

[523] Christopher Weeramantry, *Sustainable Development: An Ancient Concept Recently Revived* (Speech) in Global Judges Symposium on Sustainable Development and the Role of Law, Université de Genève, Colombo, 4-5 Jul. 1997 <https://moodle-archives.unige.ch/mod/resource/view.php?id=19949> accessed 15 March 2018

[524] For example, see Dailey (2000) 342; Bradly Condon, *Environmental Sovereignty and the WTO: Trade Sanctions and International Law* (Transnational Publishers, Inc. 2006) 291.

[525] Convention on Biological Diversity (1992). Apropos of this reference, a literal copy of the Stockholm Declaration's Principle 21 appears on the Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests', signed jointly with Rio Declaration and Agenda 21, also during the Earth Summit of 1992. See: United Nations (1992) Principle 1.a. Likewise, verbatim paragraphs of Rio Declaration's Principle 2 can be found in two UN resolutions. See UN Commission on Human Rights, *Resolution No. 1994/65: Human rights and the environment*, 64th meeting (UN Resolution No. E/CN.4/RES/1994/65, 9 March 1994); UN Commission on Human Rights, *Resolution No. 1995/14: Human rights and the environment*, 41st meeting (UN Document No. E/CN.4/RES/1995/14, 24 February 1995). It is also in the Convention on Climate Change (1992) Recital 8th.

[526] Sands (2003) 54. More or less in the same sense, see Gregory Freeland and Frederick Gordon, 'Introduction: An Understanding of Environmental Justice Claims' in Gregory Freeland and Frederick Gordon (eds) *International Environmental Justice: Competing Claims and Perspectives* (ILM Publications 2012) 12-3.

[527] This principle is widely known as '*sic utere tuo ut alienum non laedas*', meaning '*use your own property in such a manner as not to injure that of another*'. See Brunnée (2010) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1607> accessed 27 March 2018.

[528] It corresponds to the second part of the Rio Declaration's principle 2, that reads: '[…] *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*', in connection with Principles 18 and 19. Rio Declaration (1992). For instance, Nanda and Pring recall the role played by the International Court of Justice in regard with the international legal acceptance of the '*no-harm rule*', mainly by means of its explicit

Declaration's character appears to be ambiguous regarding the disjunctive between environmental and developmental reasons to manage natural resources, the whole document's general affinity with anthropocentric tenets is undoubtable. Aforementioned elements, such as standards of living, economic growth, eradication of poverty, and so on, are just some clues to understand this logic, where the right to development is quite probably the crux of the matter because it encompasses everything else. One could even uphold it does not matter the uncertainty about the legal nature of the right's bearers, if they would be people seen individually or collectively–as humankind–just as Déjeant-Pons and Pallemaerts discuss[529], given that they will always be humans in the end. To conclude, despite there are other important aspects usually alluded within the international literature, such as access to information, environmental impact assessment, or the role of women, youth, and indigenous peoples in the process of sustainable development, among others, precautionary principle is likely the most relevant concern for the aim of the study[530]. From its origins, precautionary approach has been a valid response to the uncertainty–especially scientific–of potential environmental impacts, i.e. a useful instrument that facilitates the adoption of immediate measures against ecological risks. However, without going further for the moment, Rio Declaration associates this principle directly with the cost-effectiveness analysis[531], a market-based tool widely used in public policy to handle competitiveness, revenues, income distribution, and other economic aspects that confirm the enormous influence that the concept of trade had in the preparation of the document.

3.2.7 Nature as a set of commodities in the international law

recognition of lawful validity through the advisory opinion about the '*Legality of the Threat and Use of Nuclear Weapons*' of 1996. The opinion was requested by the UN General Assembly in 1995, after a refusal from the Court to a previous WHO's request, due to a lack of jurisdiction. The Court affirmed explicitly: '*The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control* ***is now part of the corpus of international law relating to the environment***' (emphasis added). However, the Court's general opinion was riskily vague in practice, given the conclusions about the lack of customary or conventional law that prohibited the possession or use of nuclear weapons. In other words, it means somehow the possibility to bring about potential damages–not only environmental ones–in the territory of other states. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, International Court of Justice Reports 1996, p. 226, 241-2, 266-7; Nanda and Pring (2013) 24-5. About the same topic, see also Leib (2011) 118; Dailey (2000) 337-8.

[529] Déjeant-Pons and Pallemaerts (2002) 13.

[530] Rio Declaration (1992) Principles 10, 15, 17, 20, 21, and 22.

[531] An interesting example of public policy in environmental matters by means of cost-effective measures in European Environmental Agency, *Using the market for cost-effective environmental policy: Market-based instruments in Europe* (EEA 2006) 1 EEA Report.

In the strictest sense of the word, nature has traditionally been an ensemble of goods, often commodities[532], which '[a]*ll peoples may, for their own ends,* [*fully and*] *freely dispose of,* […] *enjoy and utilize* […]'[533], and states sovereignly exploit '[…] *pursuant to their own environmental and developmental policies,* [without causing] *damage to the environment of other* [s]*tates or of areas beyond the limits of national jurisdiction*'[534]. The implications of the argument are twofold. On the one hand, beyond the hair-splitting of the existent legal classifications, one could affirm that nature is presently considered as property of individuals, legal entities (public and private) and states in the field of international law[535], above all taking into account that expressions like 'dispose' or 'utilize', along with the right to possess, form integral part of the 'ownership' notion in the legal parlance[536]. As far as the point of view of states is concerned, there is somehow a kind of 'property', so to speak, described as an '[…] *obvious entitlement to decide within the confines of international law, how to deal with these resources*'[537], which is so-called *principle of sovereignty*, characterized by a territorial approach over natural resources within the doctrine[538] and whose formal origins date from a 1962 UN Declaration and other related resolutions[539]. On the other hand, it is widely known, especially since the signature of the 1972 Stockholm Declaration, that every state is the key responsible for the environmental policy and

[532] For example, see the CITES (1973) Article VII, para. 3rd.
[533] International Covenant on Civil and Political Rights (1966) Articles 1 (para. 2nd), and 47; and International Covenant on Economic, Social and Cultural Rights (1966) Articles 1 (para. 2nd), and 25.
[534] About the exploitation of natural resources, see note 590.
[535] In this sense, for instance, see Borràs (2016) 113-4; Taylor (1998) 393-4. Regarding the specific case of energy resources, see Nanda and Pring (2013) 236-8.
[536] Gifis (473) 405.
[537] Stephan Hobe, 'Evolution of the Principle on Permanent Sovereignty over Natural Resources: From Soft Law to a Customary Law Principle?' in Marc Bungenberg and Stephan Hobe, Permanent Sovereignty over Natural Resources (Springer International Publishing Switzerland 2015) 1, 11.
[538] Malcom Shaw, *International Law* (5th edn, Cambridge University Press, 2003) 760
[539] In context, the principle of sovereignty applicable to peoples and nations is addressed, from the perspective of *self-determination*, as an economic right to explore, development and dispose of nature in the 1962 UN Declaration on Permanent Sovereignty over Natural Resources, fostering even the possibility to import foreign capitals to achieve that purpose. Since then one can find already allusions to mutual respect or cooperation among countries, tenet known as '*Sic utere tuo*' in international law, whose contents are referred below. Albeit there are several instrumental antecedents of this declaration, whose references can be found within the very document, it is sufficient to emphasize a couple of prior UN resolutions regarding both the establishment of a commission, generally aimed at conducting full survey about the sovereignty status of natural resources within the member-states, and the recommendation of respecting the sovereign right of every state to dispose of its natural resources. See *Declaration on Permanent Sovereignty over Natural Resources*, New York, 14 December 1962, UN General Assembly Resolution No. 1803 (XVII); UN General Assembly, *Concerted action for economic development of economically less developed countries*, 948th plenary meeting, UN Resolution No. 1515 (XV), 15 December 1960, para. 5th; UN General Assembly, *Recommendations concerning international respect for the right of peoples and nations to self-determination*, 788th plenary meeting, UN Resolution No. 1314 (XIII), 12 December 1958. A more detailed historical review about the declaration and its procedures in United Nations, 'Permanent Sovereignty over Natural Resources' in *Audiovisual Library of International Law* (2018) <http://legal.un.org/avl/ha/ga_1803/ga_1803.html> accessed 3 November 2018.

management of its natural resources within its own jurisdiction[540]. Nevertheless, when state actions have potentially transboundary effects over the other's territory, including ecosystems, the aforesaid environmental management turns out virtually impossible without the notion of cooperation[541] [mutually respect] among countries, principle also known as '*Sic utere tuo ut alienum non laedas*'[542], '*good faith*'[543] or '*good-neighborliness*'[544]. In practice, the amalgam between both principles has not been effectively carried out, because there has been a '[…] *fundamental tension between a State's interest in protecting its independence (i.e. its sovereignty) and the recognition that certain problems, in this case regional and global environmental problems, require international cooperation*'[545]. As Ademola Abass properly explains, this disjunctive has been a real hindrance to the adoption of global ecological measures and the very development of the international environmental law, becoming it a '*painstakingly slow and contentious*' process, mostly owing to these regulations often '*intrude*' into the principle of sovereignty[546].

In any case, beyond the empirical obstacles, it has been clear for a long time that the defense of nature has been customarily in charge of states, either grounded on ecological considerations or under the umbrella of the sovereignty principle. Effectively, states have

[540] Stockholm Declaration (1972). See particularly the principles 11, 13, and 22.
[541] The normative origins of the cooperation principle are not really environmental, as one could infer from the reading of the UN Charter or the judgment, issued by the International Court of Justice (ICJ), about the famous 'Corfu Channel case', largely quoted in the doctrine and case law reports. In effect, article 74 of the UN Charter provides expressly that good-neighborliness or cooperation tenet was applicable to social, economic, and commercial matters. Meanwhile, the Corfu Channel dispute comprised the British claim against Albania regarding the harm of two vessels and the death of various members of the crews, due to the explosion of mines in Albanian territorial waters of the Corfu Channel in 1946. The ICJ held Albania liable for the damages and deaths, grounded mostly on the government's knowledge of the minelaying and the omission of its authorities to prevent the disaster. Namely, lack of cooperation. More modernly, the principle was incorporated into of the most transcendent environmental instruments of soft law at a global level, i.e. Stockholm and Rio declarations. See Charter of the United Nations (1945) Article 74; *Corfu Channel Case* (UK v Albania) (Merits) [1949] ICJ Rep 4. pp. 18, 23; Stockholm Declaration (1972) principles 21 and 24; Rio Declaration (1992) recital 2 and principle 2. Legal analyses of the Corfu Channel case regarding environmental issues, for example, in Nanda and Pring (2013) 82; Sands (2003) 249; Jorge Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2008) 32:1:14 *Fordham International Law Journal* 232, 238-42; Malgosia Fitzmaurice, 'Environmental protection and the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (first published 1996, Cambridge University Press 2008) 293, 296-7; The Harvard Law Review Association, 'Developments in the Law: International Environmental Law' (1991) 104:7 *Harvard Law Review* 1484, 1562; Patricia Birnie, 'The development of international environmental law' (1977) 3:2 *British Journal of International Studies* 169, 175-6. Environmental Case Law reports, including the Corfu Chanel case, in United Nations Environment Programme, Compendium of Summaries of Judicial Decisions in Environmental related Cases (UNEP 2004) 271-2; Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (UNEP 2004) XIII, 19.
[542] Brunnée (2010).
[543] Sands (2003) 151
[544] ibid 249
[545] Hunter, Salzman, and Zaelke (2007) 472.
[546] Abass (2012) 610.

been seen as the sole subjects of international law for ample time, not only from the perspective of the orthodox positivist doctrine[547] but also from the diversity of more modern developments[548]. Nevertheless, ancient dogmas have been experiencing shifts towards increasingly inclusive conceptions, which have given rise to the participation of greater numbers of actors in the international sphere. In fact, the way how jurists of the '*Law of Nations*' used to address the expansion of legal personality from '*real subjects*', i.e. states, towards the so-called '*apparent ones*', such as confederations or insurgents,[549] can be deemed somehow parallel to the current endeavors to incorporate in its scope to religious, political, and even commercial institutions[550], as a manner to overcome that kind of '*dogmatisms*'. Something similar has occurred in legal practice by means of international binding instruments, although in certain cases there are still provisions in which this limitation keeps in force. One of this cases occurs, for example, with the Statute of the International Court of Justice (ICJ), whose article 34 reads that '[o]*nly* ***states*** *may be parties in cases before the Court*'[551], an aspect that could be seen as a lawful hindrance to look for judicial protection in favor of nature.

In essence, the aforesaid attempts to extend the circle of the international legal standing have beaten, nay still beat, a track towards the progressive inclusion of new '*participants*'[552], '*actors*'[553], '*stakeholders*'[554] or '*subjects*'[555], interestingly without reaching a general accord of denomination, because there is a yet persistent debate about the international recognition of the legal personhood of certain institutions[556], especially non-governmental organizations (NGOs)[557], despite the efforts to determine their legal characteristics[558]. At all events, following the simple and didactic categorization, proposed by Chen, one could affirm the

[547] Lauterpacht (1975) 489.
[548] Abass (2012) 112.
[549] Oppenheim (1905) 99.
[550] Shaw (2003) 176-7.
[551] Statute of the ICJ (1945) Article 34, para. 1st.
[552] Lung-Chu Chen, An Introduction to Contemporary International Law: A policy-oriented perspective (2nd edn, Yale University Press 2000) 23.
[553] Hunter, Salzman, and Zaelke (2007)) 219ff.
[554] Alexandre Kiss and Dinah Shelton, *Guide to International Environmental Law* (Martinus Nijhoff 2007) 47ff.
[555] Shaw (2003) 175-7.
[556] The argument is not recent and does not specifically refer to environmental entities, but rather international organizations in general. A classic example about the cases of the Holy See and the Order of Malta in Hans Aufricht, 'Personality in International Law' (1943) 37:2 *The American Political Science Review* 217, 220-1.
[557] See, for example, Claudie Barrat, Status of NGOs in International Humanitarian Law (Brill Nijhoff 2014) 192-215.
[558] As in the case of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, Strasbourg, 24 April 1986, in force 1 January 1991, Council of Europe Treaty Office, Treaty No. 124.

legal considerability, in addition to states, have extended somehow towards an increasingly range of governmental and non-governmental organizations and also individuals[559], who could be seen as 'legitimized' members of the international community. Therein, one could come to believe in the parallelism of this process with the extension of human rights[560], but it is necessary to be cautious enough to understand that both experiences are quite different in substance. The recognition of human rights corresponds to an array of fierce discussions about ethical values and even to a violent social confrontation, such as the case of slaves, women, workers, and so on, while the appearance of forthcoming fellows of international law–as far as it concerns to institutions–albeit did not take place overnight and has been the outcome of abundant doctrinal debate and arduous political negotiation, at the same time has arisen out of '*expediency*' and '*practicality*', as determinant motivations to meet the expectancies about international and transboundary relationships, both within the private orbit and public one[561]. Thus their creation fundamentally aims at satisfying human needs.

For their part, the acknowledgment of human beings as subjects of international law followed a pretty different pattern. It was going to occur sooner or later, not only as an effect of the application of that ideological factor coming from the '*Western, liberal-democratic theory*'[562] but also because natural people are the real bearers of rights, materialized particularly since the *Universal Declaration of Human Rights* of 1948. Therefore, even though the role played by international entities in the global environmental field can have relevant repercussions chiefly in the bargaining and adoption of more eco-friendly agendas and policies[563], without setting aside their intervention in litigation[564], as parties–either claimants or respondents–and *amicus curiae* before courts[565], the core of the defense of *human right to a healthy environment* should spring precisely from individuals. Here is the main reason why internationalists have popularized the idea of an interplay between human rights and environment, affirming that the adverse impact on human living standards, derived from ecological degradation, has implied a serious threat to the '[…] *full enjoyment*

[559] Chen (2000) 23ff
[560] Supra § 1.3, particularly with the chart # 1.
[561] Antonio Cassese, *International Law* (first published 2001 Oxford University Press, 2002) 69.
[562] ibid 70.
[563] Robert Keohane, Peter Haas, and Marc Levy, 'The Effectiveness of International Environmental Institutions' in Peter Haas, Robert Keohane, and Marc Levy*, Institutions for the Earth: Sources of Effective International Environmental Protection* (first published 1993, The Massachusetts Institute of Technology Press 2001) 3, 8.
[564] Philippe Sands, 'International Environmental Litigation and its Future' (1999) 32:5:7 *University of Richmond Law Review* 1619
[565] Ulrich Beyerlin, 'The Role of NGOs in International Environmental Litigation' (2001) 61 *Heidelberg Journal of International Law* 357.

of human rights, […] *including the right to life, health, habitation, culture, equality before the law, and the right to property* [,] *as well as the achievement of sustainable levels of development* […]'[566].

To that extent, the recognition of nature, as a subject of international law, implies a factual change of the rights-bearing paradigm towards a new potential actor, whose inclusion into the international arena does not have consistent precedents in the Western traditional doctrine of international law.

3.2.8 Conclusions

As it was mentioned in the beginning of this section, it aimed at providing the conceptual elements to reply the research questions concerning the human-centered character of the international legal framework. In that regard, the conclusions have been organized following the structure of the aforesaid queries.

Firstly, notwithstanding there is specific evidence of the international normative ruling natural resources as mere goods, even subject to trade as it occurs, for one, in the CITES, the idea about the influence of property rights upon nature in both binding and non-binding international legal instruments can be widely demonstrated through the notion of national sovereignty over natural resources. Effectively, the variation of the sovereign right to exploit the natural resources according to the '*environmental policy*' of the country, as it was stood in the Stockholm Declaration of 1972, toward the inclusion of the term '*developmental*' to the conditions for the exploitation of natural resources, promoted twenty years later, in the Rio Declaration of 1992, can be deemed as a convincing evidence of the influential role of the property rights.

The fact that a country can exploit its natural resources according to not only environmental considerations, but rather to environmental 'and' developmental altogether reasons leads the debate to a discretional disjunctive, where the decision-makers have the final word. Therefore, if the priority of any government is development, in financial, economic, or even political terms, environmental protection will be unfailingly in jeopardy, mainly because, from 1992 on, both conditions are, at least, at the same level.

The significance of this change did not have only discursive implications but also political ones, given that both declarations are probably the most decisive expressions of the

[566] Hunter, Salzman, and Zaelke (2007) 1365-6.

international trends in the subject matter. While it is true they are not legally compulsory, their immense prestige in the international arena is an undeniable indicator of influence. In either event, this shift is also noticeable among mandatory conventions in force. For example, while the body of the Convention on Biological Diversity contains an identical provision as Stockholm Declaration's, the Convention on Climate Change encompasses the same statement provided by the Rio Declaration, although within the recitals of the preamble. Curiously, the difference exists despite both instruments came from the same source, the Earth Summit of 1992.

On the whole, beyond the ambit of state sovereignty, there is not really such a comparable reference about the tensions between property rights and nature within the texts of international instruments. As it has been seen, there are specific points of interest whose scope has been analyzed punctually and does not merit deeper inferences.

Secondly, although one could uphold the argument that there are sufficient mechanisms to protect nature in contradistinction to the influence of property rights, predicated on the contents of the international instruments in force, a deeper analysis shows these legal tools could be more rhetorical than practical. In other words, despite it is clearly demonstrable the existence of innumerable eco-friendly lawful measures supporting the combat of environmental depletion, there is not necessarily a specific provision or a set of provisions oriented to settle the cases in which property rights and environmental protection can be in conflict.

On the contrary, it has been easier to find certain rules whose contents could be construed in the sense of favoring property. The archetype is the right to utilize fully and freely the natural resources of a country, established in parallel provisions coming from both covenants regarding human rights. The precision of the provisions turns out somehow indisputable, inasmuch as when one reads the expression '*nothing*' shall be interpreted as impairing that right, one could hardly leave out the possibility that environmental protection is part of the term 'nothing'. Therefore, environmental protection could not impede the exercise of ownership, represented by the fully and freely use of natural resources.

In addition, if one connects this conclusion with the former, i.e. states or peoples are able to decide how to use fully and freely their natural resources, according to their environmental or developmental policies, the result will be a dramatic dependence of environmental measures upon the willing of national authorities, who will have the sovereign power to decide what it is better for the public or general interest.

In parenthesis, one has to bear in mind the quest of public or general interest represents always, or almost always, implicitly the wellbeing of humans, what means the laws only replicate the anthropocentric tenets of ethics.

In the course of preparing these elucidations, one has had to frequently bring into question the discursive findings from the letter of the law. In the end, an exclusively theoretical reflection runs the risk of staying in the ambit of the mere speculation. In effect, any conclusion derived from a notional approach would end in a pure conjecture, subject to corroboration. To put it simply, the argument that states always, or most of the time, act in an eco-friendly manner over their natural resources is as speculative as the opposite. One finally requires the empirical evidence to confirm one's assertions.

In that regard, one of the bitterest criticisms one can formulate revolves around the intervention of the courts to settle any dispute between property rights and environmental protection. Given the circumstances, a purely theoretical analysis of the implications resulting from a bias application of the law would turn out less significant, maybe even useless, because the contents of the adjudications would constitute a valid and more suitable source of empirical information. Therein, although this aspect corresponds entirely to the chapter concerning the international system of justice, a couple of remarks fit in this section.

On the one hand, the issue alludes to the third research question, i.e. there is probably not a better situation in which the representation of nature's interests can be explained than before a court of justice. In consequence, the results of the judicial decisions' examination are crucial to conclude if there is or not really a systematic and organized defense of nature before tribunals, and accordingly if it is necessary or not to count on an express recognition of its legal personality so that it can look after its own interests and rights. For the moment, built on the above arguments, it is inevitable to think about a lack of representation in favor of nature, at least in those cases in which the states are bounded to decide over the disjunctive between the environmental protection and the property rights–the latter of course depicted by the idea of sovereignty. It turns out really difficult to avoid the assumption about a conflict of interests.

On the other hand, by way of a theoretical confirmation of the said points of view, all the key international environmental instruments, or at least all those have been reviewed into this section, are subscribed to the settlement of disputes by the International Court of Justice, a tribunal in which solely states may be parties. Therefore, under the current state of affairs and in the same line of reasoning, the existence of a specific instance to protect nature's interests turns out imperative.

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

In the ambit of international law, it has been already said that the core reasons to recognize the legal personality of nature have arisen as an alternative to face the environmental crisis[567], focusing particularly on the belief that laws are designed to handle natural resources as the property of someone[568]. Is this true? If one might say so, the mere application of the law would imply to prioritize property rights over environmental protection. More specifically, as far as international adjudications are concerned, one may wonder if judges really make their decisions privileging property rights over nature or, at least, if the existence of any kind of ownership influences significantly each environmental case they analyze.

Consequently, whether international justices are obliged to apply a legal system completely favorable to property, to the point of recognizing it as a human right[569], to the detriment of the natural world, one should assume that this effect necessarily is reflected in their decisions, so that it would justify judicially the recognition of nature as a legal person of international law, instead of continuing to see it as a set of goods. This is the spirit of the research question that guides the whole chapter.

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[567] Leib synthetizes the main sources of environmental crisis in six categories, Judeo-Christian religious doctrine, agricultural revolution, scientific revolution, capitalism, population growth, and extreme poverty and affluence. Leib (2011) 11-21.

[568] Sands (1994); Borràs (2016) 113; Taylor (1998) 383; Ramlogan (2002) 15-6. Leib hints parallel ideas under the notion of free market rules (ibid 18).

[569] Effectively, the Universal Declaration of Human Rights proclaims that '*Everyone has the right to own property alone as well as in association with others*'. For its part, the Additional Protocol to the European Convention on Human Rights establishes that '*Every natural or legal person is entitled to the peaceful enjoyment of his possessions*', although with various restrictions, such as the limits of public interest, the payment of taxes and other contributions or penalties. A somehow similar definition can be read in the Charter of Fundamental Rights of the European Union, in which the right of property revolves around the following assertion: '*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions*', including also constraints regarding the public or general interest, albeit providing the benefit of fair compensation in case of loss as well. Despite it has already mentioned that both the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights contain expressions evoking the right to property (Supra § 2.2.2), none of those instrument has recognized expressly such a right. See Universal Declaration of Human Rights (1948) Article 17; Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952) Article 1, hereinafter Additional Protocol to the European Convention on Human Rights; Charter of Fundamental Rights of the European Union (2016) Article 17(1); International Covenant on Economic, Social and Cultural Rights (1966) Articles 1(2) and 25; International Covenant on Civil and Political Rights (1966) Articles 1(2) and 47.

4.1 Prior methodological issues

4.1.1 Why the European Court of Justice?

In the framework of this analysis, it has been selected the Court of Justice of the European Union (CJEU), heeding two key methodological reasons. Firstly, this choice allows the analysis of property rights in a wider scope, given the applicable normative, i.e. the Treaty of the European Union guarantees the right to bring legal actions not only to Member States but also natural and legal people[570]. On the contrary, in the case of the International Court of Justice (ICJ), for example, this right is circumscribed exclusively to the ambit of States[571], which would limit the tentative study merely to the field of the assumptions. Secondly, the employment of jurisprudence coming from this international tribunal reduces, at least in part, the biased criteria towards the human rights-based approach of the environmental matters, particularly the right to a healthy environment. It does not mean that judicial decisions issued by the international courts of human rights from Africa, America, or Europe, cannot be the object of study. Indeed, one could suggest a future research addressing the adjudications from those tribunals. Nevertheless, in this particular case, their exclusion has to do rather with the fact that a legal analysis about the rights of nature, from the anthropocentric perspective of human rights, would be hardly exempt from partiality, and even prejudice.

4.1.2 Avoiding research arbitrariness

The design and application of a specific scheme for the choice of study cases aim mainly at avoiding the arbitrariness to the extent feasible and guarantee the independence of the observer likewise. At the risk of appearing too much technocratic, it has been resisted the temptation of employing merely bibliographic references, emphasizing the utilization of correlations as a guideline for the selection. This mechanism helps the researcher maintain a tolerable distance with respect to the data, preventing leaving the selection to the exclusive will of the observer and the convenience of his/her desired results. It does not mean that certain outstanding compilations of jurisprudence, such as the works by Bándi and others[572],

[570] Consolidated Version of the Treaty on European Union [2016] OJ C202/13 Article 19(3a).
[571] Statute of the International Court of Justice (1945) Article 34(1).
[572] Bándi and others (2008); Bándi (2009).

Krämer[573], Hedemann-Robinson[574] and the European Commission[575] itself, among others[576], have not been consulted at all. On the contrary, their lists have been complementarily reviewed to validate the choices and their own criteria have been integrated into this legal evaluation.

To this extent, the process of selection did not base exclusively on the already systematized assemblage of case-law because, despite its enormous importance, a common perceivable flaw is the generalized lack of an explanation relating to the methodology applied in the selection of documents[577]; save for certain punctual exceptions[578]. In this sense, while it is true there is a possibility to place the sample in jeopardy, either excluding valid cases or including unusable ones, it is worthier it to count on a standardized method in aid of the avoidance of research bias.

It was neither an accurate option to use exclusively the environmental category available in the online search engine of the CJEU, in order to analyze the whole universe of cases,

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[573] Ludwig Krämer, *EU Casebook on Environmental Law* (Hart Publishing 2002); Ludwig Krämer, *European Environmental Law: Casebook* (Sweet & Maxwell 1993); Ludwig Krämer, *Environmental judgements by the Court of Justice and their duration* (European Legal Studies 2008).

[574] Martin Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2nd edn, Kindle Version, Routledge 2015).

[575] Commission, *Leading Cases of the European Court of Justice* (EC Environmental Law) <http://ec.europa.eu/environment/legal/law/pdf/leading_cases_en.pdf> accessed 12 December 2018

[576] Other compilations about the jurisprudence of the European Court of Justice in Sands (2003) xxvii – xxxii; Cathrin Zengerling, *Greening International Jurisprudence: Environmental NGOs before International Courts, Tribunals, and Compliance Committees* (Martinus Nijhoff Publishers 2013) 60-77; Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (2nd edn, Cambridge University Press 2011) 894-8; Nicolas de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press 2014) xii-xxv; Jan Jans and Hans Vedder, *European Environmental Law* (Europa Law Publishing 2008) 478-89; Vanessa Edwards, 'European Court of Justice: Environmental cases 1998' (1999) 11:1 *Journal of Environmental Law* 193; Francis Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment' (2006) 18:2 *Journal of Environmental Law* 185;

[577] Heta-Elena Heiskanen, who was writing a parallel research about the European Court of Human Rights, made me notice this issue. Heta-Elena Heiskanen, Towards Greener Human Rights Protection: Rewriting the Environmental Case-Law of the European Court of Human Rights (Tampere University Press 2018) 36.

[578] For example, to fulfill their research aims about the enforcement of legislation, Rass-Masson and others use a method of choice grounded on the EU directives and types of infringement. For its part, although there is not an explicit explanation about the methodology utilized in the EC compilation about Environmental Impact Assessment rulings of 2010, one can notice the analysis generally follows the screening criteria provided by the 1985 Council Directive 85/337/EEC and its subsequent amendments (no longer in force). In other reports, prepared for the European Commission about specific areas, such as nature, biodiversity, or habitats, the choice of cases depends on a concrete directive or article, meaning not necessarily the application of any methodology in particular, but at least of a standard pattern. See Nathy Rass-Masson and others, *Study to assess the benefits delivered through the enforcement of EU environmental legislation: Final Report* (European Commission, Milieu Law & Policy Consulting 2016) 29-43; Commission, *Environmental Impact Assessment of Projects: Rulings of the Court of Justice* (European Union 2010) 1; Commission, *Nature and biodiversity cases: Ruling of the European Court of Justice* (Office for Official Publications of the European Communities 2006); Kerstin Sundseth and Petr Roth, *Article 6 of the Habitats Directive: Rulings of the European Court of Justice - Final Draft* (European Commission, Ecosystems Ltd. 2014); Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40 (no longer in force).

because the bulk of them are not concerned to 'property rights'. By doing it, one would have carried out a nonsensical alteration of the sample. A precise selection of cases was necessary to fulfill the requirements of the study. Moreover, considering there is not an academic antecedent in the literature of international environmental law, in which one can observe a criteria screening based on or revolved around 'property rights', the formulation of a method implies an academic contribution.

4.1.3 Pearson correlation coefficient

The comparisons shown in this chapter have been developed through the most known and used correlation coefficient for two variables, so-called '*Pearson product-moment correlation coefficient*', which is usually employed, for instance, in cluster analysis of data with linguistic contents[579], such as legal documents (e.g. court decisions). It will be represented by the letter 'r'. Being a measure of the strength of a linear association between two sets of data, it will be useful for illustrating how far away the variables are each other[580], in this case the interplay among the universe and the issues of property rights and environmental protection. The closer the coefficient is to 1, the stronger the association between the two variables, while the closer the coefficient is to 0, the weaker the association will be[581].

4.1.4 The universe of cases

As a starting point, the CJEU maintains a very useful online search engine[582], which has been used to determine the universe and every sample of analysis. The total database is divided into 65 categories that groups more than 100 thousand documents in total. The selection was restricted only to environmental judgments, i.e. closed cases, either published or unpublished in the European Court Reports (ECR), owing to they are the sole legal instruments in respect of which one could attempt to corroborate the hypothesis. The rest of the documents are merely procedural ones, so they have been excluded, given that they do

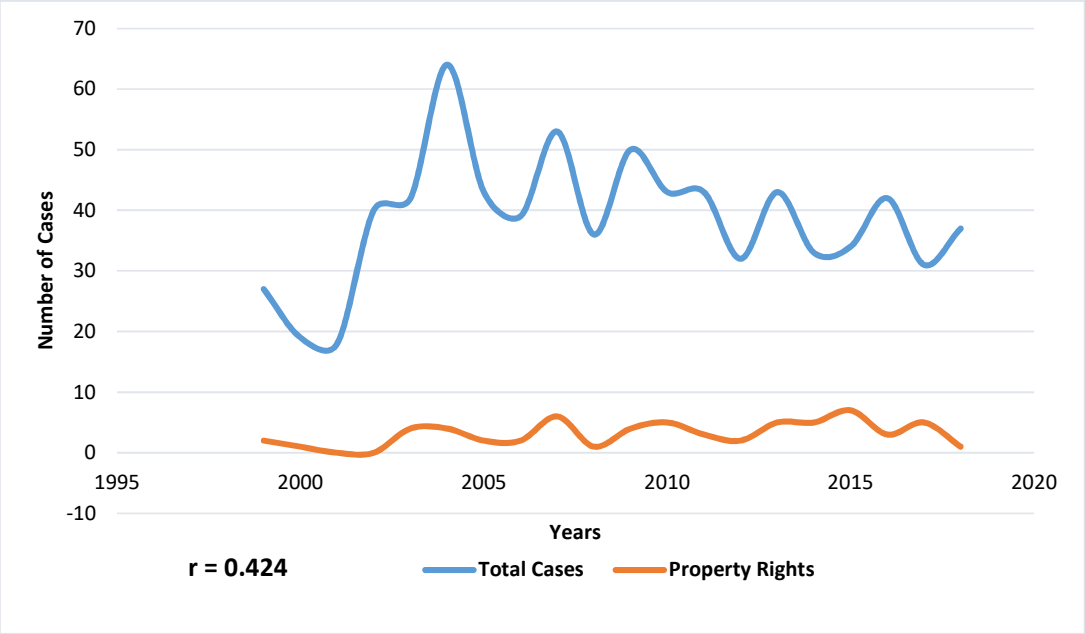
[579] Hermann Moisl, *Cluster Analysis for Corpus Linguistics* (De Gruyter Mouton 2015) 11.
[580] Lær statistics, *Pearson Product-Moment Correlation* <https://statistics.laerd.com/statistical-guides/pearson-correlation-coefficient-statistical-guide.php> accessed 3 December 2018.
[581] ibid
[582] InfoCuria - Case-law of the Court of Justice, <http://curia.europa.eu/juris/recherche.jsf?language=en> accessed 29 November 2018.

not allow achieving the foreseen research aim. Consequently, the universe total number of selected judgments is 928, comprised between 1979 and 2018. The adjudications pertain to the Court of Justice (863) and the General Court (65).

4.1.5 The importance of property rights before the CJEU

The initial step to determine how influential could be the existence of property rights within the judicial adjudications, coming from the CJEU, consists of examining the frequency of their mention throughout the texts of each decision. This incidence of mentions aims at a twofold objective. Firstly, it is a general indicator of the importance and recurrence of the concept of property rights within the ambit of the Court's activities. Effectively, if the idea of property rights is not even alluded within judicial reasoning, for example, how could one verify its degree of influence throughout the judicial sentences? Secondly, it reduces the number of rulings towards a lesser sample, which will permit focusing solely on the specific cases and handling much more adequately the statistical data.

Chart # 5 Total Cases v Property Rights



Source: CJEU, 2018

The chart # 5 shows the chronological tendency of the number of cases in which the words 'property' and 'right' (including plurals), in addition to their different combinations, such as for instance "right to property", have been mentioned–at least one time–within a

court decision, with respect to the total of the environmental adjudications, issued by the CJEU. The data is displayed in figures, although it could be read also as a percentage. Until these days, the environmental decisions have represented an average rate of 8.1% of the total adjudications in the segment of analysis from 1999 to 2018. Curiously, there is not a combination of those words within the judicial sentences before 1999. The greatest percentage was recorded in 2015 (20.6%). As a general observation, one can see the frequency of mentions is not really significant with respect to the total, not even when it reaches the highest level. Complementarily, it was calculated the correlation coefficient ($r = 0.424$), whose value shows a weak interplay between both sets of data, given its level of closeness to 0. Consequently, these results are not determinant to establish an interconnectedness, let aside any interdependence between property rights and environmental judgments. The total items of the sample were 62.

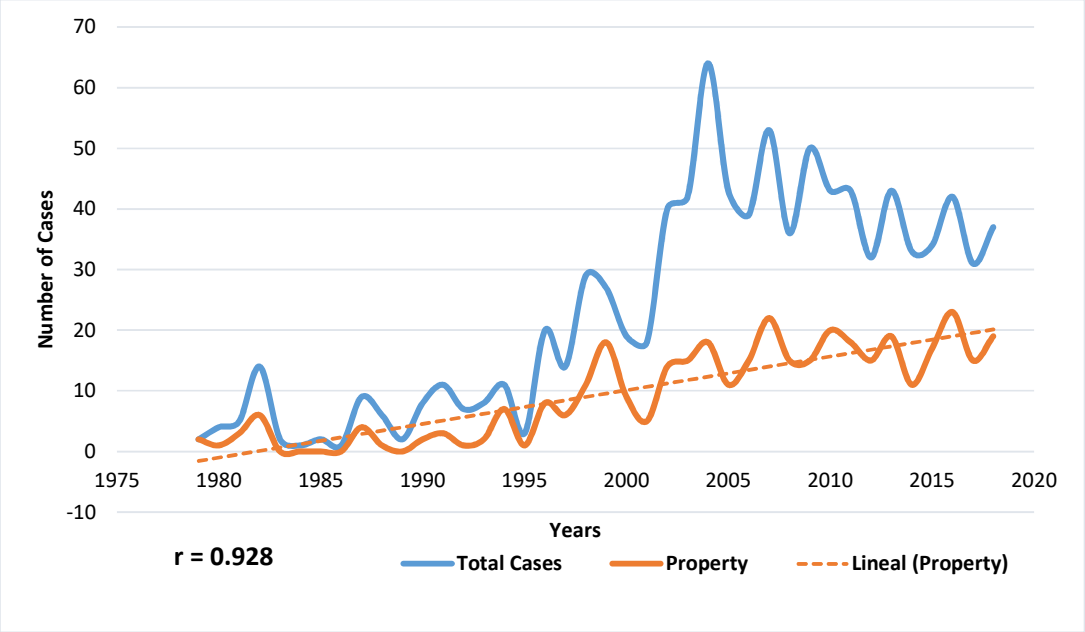
At first glance, the low incidence of 'property cases' in terms of percentage, along with a medium strength of association, derived from a correlation coefficient closeness to a cero level, could lead to believe in the absence of tensions between nature and property rights or a relative lack of interdependence between the two analyzed variables. Nonetheless, to avoid a hasty conclusion and obtain an alternative result to compare, the range of cases was expanded to the frequency of the appearance of other terminologies, also relating to 'property rights', as one can see in the chart # 6. Namely, the second tendency line contains a set of data constructed from the inclusion of adjudications in which the words 'property', 'owner', 'proprietor', 'private', and their linked terms (e.g. plurals, suffix and prefix in nouns, and so on) have been alluded. In addition, the selection was validated through the contrast with other terminologies, such as belong, possess, tenant, and their linked expressions. Nevertheless, after a first review in detail of documents, one can notice the expression 'economic interest(s)' frequently refers to cases in which there is a tension between property rights and nature, so that it was necessary to include those cases in the sample as well. This methodological procedure, however, brings about two practical issues to carefully warn.

Initially, the linguistic diversity of the court decisions is a real hindrance[583] to determining properly the sample, what is reflected even in their English translations. For example, the word 'possess' does not always denote property, particularly in the legal

[583] Certain inconvenient handles of language occur also as a result of the ambiguity, imprecision, context-dependence, and other forms of the so-called '*linguistic vagueness and uncertainty*', coming from the original national adjudications; or from the conflict between norms, derived from the 'value pluralism'. A study in deep in Gunnar Beck, The Legal Reasoning of the Court of Justice of the EU (Hart Publishing 2012) 52-90.

parlance. Nevertheless, the sentences in which it appears should not be discarded in the first instance, owing to certain court members employ them under the connotation of property[584]. Indeed, none of the words associated with the concept of property should be rejected because it would imply to run the risk of losing valid information. Certainly, the effect of this aggregation of data makes for a second obstacle regarding the insertion of useless or disjointed cases, although it should be said this is the lesser of two evils, given it occurs even with the term 'property' without others at stake[585].

Chart # 6 Total Cases vs. Property (associated words included)



Source: CJEU, 2018

To overcome the inconveniences, once selected the new sample with the aggregate data, it was verified the pertinence of the information, focusing mainly on those rulings with terminology more prone to meaning confusion, i.e. 'possess', 'belong' and 'economic interest(s)' and their associated expressions. The same procedure has been applied to all records in the database in order to avoid any kind of arbitrariness in the choice. In other

[584] For example, in *Brady v Environmental Protection Agency*, judges are completely aware that 'ownership' and 'possession' are different concepts; while in the preliminary ruling about the criminal case of *Nilsson*, possession is utilized as a synonym of 'property'. Curiously, the term 'property' is not used in none of the texts. See Case C-113/12 *Donal Brady v Environmental Protection Agency* [2013] ECR electronic publication, para. 27th; Case C-154/02 *Criminal proceedings against Jan Nilsson* [2003] ECR I-12753, para. 35th.

[585] In *Commission v Alquitranes and others*, for instance, the term 'properties' is used in a scientific sense, like '*physiochemical properties*'. Likewise, the word 'possess' is also employed within the same context. Consequently, after a review of terminology, this adjudication has to be discarded. See Case C-691/15 P *Commission v Bilbaína de Alquitranes and others* [2017] ECR electronic publication, paras. 4th, 24th, 53rd, and 55th.

words, all terminologies were searched in all documents and all restrictions of topics were reviewed case by case. This depurated sample contains 372 items in total and was shown in chart # 6.

The chronological chart # 6 illustrates the tendency of the number of cases in which the concept of 'property' has been somehow alluded, at least one time, within a court decision with respect to the total of the environmental adjudications, issued by the CJEU between 1979 and 2018. The most evident fluctuation for noticing is how the correlation coefficient goes sharply up towards 1 (r = 0.928), describing a large strength of association between both variables. The drawings of the tendency lines even follow an alike pattern, without coming to be parallel. The ratio of the relationship between the total number of judgments and the environmental ones experiences also a considerable growth (40.1%).

Although the set of data displayed on the chart are not definitive indicators of how the property rights influence the court decisions in environmental issues, they do allow arriving at relevant conclusions, at least a couple of them. On the one hand, it turns out observable that property rights constitute a present subject matter within the court reasoning about environmental matters. One could hardly affirm that it deals with the most transcendent aspect, but its presence is undeniable inside a significant quantity of adjudications with respect to the total. They are certainly not the majority but they do reach a good number (over 40%). On the other hand, the tendency line is rising, meaning that the court members are addressing more frequently those merits of each case concerning property rights within the framework of environmental issues.

4.1.6 Indicators about the rights of nature

In the wide framework of the CJEU adjudications, there are certain decisions aimed at useless or disjointed matters to this dissertation and its research questions. It does not signify, however, that the last selection of cases should be discarded because it provides an overview of the presence of property rights in the ambit of the court action. Indeed, the database reflects a valid interaction between property rights and environmental issues, but not all selected cases refer or can be necessarily used as arguments pro or against the posed thesis because the main topic is diverse (e.g. specific regulations of chemicals[586], payment of

[586] Case C-651/15 P *VECCO and Others v Commission* [2017] ECR electronic publication.

charges due to access to environmental information[587], conditions of import of agricultural products[588], and so on). To that extent, it turns out indispensable carrying out a depuration of data, in order to obtain an assortment of information more adequate to the initial inquiry, namely the legal personality of nature, but without losing sight of the issue concerning property rights.

The process of refinement of data set out with the purpose of constructing a new sample around the notion of 'ecosystems' and 'natural resources', considering that the aforementioned national decisions (New Zealand[589], Colombia[590], and India[591]) were oriented precisely to recognizing legal personality to rivers and other ecosystems. There is a parallel scope in the legislative experience of the United States, where the ordinances contain provisions about the acknowledgment of rights in favor of specific ecosystems, such as wetlands, streams, rivers, and aquifers, although they also include a more holistic category, the '*natural communities*'[592]. More or less the same occurs in Bolivia[593] and Ecuador[594], albeit their legal systems are even more holistic bestowing rights to nature.

One should bear in mind that the method to systematize the information, in the present case, do not meet exactly the same requirements than the procedure used to construct the sample about property rights, particularly the aggregation of data. The environmental character of the juridical texts implies that the bulk of associated references are virtually linked and have a too much general connotation. In other words, if one thinks about the expression 'environment', for example, as a semantic option to 'ecosystem' or 'natural resources' (the key terms), it is quite probable that one ends up including all or almost all records of the database in the sample, what would misrepresent the main objective of refining the data.

Under this assumption, the estimation of potential useless or disjointed information would be out of a reasonable range. Alike effects are observable when using other linked

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[587] Case C-71/14 *East Sussex County Council v Information Commissioner and Others* [2015] ECR electronic publication
[588] Case C-62/88 Greece v Council of the European Communities [1990] ECR I-1545.
[589] Supra note 5.
[590] Supra note 6.
[591] Supra note 7.
[592] Except for the ordinances of Mahanoy and Tamaqua (both in Pennsylvania), which only refers to 'natural communities', all ordinances issued in the United States between 2006 and 2014 therein comprises explicitly the regulation of the same ecosystems (wetlands, streams, rivers, and aquifers) and natural communities. See Mahanoy Township, PA, *Ordinance No. 2008-2*, 21 February 2008, § 7.14; Ordinance Tamaqua Borough No. 612 (2006).
[593] Supra note 9.
[594] Supra note 11.

expressions, such as ‘nature’, ‘natural’, ‘natural habitats’, ‘wild’, and ‘ecology’, concomitantly with their connected terms. Once again, it presumably occurs due to the diversity of languages and their translations, which impose restrictions on the choice, albeit this time it happens in the opposite direction. So many words are translated, for instance, as ‘nature’, ‘environment’, ‘land’, or ‘water’ and their linked expressions. The extension of the sample grows dramatically if terminologies about specific natural resources are also listed, for example, ‘land’, ‘soil’, ‘forest’ or ‘water’, among others. It carried out a preliminary test to confirm this statistical effect, reaching a sample of 683 items in total, absolutely pointless for any analysis.

On the contrary, when other words and expressions (e.g. earth, mountains, farmlands, and so on) are part of the procedure, they give rise to a tiny choice in comparison with the total database, recreating an equivalent problem of systematization to what occurred with the subject matter of ‘property rights’, i.e. they represent a too small sample of the universe, even together. The solution would be again the inclusion of other terms, what could imply a boomerang effect.

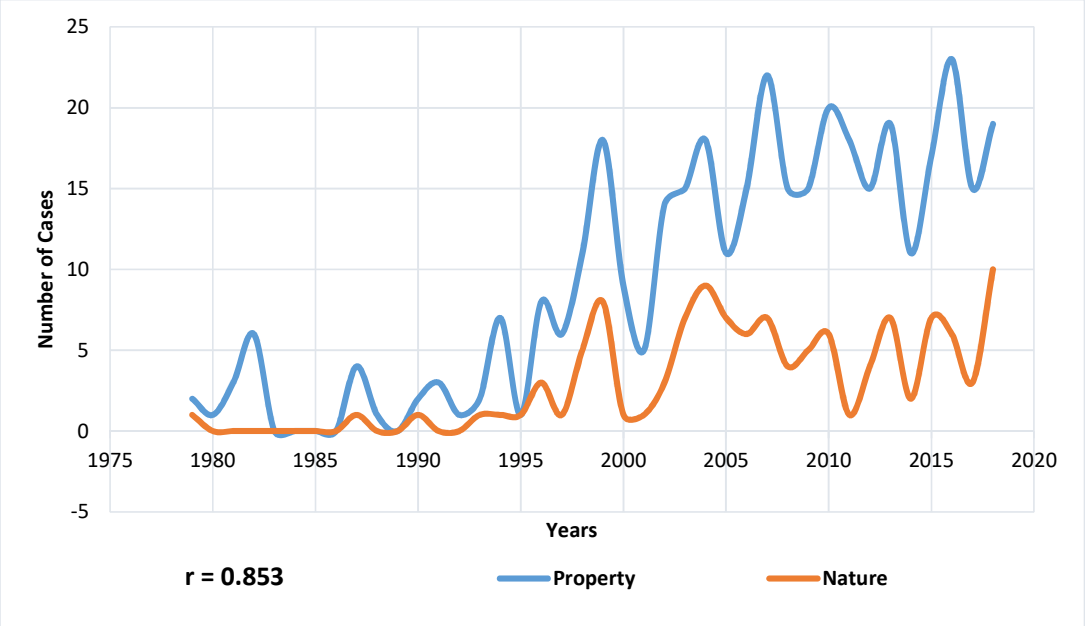
To recapitulate, one should be cautious enough to select adequately the terminologies for the systematization, avoiding carefully falling in the uncomfortable disjunctive between choosing just one key term or all of them. While it is true that using only a single category of selection could lead to the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

Consequently, it has been attempted an intermediate solution, which consists of utilizing two key expressions, ‘ecosystem(s) and ‘natural resource(s)’. Both concepts are recurrent in the previously quoted cases of ‘rights of nature’ and give the impression of a duality. On the one hand, the individuality of a natural resource conveys the message of goods or commodities, i.e. a direct reference to the notion of property rights. And, on the other hand, the completeness of the term ‘ecosystem’, already explained above. This option rejects the excessive strictness that could lead to getting rid of suitable documents and, at the same time, eludes any kind of arbitrariness in the selection, being a standardized method applicable to the whole database. Thereby the methodological procedure guarantees the independence of the observer regarding the sample, which finally comprises 119 records.

4.1.7 Final selection of environmental adjudications

Once both sets of data are ready, the next step consists of juxtaposing the information regarding property rights (372) with the information relating to ecosystems and natural resources (119). The resultant intersection between topics affects 84 cases in total, what would conform to the final sample of analysis. Nevertheless, there is a last important observation regarding 23 additional cases in which an explicit reference to the 'right to property' appears, even alluding to the punctual provisions about protection of property of the Additional Protocol to the European Convention on Human Rights[595] and the Charter of Fundamental Rights of the European Union[596]. Actually, the total documents were originally 27, but four of them were affected by the initial juxtaposition of data and are included among the 84 records. The remaining 23 documents did not contain any mention about the words natural resources or ecosystems, but they did have general allusions to the terms 'environment' and 'nature', accompanied by their associated expressions (plural, suffix, prefix, etc.). Some of them even referred to specific natural resources, such as water, forest, oil, gas, among others. That is the reason why they were automatically discarded by the procedure.

Chart # 7 Property v Nature



Source: CJEU, 2018

[595] Additional Protocol to the European Convention on Human Rights (1952) Article 1.
[596] Charter of Fundamental Rights of the European Union (2016) Article 17(1).

Nonetheless, once a case-by-case assessment was carried out, one can distinguish various documents whose selection is crucial for this legal analysis, mainly due to the significance of the judges' reasoning for the aim of this research. At the same time, however, there is another group of decisions which does not really bring about a concrete contribution, not even at a discursive level[597]. In any event, for the sake of avoiding arbitrariness but bearing in mind the importance of keeping relevant information, the whole adjudications were included as part of the sample. So, the final number of cases is 107 (the complete list is in the Annex).

From this point on, it will be spoken simply about property and nature to ease the terms of analysis. A referential result of the juxtaposition of cases has been shown in chart # 7, corresponding to the period 1979-2018. It is worth it to clarify the inclusion of the 23 judicial sentences does not affect the intersection because all cases form part of the property criterion (372). After a meticulous observation, one can notice the trajectories of each tendency line follow more or less similar patterns, although not constantly with the same intensity. The correlation coefficient (r = 0.853) confirms the evaluation, given it is quite close to 1, meaning a sturdy interaction between both variables in terms of appearance frequency.

4.1.8 The role of the right to a healthy environment

Nowadays, it has been repeatedly said, the notion of healthy environment constitutes the dominant legal discourse about environmental protection worldwide, both in the national ambit and in the international one, principally owing to it allows an understandable connection between nature and human rights. In the course of the present analysis, it has also played a remarkable role, mainly due to the conceptual interferences that one can perceive within various Court's adjudications, where it has often overlapped with certain environmental issues. Therefore, although it does not really depict the key objective of this study, it is worth it at least to take a glance at a set of data regarding its implications and interrelations with both the universe of cases and the references about property rights.

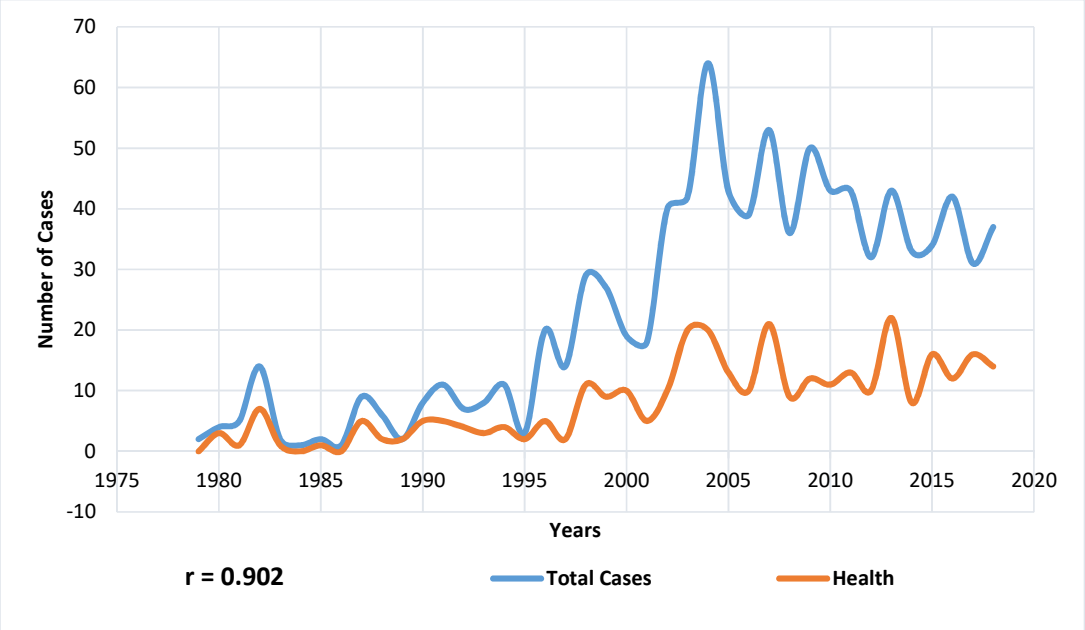
In that regard, diverse aspects call attention. Firstly, notwithstanding its global importance, the concept of healthy environment only appears in five of the 928 cases in total,

[597] For example, the key questions in *Valev Visnapuu v Kihlakunnansyyttäjä (Helsinki) and Suomen valtio – Tullihallitus* refer to the imposition and exception of taxes on certain beverage packaging, and the obligations to count on retail sale licenses. This is an example of document in which the words environment and nature should be interpreted in context. See Case C-198/14 *Valev Visnapuu v Kihlakunnansyyttäjä (Helsinki) and Suomen valtio – Tullihallitus* [2015] ECR electronic publication.

i.e. less than the 1% of discursive incidence. Secondly, in contradistinction to what happened with the expression 'property rights', with which was necessary to make an aggregation of data in function of analogous terminology, the configuration of a database by means of the expression 'health' is descriptive enough to obtain a correlation coefficient comparable with the aggregate sample of property rights.

Effectively, the chart # 8 illustrates the trend of the timeline concerning the number of cases in which the term 'health' has been somehow mentioned, at least one time, within a court decision with respect to the total of the environmental adjudications, issued by the CJEU between 1979 and 2018. The result of the correlation coefficient is quite close to the aggregate version of the 'property rights', i.e. it almost reaches 1 (r = 0.902), implying a strong association between both variables. The percentage of judgments in which the word 'health' has been alluded is 34.9%, what corroborates the existence of a significant interaction between the aforesaid notions.

Chart # 8 Total Cases v Health



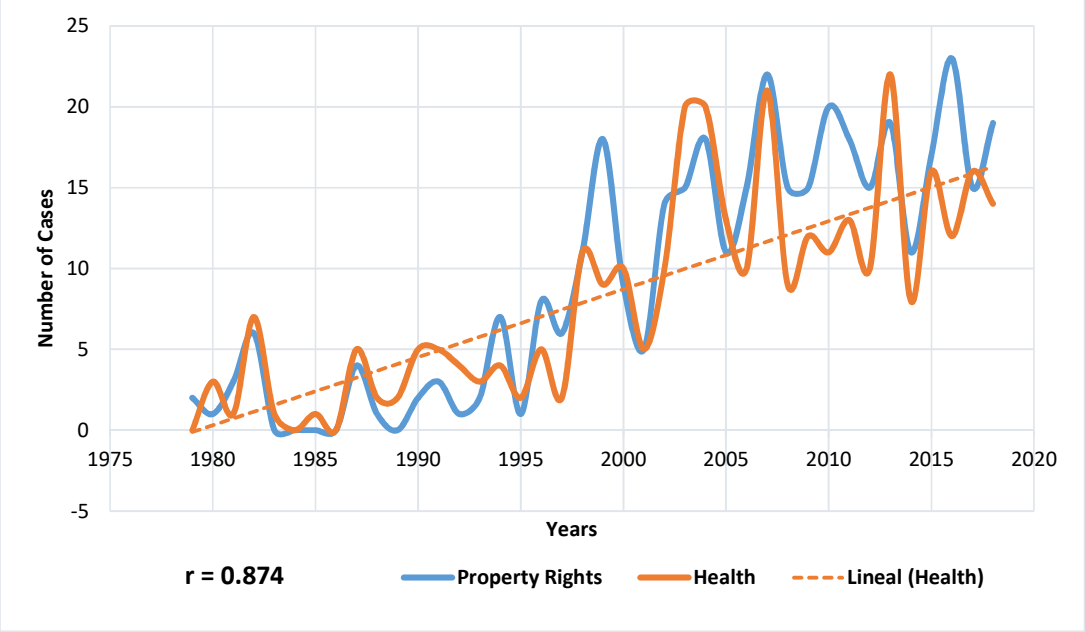
Source: CJEU, 2018

Thirdly, one last interesting observation, before passing to the analysis in deep of the selected cases, refers precisely to the interactions between the health and property rights. As one will be able to confirm bellow, in several rulings the tension with the right to property does not bring about against environmental issues, but rather against the notion of human health, which, in a certain way, ratifies the argument about health as a link between human

rights and environment. Thus, an image of the interrelation health-property within the framework of environmental cases could be quite descriptive about the tendency of the different Court's decisions.

In this framework, chart # 9 compares the chronological tendency lines of the expressions 'health' and 'property rights', including its associated terms. Albeit there are several intersections of data, graphically observable, which sometimes seem to overlap each other, the level of correlation between both variables is less robust than the previous comparisons between 'property rights' versus 'environment' and 'property rights' versus 'health'. At all events, the result of the coefficient (r = 0.874) does not mean the existence of a weak interaction of variables. On the contrary, the correlation continues to be quite consistent given its closeness to 1.

Chart # 9 Health v Property Rights



Source: CJEU, 2018

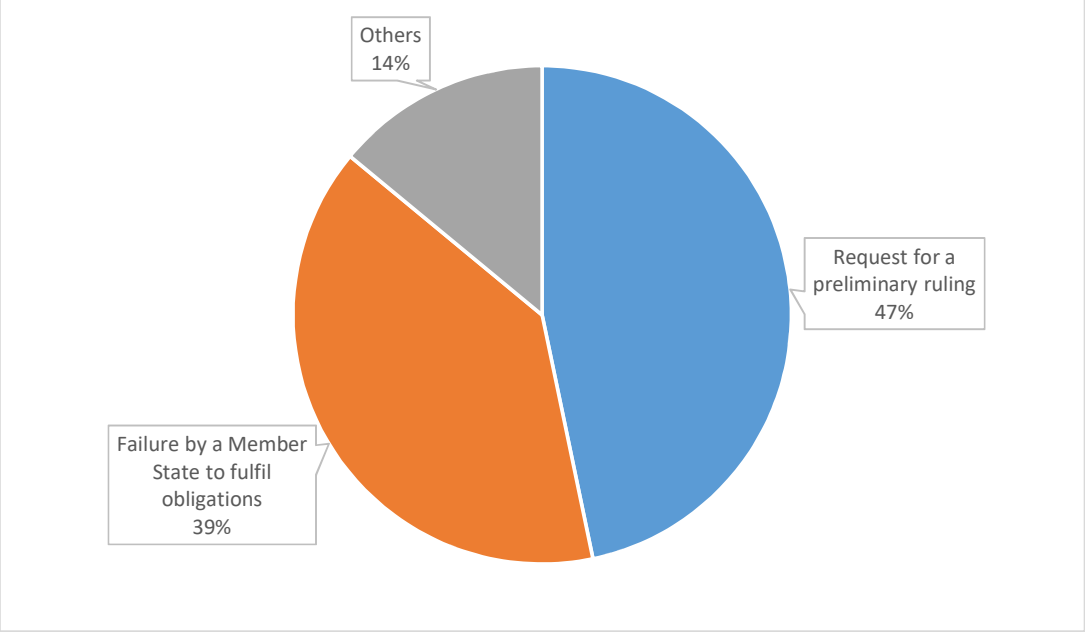
4.2 What does the Court decide about property and environment?

By way of an antecedent, the Court is able to rule on suits brought by Member States, institutions or natural and legal people[598], or even other cases provided for in the treaties[599], such as–for instance–the failures by Member States to fulfill their obligations under the

[598] Consolidated Version of the Treaty on European Union (n 625) Article 19(3a).
[599] ibid Article 19(3c).

Union law[600]. In addition, the CJEU has the power to give a preliminary ruling on the interpretation of Treaties or the validity of acts at the request of tribunals of the Member States[601]. Chart # 10 shows the types of actions contained in the sample. In general terms, the fact that the requests for a preliminary ruling represent in percentage almost half of the cases turns out advantageous to the extent that the court acts, in a certain way, as an impartial beholder, who keeps its distance from the final resolution of each case. This relative independence of the judge permits to get hold of a somehow more neutral idea about what his/her criteria are regarding each subject matter.

Chart # 10 Types of actions ruled by the CJEU



Source: CJEU, 2018

4.2.1 Environmental protection as a social function of property

Depending on the context, the fact that environmental protection can be seen as a more important aspect than property rights could have innumerable interpretations, although at first glance the CJEU's members seem to acutely agree with this opinion. In effect, apropos of the preliminary ruling, requested by the High Court of Justice from England and Wales in 1999, in the framework of two cases among ***Harry Auger Standley, David George Metson, and others v the Secretary of State for the Environment and others***, the CJEU

[600] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 Article 258.
[601] ibid Article 267.

upheld expressly that '[…] *while the right to property forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function*'[602]. By means of this assertion, the court rejected the plaintiffs' argument, who pled that the declaration by which the British public authorities had identified the Rivers Waveney, Blackwater, Chelmer, and their tributaries as waters which could be affected by agricultural pollution, and designated the areas of soil draining into those waters as vulnerable zones, infringed their right to property, given that it imposed restrictions on the agricultural use of their lands[603]. Moreover, despite it recognized explicitly that the application of some measures restricted actually the farmers from exercising their property rights, the Court affirmed that those constraints[604] '[…] *correspond*[ed] *to objectives of* ***general interest*** *pursued by the Community and* [did] *not constitute a disproportionate and intolerable interference* […]'[605].

Certainly, albeit the original context in which this tribunal issues its decision is not really a dispute about property rights, but rather about the request of annulling the designation of private lands as vulnerable zones, the question of the ownership, and maybe nay individual economic interests, ends up being one the key aspect to discuss. Why? Because when one reads the measures to be adopted by landowners, in the framework of the action programs established in Annex III of the Directive 91/676/EEC[606], it turns out undeniable they represent an explicit limitation to property rights by affecting individual economic interests, i.e. land values and incomes from their farming businesses[607]. In other words, if the lawmakers designed legislation to prevent the employment of fertilizers during certain periods or limit their application to soils under specific conditions, including climatic ones[608], there is no way to argue that production was not going to be directly affected. Thus, the restriction of property is a real given. A parallel reasoning would be applicable to the special conditions provided for the storage and use of livestock manure[609].

From the perspective of this ruling, a couple of remarks should be formulated. Firstly, although there are enough conditions to analyze the decision from the perspective of a

[602] Case C-293/97 *R v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and others and D.G.D. Metson and others* [1999] ECR I-2626 para. 54th.
[603] ibid paras. 2nd and 17th.
[604] ibid para. 55th.
[605] ibid para. 54th emphasis added.
[606] Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375/1 Article 5(4a).
[607] R v The Secretary of State for the Environment and others (n 657) para. 15th.
[608] Council Directive 91/676/EEC (n 661) Annex III, para. 1st. subpar. 1st and 3rd.
[609] ibid subpar. 2nd.

tension between property rights and protection of nature, materialized through the idea of preventing the pollution of water, one cannot obviate the fact that the CJEU replied the question of property rights based on public health reasons instead of environmental ones, i.e. for the sake of humans, arguing that '[…] *the system laid down in Article 5 reflects requirements relating to the protection of public health, and thus pursues an objective of* ***general interest*** *without the substance of the right to property being impaired*'[610]. In principle, albeit one is able to affirm the judicial sentence deals with strong anthropocentric reasoning (public health), it turns out irrefutable that the effects derived from the resolution are really eco-friendly to the detriment of property rights in practice. This could be considered an *a priori* conclusion if it were not for the existence of parallel opinions about the same case. So, for example, certain commentators have noticed already that '[t]*he Court has been firm in previous cases that economic interests do not have automatic primacy over protection of the environment*'[611]. However, albeit it contradicts somehow the beliefs of Sands, Taylor, Borràs, Leib, and others, being interpreted to mean that the case is a proof that tribunals, at least transnational ones, do not always decide in favor of property over natural resources, one cannot cease to think how rare is the fact that the CJEU has grounded its decision on public health reasons, above all considering this terminology does not even appear in the Directive[612]. In addition, Krämer is of the opinion that this argument is incomprehensible, and even hasty, within the ambit of the court given the existence of judicial precedents in which the CJEU has recognized expressly the environmental protection is a question of general interest of the Union[613].

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[610] R v The Secretary of State for the Environment and others (n 657), para. 56th, emphasis added.

[611] Sue Elworthy and Robert Gordon, 'Finding the Causes of Events of Preventing a 'State of Affairs'?: Designation of Nitrate Vulnerable Zones: R v The Secretary of State for the Environment, the Ministry of Agriculture Fisheries and Food ex parte Harry Auger Standley and others and ex parte David George Metson Bsc and Others, (1998) 10:1 *Journal of Environmental Law* 92, 115.

[612] Effectively, while the directive contains two punctual references about '*human health*', the judges come to use both terminologies, '*human health*' and '*public health*', as equivalent expressions, albeit they are not conceptually similar. Krämer also remarks this point and analyses the difference of concepts in more detail. See Krämer, *EU Casebook…* (n 628) 95-6; Council Directive 91/676/EEC (n 661) Recital 6th and Article 2(j); R v The Secretary of State for the Environment and others (n 657) para. 34th.

[613] To support his comment, the author quotes the cases C-240/83 and C-302/86, which are not part of the present selection because their decisions do not address any conflict around property rights. In any event, one can read the recognition of environmental protection as one of the '*Community's essential objectives*'. Krämer, *EU Casebook…* (n 628) 95; Case C-240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [1983] ECR 538, para. 13rd; Case C-302/86 *Commission of the European Communities v Kingdom of Denmark* [1988] ECR 4627, para. 8th. Other similar references in Case C-213/96 Outokumpu Oy. [1998] ECR I-1801, para. 32nd; Case C-176/03 *Commission of the European Communities v Council of the European Union* [2005] ECR I-7907, para. 41st. All these cases have been quoted as precedents by the Court, see infra in *ERG and others* (n 707).

At all events, the interplay between human health and environment within the ambit of reasoning of the Court requires undoubtedly a much more mature reflection, even matter of new entire research. Drawing to a conclusion based on the disposable information for this particular study would constitute a mere conjecture. Hence what is displayed at the end of this section, with the intention of avoiding an impertinent disruption to the unfolding topic, corresponds to an array of brief findings in function of the selected cases.

Secondly, from the reading of the arguments alluded by the British High Court of Justice in order to require the preliminary ruling, one could infer its opinion was close to the applicants'; namely, the British judges did believe that Directive 91/676/EEC infringed the right to property of farmers. Indeed, the fashion in which they formulated their questions is quite suggestive, so that one can read that '*If Question 1 is answered otherwise than in sense (ii) above, is the Nitrates Directive invalid (to the extent of its application to surface freshwaters) on the grounds that it infringes:* […] *(iii) the fundamental property rights of those owning and/or farming land* […]'[614]. In parenthesis, the so-called sense (ii) referred to the possibility of designating vulnerable zones exclusively to those '[…] *where the discharge of nitrogen compounds from agricultural sources itself accounts for a concentration of nitrates in those waters in excess of 50 mg/l (i.e. leaving out of account any contribution from other sources)*'[615]. If one comprehends the whole case in context, before the reasoning concerning the preliminary ruling, it does not really deal with an environmental discussion, despite it meets sufficient requirements to be deemed as a conflict about pollution of water. Indeed, the adoption of this kind of measures would be clearly justified through the precautionary principle[616], tacitly invoked in the third recital of the Directive[617] when it declares that the '[…] *excessive use of fertilizers constitutes an environmental risk* […]'[618]. Essentially, the dispute revolves mainly around a set of *technicisms*, such as if the level of concentration of nitrates should come from only agricultural sources or if the regulation

[614] R v The Secretary of State for the Environment and others (n 657), para. 20th, subpar. 2nd. Actually, the British tribunal also mentions infringements of the principles of proportionality and polluter pays.
[615] ibid para. 20th, subpar. 1st.
[616] The notion of the precautionary principle used in this study corresponds to the extensive sense of the Rio Namely, '[w]*here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*'. Rio Declaration (1992) Principle 15.Declaration.
[617] In the same sense Elworthy and Gordon (n 666) 109.
[618] Council Directive 91/676/EEC (n 661) Recital 3rd. From its origins, the precautionary principle has been attributed either to the German differentiation of harms and risks, enshrined in the environmental precept of *Vorsorgeprinzip* (foresight-planning) of the 1970s, or to the argument against fluoridation of water from the 1950s, or the nuclear power used by the United States during the 1960s. See Julian Morris, *Rethinking Risk and the Precautionary Principle* (Butterworth-Heinemann 2000) 1-3.

should be applicable only to potential sources of drinking water, among others. Krämer prefers speaking about a problem of 'wording', originated in the very directive, with respect to the scope of what one should understand concerning the expressions '*affected by pollution*', '*pollution*' or '*agricultural source*'[619]. In practice, beyond their discursive scope, none of the arguments displayed by the parties, and not even by the CJEU, represents totally the ecological issues, despite it clearly deals with an environmental dispute. While it is true that, it should be recognized, the case has been resolved in favor of nature, the lack of a judicial defense of its interests would lead aprioristically to thinking about the need to count on a legal representative.

More examples about the preeminence of green reasoning over property rights, grounded on the social function of ownership can be also found in the rulings by the General Court. Thus, in ***Romonta GmbH v European Commission***, for example, the limits to the property based on its social function constituted one of the key reasons why the Court dismissed the action for the annulment[620] of the Decision 2013/448/EU[621], brought by *Romonta GmbH*, a private German company dedicated to the production of crude montan wax from the extraction of bitumen-rich lignite[622]. The company claimed unsuccessfully that, '[…] *by rejecting free allocation of emission allowances in case of undue hardship, the Commission infringed the principle of proportionality and its fundamental rights*'[623], in particular, its right to property.

Resuming the issue about the interaction between health and nature, it is possible to identify specific jurisprudence in which the notion of human health has been quite clearly adduced by the parties as a limit of property rights, without considering the environmental issues. Effectively, although the General Court dismissed the action, the contention appears coherent and valid in ***TestBioTech eV and others v European Commission***[624]. In general terms, the lawsuit aimed at the annulment of a 2013-decision by which the European Commission authorized to Monsanto Europe SA the '[…] *placing on the market of products containing, consisting of, or produced from genetically modified soybean* […]'[625], following

[619] Krämer, *EU Casebook…* (n 628) 92-3.
[620] Case T-614/13 Romonta GmbH v European Commission [2014] ECR electronic publication, para. 59th.
[621] Commission Decision 2013/448/EU of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87/EC of the European Parliament and of the Council (notified under document C(2013) 5666) Text with EEA relevance [2013] OJ L240/27.
[622] Romonta v Commission (n 675) para. 1st.
[623] ibid para. 40th.
[624] Case T-177/13 *TestBioTech eV and others v European Commission* [2016] ECR electronic publication.
[625] ibid para. 6th.

the provisions of the Regulation 1829/2003/EC[626]. In this case, the application for the annulment, based on the precedence of human health[627] over economic interests did not sound weird for the interveners in the process[628] owing to, just like the United Kingdom reasoned, Monsanto did not ask authorization to cultivate the modified soybean in Europe, so that '[…] *the environmental risk assessment* [was] *therefore limited to a consideration of the likely effects of accidental dissemination into the environment*'[629]. Although this idea somehow distorts the scope of the healthy environment as a concept, one can even notice how it reappears later in the official discourse of the Commission[630]. Notwithstanding the decision could be seen as contrary to environmental interests, at least indirectly, it simultaneously yielded suggestive opinions in that, for example, the access to justice had been widened in terms of admissibility of actions, coming from nongovernmental organizations[631], meaning somehow a significant opportunity for promoting the representation of environmental interests, in sum nature's rights. Furthermore, as suggested by Paskalev[632], it is good news the Commission is not necessarily obliged to authorize those processes, involving genetically modified organisms (GMO), that has been scientifically approved by the European Food Safety Authority (EFSA)[633], being the Commission the responsible for '[…] *determining an appropriate level of protection for society*'[634]; by this way, also a level of protection for the ecosystem. It is worth it to clarify that, however, the compulsory character of the EFSA's opinion, in compliance with the General Court's reasoning, relies on the invoked provisions of both Regulation 1829/2003/EC[635] and Regulation 178/2002[636], so that the fact of taking into account the scientific estimations of

[626] Regulation 1829/2003/EC of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (Text with EEA relevance) [2003] OJ L268/1.
[627] By the way, as referred in note 667, the judges also employed the terms public health and human health as synonyms in this and other cases. TestBioTech and others v Commission (n 679) para. 86th and 108th; Case T-475/07 *Dow AgroSciences Ltd and others v European Commission* [2011] ECR II-5937, para. 144th.
[628] TestBioTech and others v Commission (n 679) para. 87th.
[629] ibid para. 40th.
[630] See note 697 regarding TestBioTech eV v European Commission (n 693).
[631] Vesco Paskalev, 'Losing the Battle, but Winning the War? Standing to Challenge GMO Authorisations and other Acts Concerning the Environment' (2017) 8 *European Journal of Risk Regulation* 580, 585.
[632] ibid
[633] TestBioTech and others v Commission (n 679) para. 103rd.
[634] ibid para. 105th, in the same sense, see Dow AgroSciences and Others v Commission (n 682) para. 148th.
[635] ibid paras. 100th and 103rd. If the Commission adopts its decision according to Articles 7 and 19, it is compelled to consider the EFSA's opinion, while if it issues an authorization grounded on the Articles 4 and 16 it is not bound. The difference between both sets of provisions rests upon the regulation's literal sense. In the former, the regulation explicitly reads '*taking into account the opinion of the Authority*', while in the latter there is not any express reference thereof. See Regulation 1829/2003/EC (n 681) Articles 4, 7, 16 and 19.
[636] The EFSA's competence to provide scientific opinions and technical support according the areas of its mission is based on the Regulation 178/2002/EC of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety

EFSA could be mandatory. In any event, it seems to be a merely procedural question, given that the Court itself highlighted the absence of provisions that compel the Commission to comply with EFSA's opinion[637]. To put it simply, the Commission is probably to take into account the scientific assessment by EFSA, but it does not have the obligation to act in accordance.

In that same vein, as part of another litigation between ***TestBioTech eV v European Commission***[638], the General Court ratified partially its view regarding the assumed obligatory character of the EFSA's opinion[639], although it was not the most important aspect of its reasoning. In fact, this decision could be considered relevant inasmuch as it allowed the parties to put on the table their pro and against arguments to address separately the dimensions of human health and environmental protection, within the framework of the market authorizations for genetically modified organisms[640]. In that regard, the Commission adopted a past position about the '*accidental damage*', set out by the United Kingdom in a previous case[641], i.e. it pleaded that the authorization to place genetically modified soybeans on the market permitted '[…] *the importation of the soybeans at issue for use in food and in feed, but exclude*[d] *their being used for cultivation*'[642]. In addition, it pointed out the existing differences between the safety evaluation and the environmental risk assessment, pursuant the Regulation 1829/2003/EC[643], as support of its reasoning[644]. As a corollary, it adduced the inapplicability of the Regulation 1367/2006/EC[645], arguing the action for annulment brought by the applicant referred to a nutritional assessment, which would be part of the risks of health, not the environment[646]. For its part, the plaintiff defended an altogether view of human health and environment, stating mainly that judicial actions filed by nongovernmental organizations, according to the Regulation 1367/2006/EC, do not require a restriction of the grounds relied on, neither on health nor on the environment[647]. Finally,

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Authority and laying down procedures in matters of food safety [2002] OJ L31/1, Articles 22(6) and 23(c), in particular for this case pursuant the Court's decision (TestBioTech and others v Commission, ibid para. 102nd).
637 TestBioTech and others v Commission, ibid para. 103rd).
638 Case T-33/16 *TestBioTech eV v European Commission* [2018] ECR electronic publication
639 Ibid para. 60th.
640 Ibid para. 80th.
641 See note 684 regarding TestBioTech and others v Commission (n 679).
642 TestBioTech eV v European Commission (n 693) para. 70th.
643 Regulation 1829/2003/EC (n 681) Recital 33rd.
644 TestBioTech eV v European Commission (n 693) para. 70th.
645 Regulation 1367/2006/EC of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13, Article 10.
646 TestBioTech eV v European Commission (n 693) para. 70th.
647 ibid para. 35th.

the General Court ruled the annulment of the challenged act, recognizing '[…] *it is clear that the scope of the concept of 'environmental law' is not as restricted as claimed by Commission in the contested decision*'[648], a very well welcome statement by the activism[649].

4.2.2 Some tensions between 'polluter pays' and 'precautionary' principles

Another source of conflict between property rights and environmental protection revolves around the 'polluter pays principle'[650] and the 'precautionary one'[651]. In the preliminary ruling, required by a Regional Administrative Tribunal of Sicilia, Italy, concerning the judicial dispute between the companies ***Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA, and Syndial SpA v the Ministry of Economic Development (Ministero dello Sviluppo economico) and others***[652], for example, the applicants in the main proceedings claimed the unilateral determination of measures, by the administrative authorities, for remedying the environmental damages to the Priolo Site of National Interest[653]. Basically, further to the denial of their responsibilities about the contamination, they alleged that these administrative acts of determination of environmental measures imposed excessive restrictions on their property rights and were contrary to proportionality because '[…] *where land has been decontaminated or has never been polluted, the competent authority does not in any way have the power to make use of that land subject to the carrying out of environmental remedial measures on another site* […][654]'. Moreover, they upheld that the operator's interest to remedy the harms rested on the prospect that their productive activities were resumed[655], i.e. their reasons were grounded on a mere instrumental view of natural

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[648] ibid para. 63rd.
[649] See, for example, Anais Berthier, 'CJEU rules against the Commission: the health impacts of GMOs can be challenged under the Aarhus Regulation' in ClientEarth, *Access to Justice for a Greener Europe* (ClientEarth 2018) <www.clientearth.org/cjeu-rules-against-the-commission-the-health-impacts-of-gmos-can-be-challenged-under-the-aarhus-regulation/> accessed 4 January 2019.
[650] In this study, the scope of the 'polluter pays principle' is conventionally defined in function of the Rio Declaration, i.e. as the promotion of the '[…] *internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment*'. Rio Declaration (1992) Principle 16th.
[651] About the sense of the precautionary principle, see note 671.
[652] Case C-379/08 *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and others* [2010] ECR electronic publication. There is a joined decision, whose reference is Case C-380/08 *ENI SpA v Ministero dell'Ambiente e della Tutela del Territorio e del Mare* (Ministry of Environment and Protection of the Territory and the Sea) *and others* [2010] ECR electronic publication.
[653] ibid para. 19th.
[654] ibid para. 69th.
[655] ibid

resources. Thereon, the CJEU's response was quite similar to what already averred in the preceding adjudication, being interpreted to mean that property rights do not constitute an immutable principle but a prerogative that should respond to its social function[656]. That is to say, the court rejected the point of contention, giving the reason to the national tribunal[657], predicated upon the power of competent authority to alter substantially the actions to redress ecological damages, pursuant to the Directive 2004/35/CE[658]. Therefore, whether general interest requires a justified constraint of its exercise, it will be possible so long as it is balanced and does not unbearably interfere with the effective implementation of the right[659]. There is jurisprudence endorsing this Court's legal yardstick[660].

By the way, as it was already mentioned, environmental reasons could be argued as foundations of general interest[661]. In this regard, one important difference with respect to the case of Standley, Metson and others consisted of the fact that the main underpinning of the

[656] ibid 80th.
[657] ibid Resolution, para. 1st.
[658] The CJEU invoked the Articles 7 and 11(4) of the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.
[659] ERG and others (n 707) 80th.
[660] ibid. Although the ensuing cases do not correspond precisely to environmental issues, but rather agricultural ones, they do allude and reinforce the notion of the right to property as one of the general principles of European law and its social function. The Court has utilized them as precedents of different adjudications. See Case C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR I-3729, para. 23rd; Case C-265/87 *Hermann Schräder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989] ECR I-2263, para. 15th; Case C-280/93 *Federal Republic of Germany v Council of the European Union* [1994] ECR I-5039, para. 78th; Case C-22/94 *The Irish Farmers Association and others v Minister for Agriculture, Food and Forestry, Ireland and Attorney General* [1997] ECR I-1829, para. 27th. They have been also quoted indistinctly by Krämer, *EU Casebook…* (n 628) 95-6. Albeit they do not have to do with environmental issues at all, another set of rulings also employed by the CJEU, as precedents for the valid restrictions of property rights, are Case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR I-2633, para. 18th; Case C-177/90 *Ralf-Herbert Kühn v Landwirtschaftskammer Weser-Ems* [1992] ECR I-58, para. 16th; Case C-306/93 *SMW Winzersekt GmbH v Land Rheinland-Pfalz* [1994] ECR I-5571, para. 22nd; Case C-44/94 *R v Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations and others and Federation of Highlands and Islands Fishermen and others* [1995] ECR I-3133, para. 55th; Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-3978, para. 21st; Case C-200/96 Metronome Musik GmbH v Music Point Hokamp GmbH [1998] ECR I-1971, para. 21st; Joint Cases C-20/00 *Booker Aquacultur Ltd v The Scottish Ministers* [2003] ECR I-7446, para. 68th and C-64/00 *Hydro Seafood GSP Ltd v The Scottish Ministers* [2003] ECR I-7446, para. 68th; Joint Cases C-37/02 *Di Lenardo Adriano Srl v Ministero del Commercio con l'Estero* [2004] ECR I-6945, para. 82nd and C-38/02 *Dilexport Srl v Ministero del Commercio con* l'Estero [2004] ECR I-6945, para. 82nd; Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v Ministero delle Politiche Agricole e Forestali* [2005] ECR I-3820, para. 119th; Joint Cases C-402/05 P *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2008] ECR electronic publication, para. 355th and C-415/05 P *Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR electronic publication, para. 355th.
[661] Some arguments about general interest in Elworthy and Gordon (n 666).

judicial decision in *ERG and others* was not 'public health'[662], as in the former, but rather the protection of environment[663].

Additionally, it is worth it to allude to the precautionary principle, a general tenet of Community law pursuant the General Court[664], which this time has been explicitly and recurrently employed as sufficient justification for the taking of environmental remedial measures because, as it has adduced by the defendant, i.e. the Italian government, the unrestricted use of decontaminated areas '[…] *would constitute an insurmountable barrier to the implementation of the remedial measures chosen by the competent authority*'[665]. Moreover, the respondent alleged that the legitimate right of the public authority to take the required actions could be crucial to prevent further harms both in the area at stake and even in adjacent sites, an argument widely shared by the Court[666], whose ruling in this occasion has inclined generally towards the protection of environment over the right to property.

Another exemplificative decision concerning the 'polluter pays principle' can be found in the preliminary ruling petitioned by the Italian Council of State (*Consiglio di Stato*) for the controversy between the ***Ministry of Environment and Protection of the Territory and the Sea (Ministero dell'Ambiente e della Tutela del Territorio e del Mare) and others v the private company Fipa Group srl and others[667].*** In this framework, the central source of contention touched on the feasibility of imposing to an owner the execution of remedial measures on a contaminated site, even though it would have been impossible to determine his/her liability level[668]. Following the records alluded in the adjudication, it seems to be that the pollution of the place at issue originally came from the industrial manufacture of insecticide and herbicide, carried out between the sixties and the eighties, whereby the location was classified as the '*Massa Carrara Site of National Interest for the purposes of its rehabilitation*'[669]. Much later, between 2006 and 2013, several private companies–including the *Fipa Group*–were progressively acquiring parcels of that land in order to undertake diverse businesses, such as the sale of electronic devices, the operation of a real estate agency, the construction and repair of boats, and so forth[670]. Nonetheless, in 2007 and

[662] R v The Secretary of State for the Environment and others (n 657), para. 56th.
[663] ERG and others (n 707) 80th and 81st.
[664] Dow AgroSciences and Others v Commission (n 682) para. 144th.
[665] ERG and others (n 707) 70th.
[666] ibid 83rd.
[667] Case C-534/13 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare and Others v Fipa Group srl and others* [2015] ECR electronic publication.
[668] ibid para. 37th.
[669] ibid para. 25th.
[670] ibid paras. 26th, 27th, and 33rd.

2011, the public authorities of environment and health ordered *Fipa Group* and the other owners the building of a hydraulic capture barrier aimed at the protection of the groundwater table and the rehabilitation of the soil, as an 'emergency safety' measure[671]. As it was expected, the owners filed a suit before the Regional Administrative Court of Tuscany, pleading they were not responsible for the pollution, so that they obtained the annulation of the acts in question in the first instance[672]. Finally, the appeal proceedings were brought by the national authorities before the Council of State[673], whose decision was suspended until the settle of the preliminary ruling.

To some extent, the strain between property rights and environmental protection, in this case, could be depicted by the contrast between the application of the 'polluter pays principle' and the 'precautionary one'. In that sense, it does not appear absolutely fair that someone, who is not liable for the harmful effects of contamination, is bound to pay in behalf of the real polluter, just because exerts his/her right to property. Contrarily, it would be neither totally lawful that nobody should take the remedial measures to avoid the worsening of the groundwater table and the quality of the soil, in pursuance of the precautionary principle and the other preventive actions to rectify environmental damages[674].

In this context, the CJEU's solution to this disjunctive turned out quite plain in legal terms, not only because it declared the temporal inapplicability of the Directive 2004/35/CE[675], given that the harms occurred before 30 April 2007[676], but also due to it fitted to the literal interpretation of national law in that it was not possible to oblige the owner to accomplish with preventive and remedial measures, if s/he was not responsible for pollution[677]. Moreover, this inapplicability of the European law was also supported on the lack of a causal link between the damage and the activities of individual operators[678], according to the Directive[679] and previous case-law[680]. In either event, by way of a criticism, the intermediate character of the ruling, imposing on the owners the duty of reimbursing '[…] *the costs relating to the measures undertaken by the competent authority within the*

[671] ibid para. 28th.
[672] ibid para. 29th.
[673] ibid para. 30th.
[674] ibid para. 37th.
[675] Directive 2004/35/CE (n 713) Articles 17 (1st and 2nd indents) and 19(1).
[676] Fipa Group and others (n 722) para. 25th.
[677] ibid Resolution.
[678] ibid para. 59th.
[679] Directive 2004/35/CE (n 713) Article 4(5).
[680] See Case C-378/08 Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and others [2010] ECR electronic publication paras. 52nd and 53rd.

limit of the market value of the site […]'[681], which ends up implying a prejudice to both property rights and environmental protection, owing to the owner will have to pay something for what s/he is not responsible, while the environment will not be subject of restoration or protection. Curiously, the only untouched interests correspond to the state administration and once again nature's interests are not represented.

4.2.3 The directives of birds and habitats

Another set of relevant cases, where one can identify a tension between property rights and environmental protection, refers to the classification of special protection areas (SPA). Thus, for instance, one of the archetypal cases is ***Commission of the European Communities v Kingdom of Spain[682]***, in which the Court declared the defendant had failed to fulfill its obligations regarding the classification of the Santoña marshes, located in the Autonomous Community of Cantabria, as a special protection area and the adoption of appropriate measures to avoid pollution and deterioration of its habitats, according to the so-called 'Birds Directive' (currently repealed)[683]. This case is of primary importance for the matter of discussion because it contains an explicit declaration supporting the supremacy of economic interests over environmental ones, which is formulated by a member State. In effect, the Spanish government upheld that '[…] *the* ***ecological requirements*** *laid down in that provision* ***must be subordinate*** *to other interests, such as social and* ***economic interests****, or must at the very least be balanced against them*'[684]. Namely, among other reasons, the respondent adduced the classification was going to provoke a reduction of the industrial and fishery sectors in the region, becoming projects less profitable[685]. Moreover, it pleaded the aquaculture activities had only a small ecological impact on the marshes compared with its economic repercussion[686]. Notwithstanding these and other defendant's endeavors to contribute with convincing evidence[687], the Court finally denied its arguments, based

[681] Fipa Group and others (n 722) Resolution.
[682] Case C-355/90 *Commission of the European Communities v Kingdom of Spain* [1993] ECR I-4272.
[683] The reference corresponds to the Articles 3 and 4 of the Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1979] OJ L103/1 (no longer in force), which was later amended by the Commission Directive 97/49/EC of 29 July 1997 OJ L223/9 (no longer in force). Both regulations were abrogated by the Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2009] OJ L20/7.
[684] Commission v Spain (n 737) para. 17th, in concordance to para. 43rd (emphasis added).
[685] ibid para. 45th.
[686] ibid para. 43rd.
[687] ibid para. 25th. The Spanish Government even affirmed to have classified *Santoña* and *Noja* as nature reserves, as an acknowledgment of their ecological value, in 1992.

primarily on a notion of lack of discretion. To that extent, while it is true that Member States possessed certain discretionary margin for the designation of lands as special protection areas, the Court had emphatically made clear the taxonomy should be subjected principally to ornithological criteria[688], avoiding even invoking '[…] *grounds of derogation based on taking other interests into account*'[689]. There has been reiterative case-law in this regard[690]. In either event, one could undoubtedly conclude that, through this particular decision, the Court promoted the preeminence of environmental grounds over property rights.

***Commission of the European Communities v Ireland*[691]** is another example in a similar vein. In this case, the Court–among other breaches–declared the defendant had failed, save for punctual exceptions[692], to fulfill its obligations regarding the classification as special protection areas (SPAs) of '[…] *all the most suitable territories in number and size for the species conservation of wild birds* […]'[693], according to the same Directive 79/409/EE, but on its reformed version of 1997[694]. Although the context of the case does not really deal with property rights in contrast to the environment, but rather the conditions and periods of transposition and application of European law to the national one, the question of ownership appears quite clear and concrete. Effectively, the Commission stated that '[…] *the Irish authorities* […] *have in many cases limited SPAs to sites in public ownership and have not classified sites seriously contested by economic interests*'[695], what would entail, after a

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[688] ibid para. 26th.
[689] ibid para. 18th.
[690] Notwithstanding this argument could sound somehow contradictory, it is actually not. To Krämer, Member States had the duty to designate special protection areas, according to the '[…] *clear and unambiguous wording of Article 4(1)*' of the already abrogated Council Directive 79/409/EEC. For their part, Jans and Vedder, who share this opinion, have added the argument about the lack of an express grounds allowing exceptions within the Directive. Nonetheless, as the Court itself had admitted, albeit there was certain discretion to choice those territories, there was not the same discretion to exclude them from the classification. '*If that were not so*, [the CJEU declares] *the Member States could unilaterally escape from the obligations imposed on them by Article 4(4) of the directive with regard to special protection areas*'. Krämer, *EU Casebook…* (n 628) 287; Jans and Vedder (n 631) 452-4; Council Directive 79/409/EEC (n 738) Article 4(1); Case C-57/89 *Commission of the European Communities v Federal Republic of Germany* [1991] ECR I-924, para. 20th. Other precedents of the Court's criteria about the inapplicability of autonomous derogations, for example, in Case C-247/85 *Commission of the European Communities v Kingdom of Belgium* [1987] ECR I-3057, para. 8th; Case C-262/85 *Commission of the European Communities v Italian Republic* [1987] ECR I-3094. The preceding cases have been used as jurisprudence indistinctly by the Court, and quoted by Krämer, Jans and Vedder, even appearing in the universe of documents. However, they did not contain any terms to be included in the present selection of cases, so that they were automatically discarded.
[691] Case C-418/04 *Commission of the European Communities v Ireland* [2007] ECR I-10997.
[692] ibid Decision, para. 1st. The exceptions comprised those territories aimed at ensuring the conservation of the Greenland white-fronted goose (*Anser albifrons flavirostris*), the lapwing (*Vanellus vanellus*), the redshank (*Tringa totanus*), the snipe (*Gallinago gallinago*), the curlew (*Numenius arquata*), and other regularly occurring migratory species not mentioned in Annex I of the Directive.
[693] ibid
[694] Council Directive 79/409/EEC (n 738) Article 4(1) and (2).
[695] Commission v Ireland (n 746) para. 125th.

simple inference, that respondent used to execute the taxonomy of areas somehow in favor of private property; i.e. put in practice what Spain adduced in principle in the previous case. In the end, the CJEU accepted that Commission's plea and ruled against the respondent, Ireland. One remarkable aspect of the decision was the employment of the concept of '*public interest*'[696], taken from the so-called Habitats Directive[697]. Unlike the 'Birds Directive'[698] [currently in force], the Habitats Directive stipulates a condition of exception to undertake programs or projects in special areas of conservation, despite their potentially negative assessment, when it deals with '[…] *imperative reasons of overriding public interest, including those of a social or economic nature* […]'[699]. Nonetheless, the condition is the non-existence of alternative solutions[700]. In any event, beyond the fact that the Court disallowed this argument, pleaded by Ireland as a justification for the maintenance of the drainage ditches in Glen Lake[701], it does constitute formally an assumption–even being exceptionally applicable–in which legal system guarantees the preeminence of property rights over environmental issues.

4.2.4 The implementation of public and private projects

The execution of public and private projects is probably one of the best examples where the tensions between property rights and environmental protection become visible. Indeed, although the kernel of the disputes does not rest always upon questions associated with ownership, it often appears as the motivation of revisions of permits, monitoring or even lawsuits. To illustrate this assertion, one can utilize the process about the preliminary ruling petitioned by the Austrian Administrative Court (*Verwaltungsgerichtshof*) previously to the resolution of the action brought by the ***Municipality (Marktgemeinde) of Straßwalchen and others v the Federal Ministry for Economy, Family and Youth (Bundesminister für Wirtschaft, Familie und Jugend)***[702]. The national tribunal's main inquiry bore upon the pertinence of categorizing a trial production of natural gas, authorized to the company *Rohöl-Aufsuchungs AG* without any environmental evaluation, as an '*extraction for commercial*

[696] ibid paras. 260th and 261st.
[697] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7, Articles 6(4) and 16(1c).
[698] Reference to the Directive 2009/147/EC (n 738)
[699] Directive 92/43/EEC (n 752) Article 6(4).
[700] ibid
[701] ibid paras. 170th and 171st.
[702] Case C-531/13 *Marktgemeinde Straßwalchen and Others v Bundesminister für Wirtschaft, Familial und Jugend* [2015] ECR electronic publication.

purposes'[703], given that the so-called [currently repealed] EIA Directive provided that this kind of extractions had to count on an environmental impact assessment, so long as the extracted amount exceeds 500 thousand cubic meters per day[704]. Therefore, pursuant the very contents of the permit, the dispute revolved around the profitable nature of the exploratory drilling operations, aimed at determining if this industrial activity would be economically viable in the future[705]. In the end, although the CJEU rejected the arguments formulated by the claimants, considering that a drilling intended for establishing the cost-effectiveness of a natural source does not come within the scope of the invoked provisions, it did rule about the obligation of counting on an environmental assessment, grounded on a different provisions within the same Directive[706], due to the fact that it was dealing with a deep drilling up to a depth of 4 150 meters[707]. To sum up, albeit this decision denotes the preeminent value that nature can depict over property rights before the Court, at least in this particular occasion, it also allows noticing that it is not rare that national public authorities and private entities align themselves with the notion of economic interests, even defending conceptually the scope of those arguments. Under these circumstances, at least during the administrative procedure, it turns out quite curious that nobody seems to represent the nature's interests; in fact even though the Municipality appears in the course of the judicial phase of the process, one cannot forget it is accompanied by a group of potential affected people[708].

This alluded lack of representation is more noticeable when the Court's rulings are supposedly in contradistinction to environmental protection. Thus, in ***Commission of the European Communities v France***[709] the Court dismissed an allegation of failure by France to fulfil its obligation by having declassified part of the *Marais Poitevin intérieur* as a special

[703] ibid para. 18th (1).
[704] In consonance with the CJEU's ruling, the allusion involves the Council Directive 85/337/EEC (n 633), amended by the Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation 1013/2006/EC (Text with EEA relevance) [2009] OJ L140/114. However, one should take into account the point # 14 of Annex I at issue was included through the Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1997] OJ L73/5 (no longer in force). All these directives were abrogated by the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance [2012] OJ L26/1, which constitutes the legal framework currently in force. Within this legal text, the normative reference of the case is still the point # 14 of Annex I.
[705] Marktgemeinde Straßwalchen and others (n 757), para. 12nd.
[706] Council Directive 85/337/EEC (n 633), Article 4(2) and Annex II, point # 2(d).
[707] Marktgemeinde Straßwalchen and others (n 757), para. 10th, Resolution (para. 2nd).
[708] ibid paras. 2nd and 10th.
[709] Case C-96/98 *Commission of the European Communities v French Republic* [1999] ECR I-8548.

protection area, through a reduction in its surface[710], in order to construct the motorway link between *Sainte-Hermine* and *Oulmes*[711]. This project had been declared of *public utility* and urgent, and had accomplished the requirements of compatibility with the land use, public inquires and the environmental impact assessment, according to the [currently repealed] Council Directive 85/337/EEC[712]. France got advocated from the accusation alleging a mistake by which '[…] *a 300-metre wide area was included in the Marais Poitevin intérieur SPA when it was notified to the Commission in November 1993*'[713]. Moreover, the defendant assured this spot of land did not really form part of the special protection area and the final selected route avoided any existing or potential special protection areas[714]. Lastly, the Court corroborated France's pleas and accepted the respondent had committed an error of communication, discarding therefore the claim in this specific point[715]. According to preceding Court's interpretations[716], there was not an infringement of the Birds Directive[717] because France had not discretionally reduced the extent of that area[718]. That area simply did not form part of the SPA. Nevertheless, it draws attention why the Court did not even spare a glance at the Commission's argument about the environmental effects of the motorway construction. There is only a brief mention about the disturbance of birds by virtue of the completion of works and, even more important, '[…] *the isolation of the remainder of the SPA east of the project towards Fontenay-le-Comte, which will be cut off entirely from the SPA by the motorway*'[719]. Drawing an analogy with property rights, although it did not deal with a private project, one could affirm there is also a tension against environmental protection when public interests are involved and, as one can notice in this case, they sometimes are imposed.

In contrast, the Court does not always align with the Member States' opinions when it deals with the building of public projects. An example can be found in ***Commission of the European Communities v Spain,*** in which the CJEU judged against the Spanish government due to the lack of '[…] *an assessment of the effects on the environment of the project for a*

[710] ibid para. 56th.
[711] ibid para. 48th.
[712] ibid para. 48th, Council Directive 85/337/EEC (n 633), Articles 3, 6(3).
[713] Commission v France (ibid) para. 52nd.
[714] ibid para. 51st.
[715] ibid para. 56th.
[716] See Commission v Spain (n 737) para. 35th; Commission v Germany (n 745) paras. 20th to 22nd. More examples also in note 745.
[717] Directive 79/409/EE (n 738) Article 4(4).
[718] Commission v France (n 764) para. 50th.
[719] ibid para. 49th.

Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed'[720]. Therein, the chief exculpation set out by the defendant consisted of the environmental impact assessment was not necessary for those works implying an enhancement of existing infrastructure; namely, the installation of a single track did not constitute the construction of a new railway line[721]. Beyond the environmentally friendly character of this ruling, what one should emphasize is the fact that the intervention of a supranational entity is sometimes required in order to avoid certain overindulgence in the application of national, and sometimes even international, legislation. From a brief analysis of the Spanish government's discourse one can infer a marked bias in favor of the execution of public works, mainly characterized for the use of the expressions 'not necessary', 'not required', 'not applicable', 'not intended', 'not apply' or 'not subjecting to'.

An additional interesting ambit of analysis derives from the application of the Aarhus Convention[722] and other related regulations, such as it occurs, for one, in the preliminary ruling required by the Supreme Court of the Slovak Republic (*Najvyšší súd Slovenskej republiky*) regarding the judicial dispute between ***Jozef Križan and others v the Slovak Environment Inspectorate (Slovenská inšpekcia životného prostredia)***[723]. By and large, the main proceedings dealt with an integrated permit in favor to *Ekologická skládka* to construct and operate a landfill site in a former quarry, located in the town of Pezinok, Slovakia[724]. Jozef Križan, along with other 43 residents, filed lawsuit against a second instance's administrative decision of 18 August 2008[725], by which the Slovak Environment Inspectorate (*Slovenská inšpekcia životného prostredia*) had rejected an ensemble of objections concerning the inconsistency of the 2006 amended urban development plan, the refusal to disclose the location of the landfill site, and the incompatibility between the environmental protection and the insufficient distant of the place with respect to the closest human dwellings[726]. Given that the Bratislava Regional Court (*Krajský súd*) had dismissed this judicial claim in December 2008, the petitioners lodged an appeal before the Supreme Court of Slovakia (*Najvyšší súd Slovenskej republiky*), whose result was favorable to them

[720] Case C-227/01 *Commission of the European Communities v Kingdom of Spain* [2004] ECR I-8268, Resolution.
[721] ibid para. 37th.
[722] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 20 October 2001, UN Document No. 37770, United Nations Treaty Series, vol. 2161, p. 447, Article 9 (2) and (4). Hereinafter, Aarhus Convention.
[723] Case C-416/10 *Jozef Križan and Others v Slovenská inšpekcia životného prostredia* [2013] ECR electronic publication.
[724] ibid para. 33rd.
[725] ibid para. 46th.
[726] ibid para. 44th.

because this tribunal decided to suspend and annul the Inspectorate's integrated permit in May 2009, predicated mainly on the fact that the Inspectorate '[…] *had failed to observe the rules governing the participation of the public concerned in the integrated procedure and had not sufficiently assessed the environmental impact of the construction of the landfill site*'[727]. Nevertheless, *Ekologická skládka*–the company affected by the permit suspension–brought a claim before the Constitutional Court (*Ústavný súd Slovenskej republiky*), obtaining a revocation of the Supreme Court's ruling[728]. Among other reasons, the Constitutional Court overruled the appealed decision arguing the infringement of the company's ***right to peaceful enjoyment of its property***[729], recognized by both the Slovakian Constitution[730] and the Additional Protocol to the European Convention on Human Rights[731]. Furthermore, it determined that the Supreme Court had exceeded its powers by examining the legal principles of the environmental impact assessment, '[…] *even though the appellants had not disputed them and it lacked jurisdiction to rule on them*'[732].

Beyond the appropriate or inappropriate legal implications over public participation in projects of green relevance or decision-making processes–a particular aspect that one could separately discuss–the lack of a tribunal's jurisdiction to decide about environmental questions unfailingly leads to an absence of representation concerning ecological interests or, at least, the interests of those people to whom the potential environmental harms could affect. Without appearing too much exaggerated, the fact that *Ekologická skládka* has submitted the missing document about the project's location to the national authorities on the condition that it is not revealed to the other parties, grounded on reasons of commercial confidentiality[733], illustrate quite clearly how a private interest could unfairly restrict the exercise of people's rights, let alone nature's ones. It even arises an inference about the invocation of the precautionary principle, albeit this argument was not really advocated by any litigant during the whole procedure, owing to the construction of a landfill site always implies a threat of serious damage, even more, when there is any doubt about the temporal validity of the environmental assessment[734], in whose case one could plead also lack of

[727] ibid para. 41st.
[728] ibid para. 42nd and 43rd.
[729] ibid para. 43rd.
[730] Article 20(1) of the Constitution of the Slovak Republic No. 466/1992 Coll. and its amendments, in Andrej Kiska, prezident Slovenskej republiky <www.prezident.sk/upload-files/46422.pdf> accessed 28 December 2018.
[731] Additional Protocol to the European Convention on Human Rights (1952) Article 1.
[732] Križan and others (n 778) para. 44th
[733] ibid para. 47th (2).
[734] ibid para. 92nd.

scientific certainty. Thereon, the CJEU has been strict in rejecting the use of trade secrets as a justification of any breach of the Aarhus Convention or the European law, even throughout different institutional reports[735].

Actually, solely one of the five questions posed by the national tribunal to the CJEU had to do strictly with property rights, although it could be said the second query was somehow relating to them as well, in terms of the commercial or industrial confidentiality. In effect, the inquiry dealt with the possibility of interfering '[…] *unlawfully with an operator's right of property* […] *by means of a judicial decision meeting the requirements* […]'[736] of international and European law, in the matters of public participation and environment. There are several relevant regulations thereon. Firstly, the pertinent section of the Aarhus Convention lays down that each party should ensure that the public concerned has the access to review any proceeding before an autonomous and neutral entity established by law and bring into question the legality of any ruling[737]. For this purpose, the procedures should '[…] *provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive*'[738]. In context, beyond the favorable or disadvantageous nature of the administrative and judicial results obtained by Križan and the other plaintiffs throughout the different instances of the public proceedings, one can corroborate that both the Slovakian authorities and the legal system represented a warranty of the aforesaid Aarhus Convention's provisions in this field, implying by no means a hindrance to the exercise of property rights. In consequence, this was precisely the opinion of the CJEU regarding this point to reply the fifth question, i.e. the implementation of the international law was '[…] *not capable, in itself, of constituting an unjustified interference with the developer's right to property* […]'[739]. Secondly, within the text of the adjudication, there is an allusion to the [currently abrogated] Directive 96/61, which contained a very alike provision[740] to that one already cited as part of the Aarhus Convention, establishing the same

[735] For example, see Court of Justice of the European Union, *Fact sheet: Public Access to Environmental Information* (Research and Documentation Directorate 2017), 10
[736] ibid para. 47th.
[737] Aarhus Convention (n 777) Article 9(2).
[738] ibid Article 9(4).
[739] Križan and others (n 778) para. 116th.
[740] According to the text of the CJEU's ruling, the reference corresponds to the Article 15a of the Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [1996] OJ L257/26 (no longer in force), in its modified version by the Regulation 166/2006/EC of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC [2006] OJ L33/1 (currently in force). However, the extract quoted in the adjudication was not really incorporated by the alluded Regulation 166/2006/EC. Indeed, the correct reference about the insertion of Article 15a is located in the set of amendments to the Directive 96/6/EC, issued in the Article 4(4) of the Directive 2003/35/EC of the European

procedural guarantees of access to decisions, acts or omissions concerning public participation, so that both analyses turn out notoriously interconnected. Finally, one last reference corresponded to the [presently repealed] Directive 85/337[741] concerning to the necessary environmental assessment of the effects of the projects, an aspect that does neither alter the exercise of property rights in any shape or form.

By way of conclusion, notwithstanding the CJEU denied the arguments, upheld by both the enterprise and even the Constitutional Court, about the impairment of property rights by means of the suspension of the effects of a ruling, one should not completely ignore the fact that the representation of environmental interests, and even people's, are often ineffective at national level, judicially speaking. The intervention of the CJEU turns out once again crucial, as far as the environmental restrictions of ownership can be invoked in favor of the general interest and its social function[742], i.e. prioritizing the people's rights to participate in the public decision-making processes and the protection of nature over private interests.

4.2.5 Control of pollution and overexploitation of natural resources

The second side of the same coin could be found, for instance, in ***Commission of the European Communities v Republic of Austria***[743], in whose case the CJEU ruled against the latter for having failed to fulfill its obligations regarding the free movement of goods[744]. Initially, the respondent had imposed an outright ban on the circulation of trucks of more than 7.5 tons, carrying certain commodities, through a section of the A12 motorway in the Inn valley[745], a measure justified on grounds of protecting both human health and

Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17 (currently in force as well). Some years later, the Council Directive 96/61/EC was repealed by the Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version) [2008] OJ L24/8 (no longer in force), in which the provision at issue was codified in the Article 16. The latter was finally repealed by the Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) Text with EEA relevance [2010] OJ L334/17, which is currently in force and whose respective provision is located in Article 25.

[741] Council Directive 85/337/EEC (n 633) Article 2(1) and (2).

[742] Križan and others (n 778) paras. 113rd and 114th. The Court employed the recurrent case-law to support its judgment in this case, i.e. ERG and others (n 707) paras. 80th and 81st; Procureur de la République v ADBHU (n 668) para. 13rd; Commission v Denmark (n 668) para. 8th; Outokumpu Oy. (n 668) para. 32nd.

[743] Case C-320/03 *Commission of the European Communities v Republic of Austria* [2005] ECR I-9907.

[744] Consolidated Version of the Treaty on the Functioning of the European Union (n 655) Articles 28 and 29.

[745] Governor's Ordinance 279 for restricting the traffic on the A12 motorway in the Inn valley (sectorial driving prohibition) in the Federal Law Gazette of 27 May 2003. Originally in German: Verordnung des Landeshauptmannes, mit der auf der A 12 Inntalautobahn verkehrsbeschränkende Maßnahmen erlassen werden (sektorales Fahrverbot), im Bundesgesetzblatt für die Republik Österreich. <https://www.ris.bka.gv.at/Dokum

environment[746], and even based on the accomplishment of the [currently repealed] Directive 96/62/EC[747], particularly regarding the application of plans or programs to reduce the atmospheric emissions of pollutants in those zones in which the levels were higher than the limit value plus the margin of tolerance[748].

According to the Commission's criteria, Austrian prohibition was discriminatory against alien undertakings, by affecting more than 80% of foreign users of this vital route of communication among various countries, and less than 20% of national transporters[749]. Following the CJEU's argument, the environmental reasons invoked by the defendant to have taken the measure restricting the vehicular traffic were dismissed because they could not be described as a plan or a program linked to specific exceeded permissible limits in the meaning of the terms established by the aforementioned Directive[750]. To that extent, the applicant upheld the circulation constraint was taken for unlimited duration, which was not compatible with the temporary and urgent condition prescribed by the European regulation[751], despite it rather refers to the adoption of measures aimed at reducing the risks of exceeding limit values or alert thresholds, including the suspension of motor-vehicle traffic[752]. In other words, although the claimant itself recognized the permissible limit under the directive for nitrogen dioxide, increased by the margin of tolerance, was clearly exceeded in 2002[753], the Court declared the prohibition of traffic was a too much radical measure that affected the transit of goods, even suggesting–without any mention in particular–the possibility of taking alternative or less restrictive actions to transport them[754].

Summing up, this is an example in which the Court did not have doubts about the preeminence of private economic interests over environmental issues, despite its judges were expressly aware that environmental protection consisted of one of the core aims of the

ente/BgblPdf/2003_279_2/2003_279_2.pdf> accessed 19 December 2018. See also Commission v Austria (n 798) para. 1st.

[746] Commission v Austria (n 798) para. 58th.

[747] Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management [1996] OJ L296/55 (no longer in force). This directive was repealed by Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L152/1. See also Commission v Austria (n 798) para. 50th.

[748] Commission v Austria (n 798) para. 51st.

[749] ibid para. 38th. Jans and Vedder share this argument of the Commission. See Jans and Vedder (n 631) 249.

[750] Council Directive 96/62/EC (n 802) Article 8(1) and (3); Commission v Austria (n 798) para. 82nd.

[751] Commission v Austria (n 798) para. 40th.

[752] Council Directive 96/62/EC (n 802) Article 7(3).

[753] Commission v Austria (n 798) para. 40th.

[754] ibid para. 87th. Jans and Vedder interpret this assortment as a duty for the Member States. See Jans and Vedder (n 631) 255

Community[755]. Austrian defenders even remarked that economic effects were not enough reason to regard the contested regulation as illegal, owing to the market of transportation industry was already characterized by structural overcapacity and extremely low-profit margins[756], so that somehow the impact over property rights was actually insignificant. It calls attention, however, the lack of arguments regarding the risks of exceeding the permissible limits to justify the ban. If there was an antecedent of excessive pollutant emissions in 2002, one may wonder why the Court did not even consider the possibility that air quality was in jeopardy. Since then, lorries' drivers continued to use the road until May 2003, when the prohibition was issued. There was not even a comparative analysis between the economic effects and the impacts derived from the atmospheric emissions, which would allow knowing whether environmental matters had any kind of real influence over the decision.

One last reflection. Albeit the respondent clearly represented the environmental aspects in this case, it turns out quite difficult to dissociate its economic motivations from the ecological ones. One does not need to read between the lines to notice the Court strongly believed in the existence of discrimination towards foreign competition, when it asserted the prohibition infringes the principle of proportionality[757], and above all if one takes into account of the interrelation between percentages of potentially affected trucks (80% non-Austrians and 20% Austrians), displayed by the plaintiff. In addition, Austria also rejected one of the alternative solutions proposed by the Commission and the other intervening Member States (Germany, Italy and The Netherlands), arguing more or less the same economic reasoning the Commission used, i.e. the banning of EURO vehicles (types 0, 1 and 2) would be disproportionate, by affecting around the 50% of the heavy goods traffic[758].

Another situation in which the tension between environmental protection and property rights is visible can be found in the field of agricultural production. As a matter of fact, in the preliminary ruling requested by the Greek Council of State (*Simvoulio tis Epikratias*) for the dispute between the limited liability company ***Agrooikosystimata EPE v the Ministry of Economy and Finances (Ypourgos Oikonomias kai Oikonomikon and others)***[759], for example, one can perceive the preeminence of the category of agrarian producer as the key

[755] ibid para. 72nd. Concerning environmental protection as one of the essential community's objectives, see also note 668.
[756] ibid para. 55th.
[757] ibid para. 91st.
[758] ibid para. 59th.
[759] Case C-498/13 *Agrooikosystimata EPE v Ypourgos Oikonomias kai Oikonomikon and others* [2015] ECR electronic publication.

motive to be awarded a state grant. Effectively, the sole question posed to the CJEU consisted of the interpretation of those regulations concerning the qualification of *Agrooikosystimata EPE* as one of the beneficiaries of the '*long-term set-aside scheme for agricultural land*' (LTSAS)[760]. To put it simply, the Council asked if it was enough that the enterprise assumes the financial risk and the management of the land or if it was necessary to have the condition of '*farmer*', as a prerequisite for being able to receive financial aid in conformity with the European law. The central discussion regarding property rights was concentrated at the interpretation of the [no longer in force] Regulation 2078/92, whose scheme consisted mainly of the award of financial support for *farmers,* on the condition of positive effects on the environment and the countryside[761]. To that extent, *Agrooikosystimata* had leased an area of more than 237 hectares to establish biotopes and ecological parks, which allowed it to be part of the program in 1997[762]. Nevertheless, in 2007, the Director for Agricultural Development of the Prefectural Administration of Magnesia resolved to exclude the company from the program, arguing the inclusion of the leased lands was aimed at commercial and lucrative purposes and *Agrooikosystimata* had not suffered any loss of agricultural revenue, as a consequence of the inclusion of those lands into the program[763]. In fact, the company did not seem to practice any farming activity. Later, the Administrative Court of Appeal of Larisa (*Dioikitiko Efeteio Larisas*) rejected the appeal brought by *Agrooikosystimata*, grounded on more or less the same terms alleged by the Director for Agricultural Development[764]. Finally, beyond the idiomatic incongruences about how to understand the scope of the expression '*farmer*'[765], the CJEU ruled the regulation had to '[…] *be interpreted as meaning that only persons who have previously produced*

[760] ibid para. 26th.
[761] Council Regulation 2078/92/EEC of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside [1992] OJ L215/85 (no longer in force), Article 2(1). This regulation and its subsequent amendments have been progressively replaced by a succession of regulations since 1999 (starting from the Regulation 1257/1999/EC). Currently, the Regulation 1305/2013/EU is in force. See Council Regulation 1257/1999/EC of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations [1999] OJ L160/80 (no longer in force), repealed by the Council Regulation 1698/2005/EC of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) [2005] OJ L277/1 (no longer in force), repealed by the Regulation 1305/2013/EU of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 [2013] OJ L347/487, in force.
[762] Agrooikosystimata (n 814) para. 14th.
[763] ibid para. 20th.
[764] ibid para. 24th.
[765] ibid para. 31st.

agricultural products could benefit under the long-term set aside scheme for agricultural land […][766].

Notwithstanding the ruling cannot be considered entirely eco-friendly, one should hardly reproach the Court's opinion, given that it follows the literal sense of the regulation at issue. It draws attention, however, how the argument of private interest can be aligned with the environmental protection, to the point of being useful to discard an argument pro nature, such as the establishment of ecological areas, in favor of protecting agricultural activities. In other words, the Court recognized the environmental objectives of the regulation as simply secondary ones[767], even supporting its opinion through previous jurisprudence[768], what could be construed as a contradiction, above all if one thinks about the regulation was intending to promote more adequate methods, environmentally speaking, for the practice of agrarian activities[769]. Therefore, setting aside the legitimacy of the profitable or unprofitable ends of the company, it turned out more valuable to have eco-friendly farming than conservation activities from the perspective of the LTSAS program.

Jans and Vedder are of the opinion that the Court has separately addressed farming and environmental protection, as a result of having '*dissociated*' itself the doctrine of the indivisibility[770] of the common agricultural policy (CAP)[771]. In fact, the Court has pointed out expressly that '[…] *there is nothing in the case-law to indicate that, in principle, one should take precedence over the other*'[772]. In that sense, the authors believe in the Court has also employed the 'center of gravity' doctrine[773] to solve the legal conflict between both ambits[774], quoting as an example the Huber case[775].

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[766] ibid ruling.
[767] ibid para. 43rd.
[768] In the decision about the preliminary ruling, requested by the Austrian Supreme Court (*Oberster Gerichtshof*) for the case between the ***Republic of Austria (Republik Österreich) v Martin Huber,*** the CJEU had already stated that, although the Regulation 2078/92 aimed at fostering more eco-friendly ways of production, their character was merely '***ancillary***'. See Case C-336/00 *Republik Österreich v Martin Huber* [2002] ECR I-7736, para. 36th.
[769] Regulation 2078/92/EEC (n 816) Article 1.
[770] Following to Justice René Barents, Jans and Vedder explain that the principle of indivisibility of the common agricultural policy imply the inclusion of everything necessary for its management, for example, the attainment of free movement, price intervention measures, external relations, and so on. Jans and Vedder (n 631) 78.
[771] ibid 79.
[772] Case C-164/97 *European Parliament v Council of the European Union* [1999] ECR I-1153, para. 15th. The reference is quoted by Jans and Vedder, ibid 78.
[773] The center of gravity doctrine refers to the methods of 'interest analysis' or 'contacts approach', often used to choose the applicable law in cases of controversy, particularly concerning public policy. See Gifis (n 473) 97.
[774] Jans and Vedder (n 631) 79.
[775] Huber (n 823).

To recapitulate, by a way of a conclusion, *Agrooikosystimata* decision constitutes an instance of how environmental protection and property rights can be linked in practice, not always being contradictory concepts. It deals with a possibility that rarely occurs, but does occur in the end.

4.2.6 Nature as a commodity

The dispute between the ***Hotel Sava Rogaška v the Republic of Slovenia***[776] is quite probably one of the best examples of a controversy in which the legal discourse concerning property rights totally displace any dimension about environmental protection, setting up a scenario to widely discuss the commercial ends of water resources. Fundamentally, the preliminary ruling petitioned by the Slovenian Supreme Court (*Vrhovno sodišče Republike Slovenije*) focused on the interpretation of the prohibition to merchandise '[…] *mineral water from one and the same spring under more than one trade description*'[777], provided by the Directive 2009/54/EC[778].

The main problem arose when the hotel submitted an application for the recognition of the trade description '*ROI Roitschocrene*' for the extraction of mineral water, discovering that another trade description, '*Donat Mg*', had been recognized some years before for similar reasons, to draw mineral water from the same aquifer[779]. For that reason, the Ministry of Agriculture and Environment refused the application[780]. In this regard, the whole arguments that were set out as part of the proceedings concerned to the legal scope of the term '*spring*' and its associated concepts, such as the aquifer, the body of groundwater, and the points of exit[781]; namely, they addressed exclusively the question associated with the trade of mineral water. The Court even discarded the analysis of the Directive 2000/60/EC[782], arguing essentially the environmental character of its objectives[783], and emphasized the primary purposes of the Directive 2009/54/EC regarding the protection of

[776] Case C-207/14 *Hotel Sava Rogaška, Gostinstvo, turizem in storitve, d.o.o. v Republika Slovenija* [2015] ECR electronic publication.
[777] ibid para. 22nd.
[778] Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters (Recast) (Text with EEA relevance) [2009] OJ L164/45, Article 8(2).
[779] ibid paras. 17th and 18th.
[780] ibid
[781] Hotel Sava Rogaška (n 833) para. 22nd.
[782] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1, Article 1.
[783] Hotel Sava Rogaška (n 833) para. 43rd.

consumers' health and the warranty of a fair market of natural water[784]. Lastly, the CJEU's opinion differed from the claimant's in that it ruled that the notion of '*same spring*' meant to speak about '[…] *one or more natural or bore exits,* […] *which originate*[d] *in one and the same underground water table or in one and the same underground deposit* […]'[785], so that the recognition of new trade descriptions for the same source had no place.

One should wonder, however, why certain aspects were not discussed. For instance, nobody debated about the environmental effects of conferring new rights of extraction, i.e. how was going to be affected the normal flow of mineral water from the deposit [availability], or whether the quantity of existent water was sufficient to satisfy the demand, without impacting the '*carrying capacity*' of the ecosystem. The inexistence of answers within the ambit of this ruling denotes one more time the lack of representation concerning the environmental interests.

4.2.7 Conclusions

The common thread of this chapter has been revolving around the tensions between property rights and environmental protection, as a consequence of the effective court's adjudications in environmental terms. In this regard, it should be warned that conclusions are applicable exclusively within the ambit of the Court of Justice of the European Union, being the selected case study.

As an overall conclusion, at least in the case of the European Court of Justice, although there is a statistically strong correlation between property rights and environmental protection, there is no manner to corroborate any directly proportional interdependence between both variables. Namely, the existence of a significant number of environmental adjudications in which one can identify some implications concerning property rights, no matter the real degree of incidence within the case (e.g. public or private property; claimant's, defendant's or third-party's ownership, and so on) could not be construed as a direct interconnection between property and nature. The correlation solely shows the frequency of appearance of the term property and other semantic associations within environmental rulings, without detailed specificities about its scope, occurrence or prevalence.

[784] Directive 2009/54/EC (n 835) Recital 5th.
[785] Hotel Sava Rogaška (n 833) Resolution.

In effect, the posed research question was initially pretty simple. The idea consisted of analyzing a set of decisions conducive to determining if the judges ruled in favor of property rights and in detriment of natural resources. To some extent, the question gave somehow the impression that the defense of property was directly proportional to the detriment of nature. Therein, in light of data, one is able to formulate several important remarks. The first issue of significance lies in the fact that decisions are heterogeneous so that they do not necessarily follow a specific pattern, and they are not absolute, which means their scope is changing over time. In practice, it essentially signifies that the CJEU does not always rule against nature in those cases where one can perceive any kind of tension with property rights. In fact, it seems the bulk of situations are settled through an eco-friendly decision. Nevertheless, the explanation of this result does not predicate on the international law, strictly speaking, but rather in the community one, where the notion of the 'social function of property' has played a remarkable role limiting the scope of ownership.

In addition, when one scrutinizes the apparent direct proportionality between the defense of property and the depletion of natural resources, so to speak, it curiously seems to be true under this logic of reasoning, but not otherwise. In other words, when the court's ruling is favorable to the protection of property, it indefectibly has negative implications for nature. However, it does not occurs on the contrary, i.e. a decision in favor of environmental protection does not necessarily involves a negative connotations to property rights.

Summing up, the theoretical and legal preeminence of property rights over natural resources, alleged by defenders and promoters of rights of nature actually appears to be more rhetorical than empirically demonstrable in the international field. It does not mean, of course, there is not any decision contrary to nature's wellbeing. Indeed, there are some unfavorable judgments but they are not definitively the majority.

A second question to reply involved the condition of being the owner of the natural resources as a prerequisite to claiming for their environmental protection. As it has already been explained, this research question stemmed from drawing inference about the allegations of national courts in the paradigmatic cases quoted in this dissertation. On the one hand, among the main reasons to reject the lawsuit in Sierra Club v Morton, the court adduced that the plaintiff lacked standing to bring the action due to it could not demonstrate a genuine economic interest in the Mineral King Valley. On the other hand, in the cases of Colombia and New Zealand, the petitioners were natives who utilized the natural resources, particularly the rivers Atrato and Whanganui respectively, under ancestral traditions, although they also exerted certain property rights or had some economic interests upon surrounding territories.

Accordingly, the association between both premises led to believe that the probability of obtaining an eco-friendly decision increased if the claimant was the proprietor of the natural resources whose protection was been demanded; or if - at least – s/he exerted some kind of associated right to ownership or some economic interest. Nonetheless, one should reject eloquently this hypothesis, predicated on the data. Indeed, although there are some cases in which the applicant is, at the same, time the owner, they are clearly the minority of the selected adjudications. Moreover, from the total applicants who are owners of the natural resources, only the half of cases could achieve an environmentally favorable decision. The rest was mainly neutral or its impacts were insignificant.

Thirdly, another query concerned the existence of someone who can legally represent the nature's interest before international courts. In the particular case of the CJEU, the response is lawfully and statistically affirmative. Effectively, the power to bring a lawsuit before the Court, by the Member States, institutions, or natural and legal people, constitutes an actual possibility of judicially defending nature's interests or promoting environmental protection. Statistics account for the exercise of this right when one can notice that a little less than a half of the claims are filed by the Members States, while four of each ten are brought by the European Commission, on average, and one of each ten is filed by some institution or natural person, approximately. On the balance of probabilities, these data tend to diminish the state interference in the disputes regarding property and nature, unlike what occurs, for example, before the International Court of Justice, where only states are legitimized to bring an action, which is not always guided by environmental motivations.

In this scenario, the legal openness of the CJEU to rule those claims coming from a variety of litigants, different from the ambit of states, depicts an environmentally favorable provision, even to be replicated. But one has also to admit there is a second side of the same coin, which occurs when nobody is interested in taking the legal actions to protect nature. In those cases, it would be important to count on a specific instance in charge of taking care of natural resources, without depending on someone's good will. The issue becomes even more evident when it deals with the ambit of the International Court of Justice, for example, in whose case an independent representation of nature would not be only necessary but rather imperative.

In this framework, it is worth it to mention the heterogeneity of positions that different states assume with respect to the disjunctive between environmental protection and property rights. In effect, while some national public entities firmly champion the environmental protection over a certain economic interest, others defend openly the opposite under the

umbrella of the 'public interest', or 'general interest' as well, which often means some economic interests entailing property rights. Moreover, while some states show divergences between their institutions of government and their entities in charge of the administration of justice about this subject matter, others even display aligned stances in defense of property rights instead. Under these circumstances, the fact that certain national public institutions take sides could be a matter of criticisms, probably severe ones, but it does not constitute a situation too much disturbing, at bottom, because they are obliged to protect the '*public interest*', whose definition depends directly on themselves. Among other important aspects, environmental issues should be part of that definition, but it does not always occur in practice. However, the fact that a tribunal of justice assumes one or another position is really disquieting, owing to justice has to independently decide. Therein, one has found some requests of preliminary rulings, apropos of the information displayed in this section, in which the arguments coming from national courts tend noticeably to defend economic interests over nature's ones. Although one could understand, but not certainly justify, a state policy biased toward some kind of public interest that places nature in jeopardy, an administration of justice in the same line would be definitively unacceptable. This assumption leads gravely to think about a conflict of interests, and consequently to the lack of representation with respect to the nature's interests.

To recapitulate, in the framework of the European Court of Justice, the question of the absence of legal representation is not necessarily a problem of international law, not even of the Union law. It deals with a problem of national law. The interferences in the common course of the public policy and the administration of justice spring from local legislation. Nevertheless, although state is responsible for the implementation of the environmental public policy, there are several examples–among the selected data–accounting for the questionable impartiality of the said states to represent nature's interests.

In addition, beyond the institutional disagreement of ideas with regard to environmental protection in the inner country, the assortment of views proves the bestowal of legal personality to nature should not be local, but global, which corresponds better to its comprehensive character. Namely, if nature is recognized as a subject of law in a certain country, but it there is not the same acknowledgment within the 'neighborhood', so to speak, it will not matter the scope or the strictness of the ecological efforts the green country takes owing to they are not going to be enough. By a way of an example, the environmental measures and actions one can take to maintain the river clean will not properly work if the neighbor, who is located upstream, dumps pollutant substances. Water will unfailingly come

dirty. In other words, individual actions in this ambit turn out usually ineffective, no matter the level of endeavor.

In that regard, the role assumed by the CJEU has been crucial orienting a more homogeneous and reasoned issuing of green decisions in this type of disputes. Without its intervention, the implementation of numerous environmentally protective actions would not have been possible, in detriment of nature. Notwithstanding, one has to be aware enough to admit that the root of the balance between its independence and influential power lies especially in its regional character, and consequently in the legitimacy it possesses in front of the Member States. This particular circumstance endows the Court a peripheral vision about ecological issues that adapts in a better fashion to the comprehensive character of nature and facilitates it more appropriate enforcement of community and international law. Concomitantly, it also demonstrates the incidence in the inner policy of a country requires a certain level of legitimacy, at the public level, in order to it can be effective to such an extent. In the scheme of things, although the projects are full of the best intentions, such as it occurs in the Tribunal of the Rights of Nature for example, mentioned in the next chapter, their actions will be limited to the scope they are able to attain considering the fact it is a private platform, with a highly restricted power of incidence. Therefore, the environmental relevance of the actions taken by this kind of entities will tend to be more rhetorical than really practical.

To conclude, the last research question regarding this section consisted of evaluating if there are enough warranties to protect natural resources in the current international system of justice. If one directs one's attention exclusively to the CJEU's selected data, the response would be statistically affirmative given that a little less of the ten percent of the sample obtained unfavorable decisions.

On the contrary, what one can actually appreciate, based on the review of the said data, is that the critical cases correspond rather to the local level. Therein lies the tensions between the [public] economic interests and the protection of nature, in which the intervention of the states plays a crucial role. As it has been previously mentioned, if the national public policy's objectives are well defined, and the independence of the national administration of justice is guaranteed, there would not be reason enough to concern. Nevertheless, the problem occurs when one can bring into question serious errors of procedure, either administrative or judicial, or the event brings about far-reaching environmental impacts, among others. Additionally, if states incline to prioritize those public interests over the welfare of nature, the immediate effect will be the absence of defense mechanisms in its favor, meaning

somehow lack of representation as well. Consequently, the international arena would seem the best ambit to look for alternatives.

Fifth Chapter

Nature, a new legal actor in the international arena

5.1 Legal rights and representation of nature and ecosystems

5.1.1 Early antecedents

To contextualize, if one makes do with a peripheral vision about the idea of the recognition of rights of nature, one takes the risk to think it deals merely with '[…] *imaginative legal innovations and prescriptions for radical social transformation* [useless, so to speak] *beyond present institutional or legal scope*'[786]. Nevertheless, a revision in detail of erstwhile records will permit to discover these proposals are not only contemporary novelties to face the environmental crisis, but rather lawful concerns, whose historical roots could be located even in the Renaissance. For example, one of the ancient antecedents is '[…] *the right of the insects to adequate means of subsistence suited to their nature*'[787], a right recognized as a result of a sixteenth-century court proceeding, instituted against a swarm of weevils under the accusation of having plundered the vineyards of the city of Saint-Jean-de-Maurienne, in France[788].

Interestingly, beyond the arguments and explanations about the legal appropriateness of the reasoning, the very nature of this kind of animals demanded from the judges to think about the community, i.e. the swarms, instead of the individuality, i.e. each insect, which in certain sense represents the essence of the ecocentric doctrine. Indeed, swarms were not the only case. Evans remembers that, at the time, practitioners were perfectly aware that natural laws governed the protection of general welfare among animals living in communities, i.e. herds, flocks or swarms, which punished corporally or capitally any potential attack coming from their own members[789].

5.1.2 Modern forerunners

[786] P. S. Elder, 'Legal Rights for Nature: The Wrong Answer to the Right(s) Question' (1984) 22:2 *Osgoode Hall Law Journal* 285, 293.
[787] Evans (1906) 50.
[788] ibid 37.
[789] ibid 34-5.

Around four hundred years later, in 1902, Salmond spoke again about the existence of a community, more or less under the same line of reasoning that ancient practitioners did, focusing on its own welfare[790]. Nevertheless, this time the author referred to the existence of a '*community at large*'[791], wherein humans and animals inhabit together, an aspect that certainly draws near to the ecocentric doctrines in theoretical terms. In principle, the idea does not seem complicated, because the animals are not individually entitled to anything. They are just things. However, the argument turns increasingly obscure when Salmond asserts that animals could be holders of certain rights as fellows of the community, referring specifically to '*particular classes of animals*'[792]. Being goods, animals cannot possess rights by themselves, so that Salmond utilizes the public and charitable trust, which constitutes, as it was previously mentioned[793], another valid mechanism to represent nature in form of goods. Therefore, animals have the right to be part of that trust. To Salmond, both duties and rights do not really correspond to animals, but to the society itself. If one reads between the lines, however, Salmond looks like a fervent believer of animal rights, to the point that he comes to inquire himself if animals could really be deemed holders of rights and have legal personality. He immediately dismisses the possibility, mainly because he consider from the outset they are '[…] *merely things–often the objects of legal rights and duties, but never the subjects of them*'[794], according to the Western traditional principles that guide all his discourse. Curiously, his will to recognize their rights is so strong that he ends up including the animals into the society to attain this goal[795]. Moreover, his arguments are transcendent to the doctrines of nature's rights because they became one of the juridical sources, utilized by the Indian High Court of Uttarakhand at Nainital, in the conferral of legal personality to the rivers Ganga and Yamuna[796], and the glaciers Gangotri and Yamunotri[797].

Another important author to mention is Clarence Morris. He is responsible for the first modern explicit allusion to nature as a subject of law, which appeared in a curious 1964

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[790] John Salmond and Glanville Williams (ed), *Salmond on Jurisprudence* (first published in 1902, Sweet and Maxwell Limited 1957) 352.
[791] ibid
[792] ibid. It is difficult to avoid thinking about the parallelism between this Salmond's conjecture and the case of the beetles in the vineyards.
[793] This Salmond's work is quite probably one of the most remote antecedents of Sax's idea to apply the public trust doctrine to natural resources. Supra note 888.
[794] Salmond and Williams (n 945) 351.
[795] ibid 352. In his own words: '*These duties towards animals are conceived by the law as duties towards society itself. They correspond not to private rights vested in the immediate beneficiaries, but to public rights vested in the community at large – for the community has a rightful interest, legally recognized to this extent, in the well-being even of the dumb animals which belong to it*'.
[796] *Mohd. Salim v State of Uttarakhand & others* (n 7) para. 13th.
[797] *Lalit Miglani v State of Uttarakhand & others* (2017) 63.

essay, prepared apropos of a landscape architecture lesson[798]. At first glance, a couple of interesting facts should be emphasized. On the one hand, Morris was quite probably the first author who gave a name to that human-centered approach seen as a threat to nature; but he employed the expression '***homocentric***'[799], which never came to popularize to the same extent that the term 'anthropocentric'[800] did. On the other hand, one of the key arguments to support the recognition of rights of nature was peculiarly anthropocentric as well, and focusing on the economic need to satisfy the losses experienced by both people and nature affected by others' harmful actions[801]. Morris upholds that '[s]*ome of the costs fall on brutes and things, worth protecting for themselves as well as for their use to men*'[802].

In the transition between the sixties and seventies, some inspiring releases sprang from different sources than legal ones, poetry, activism, journalism, and education; all of them compiled by Nash[803]. Thus, in 1969, the poet Gary Snyder evoked the representation of living nature under the umbrella of what he called 'the wilderness', prompting to formulate a '[…] *new definition of humanism and a new definition of democracy that would include the nonhuman, that would have representation from those spheres*'[804]. In addition, he narrated the experience of Pueblo societies, where a similar kind of democracy he expected was practiced. '*Plants and animals are also people,* [Snyder avows] *and, through certain rituals and dances, are given a place and a voice in the political discussions of the humans*'[805]. Although the academic value of the reference is not obviously juridical, it did play a strategic role at the moment of its publication, mostly aiding to make the legal proposition visible. Snyder's voice was not definitively little something, and it is not nowadays. '*Turtle Island*', the winner of the 1975 Pulitzer Prize for Poetry as a manifest in favor of nature continues to influence contemporary writers, historians, ethicists, and even some scientists[806]. The second mention corresponds to the activist Joan McIntyre, who wrote

[798] Morris (n 256) 185
[799] ibid 189.
[800] The reference about the first academic use of the term 'anthropocentric in Nelson and Ryan (2017).
[801] Morris (n 256) 190.
[802] ibid 191.
[803] Nash (n 19) 127-8, 249.
[804] Gary Snyder, Turtle Island: with "four changes" (first publication 1969, New Directions 1974) 106
[805] Ibid 104.
[806] See, for example, Nash (1989) 249; Jason Wirth, *Mountains, Rivers, and the Great Earth: Reading Gary Snyder and Dōgen in an Age of Ecological Crisis* (Suny Press 2017) 113; David Gilcrest, *Greening The Lyre: Environmental Poetics And Ethics* (University of Nevada Press 2002) 40; Ayako Takahashi, 'The Shaping of Gary Snyder's Ecological Consciousness' (2002) 39:4 *Comparative Literature Studies* 314, 324; Max Oelschlaeger, 'Wilderness, Civilization, and Language' in Max Oelschlaeger (ed), The Wilderness Condition: Essays on Environment and Civilization (Island Press 1992) 271, 303.

in 1971 a book chapter propounding a bill of rights for wildlife[807], whose importance lies mainly in the fact that it pragmatically supports the global insight, addressed previously by Morris. McIntyre suggested that '[…] *any meaningful legislative program must be constructed on a new morality, must be directed at achieving a Bill of Rights for* ***all*** *wild creatures,* ***everywhere***'[808]. The use of the adjective 'all' and the adverb 'everywhere' represents the cohesive character of his proposal, what is doubtlessly confirmed when the author quotes Leopold, to whom he seems to know beforehand[809]. A third source came from a 1971 chronicle about the '*First Constitutional Convention to recognize the existence and rights of the Great Family*', prepared by Harold Gilliam, a newspaperman from the San Francisco Examiner and Chronicle[810]. According to him, the meeting was aimed at asking '[…] *how the Bill of Rights might be rewritten by the national bicentennial in 1976 to affirm not only the rights of man but the rights of all living things–members of the Great Family*'. Beyond this assertion, there is no more specific information about the contents of such a convention, so that it would not be totally adequate to comment it deeply. It would be better to articulate the brief remark that Gilliam made about the aforesaid event with a couple of his own works. Why? Because it looks as though the columnist agreed with the hinted amendment of the Bill of Rights concerning '*all living things–members of the Great Family*', i.e. nature. One might infer this conclusion from the context of the three questions Gilliam posed immediately after the statement about the gathering's aim. Namely, '[w]*hat are the rights of a pelican? A redwood? A stream?*'[811] To decipher his opinion about the rights of nature is necessary to segregate his twofold facet, discarding the scathing journalist he sometimes used to show up within his chronicles[812], and keeping the environmental activist who published a few interesting works about ecological and other personal concerns[813].

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[807] Joan McIntyre, 'A Bill of Rights for Wildlife' in Garrett De Bell (ed), *The Voter's Guide to Environmental Politics before, during, and after the Election* (Ballantine Books, Inc. 1970) 74ff

[808] ibid 76 emphasis added.

[809] ibid 84.

[810] The event and its contents are quoted by Nash (1989) 127, as Harold Gilliam, 'An Equinoctial Ceremony in a Nob Hill Cathedral' *San Francisco Examiner and Chronicle* (San Francisco, 17 October 1971) 31.

[811] Nash (1989) 128

[812] For example, Joel Hedgpeth remembers how Gilliam, overwhelmed by the excess of unnecessary technical data, reported a section from one of the conferences of the U.S. National Commission for UNESCO in his column. '*Clobbered with bushels of horror statistics and predictions of barely conceivable calamities*, [Gilliam wrote] *we could sit there in the meeting rooms of the St. Francis in a kind of stupor and occasionally check our watches to see how long it was until the next meal*'. See Joel Hedgpeth, 'Militant Ecology in San Francisco, the 13th National Conference of the U. S. National Commission for UNESCO: Man and His Environment: A View toward Survival' (1970) 20:6 BioScience 365, 366.

[813] For example, Harold Gilliam, 'The Fallacy of Single-Purpose Planning' (1967) 96:4 *Daedalus, America's Changing Environment* 1142; Harold Gilliam, *Between the devil & the deep blue bay: the struggle to save San Francisco Bay* (Chronicle Books 1969); Harold Gilliam, *For Better or for Worse: the Ecology of an Urban Area* (Chronicle Books 1972), among others.

From a broad overview, one can observe that Gilliam continuously oriented his discourse towards the maintenance of a balanced relationship between humans and nature, public and private interests, and even current and future generations. These ideas, recurrent within his texts[814], are precisely the starting point to infer he champions somehow the position about rights of nature, above all when he asserts that '[e]*very species, including Homo sapiens, must live in balance with its natural environment*'[815]. To him, '[…] *the fate of wildlife reflects the inconsistencies of man*', who firstly destroys the species and later, feeling regretful, strives to save the survivors[816]. It provokes an impasse, he states, a '[…] *conflict concerned a deadly serious matter: the relation of man to his environment, particularly to* ***the community of plants and animals to which he belongs***'[817]. Summing up, although one can perceive an anthropocentric root in his statements[818], Gilliam sees a natural community integrated by humans as well, thus he could be considered as one of the genuine pragmatic forerunners. Finally, the last no legal allusion refers to an educational researcher, Thomas Colwell Jr., whose academic interests have been strongly relating to environmental education since the end of the sixties, emphasizing precisely the recurrent idea about [hu]man as part of nature[819]. To him, humans belong to a '*natural community*', understood as a wholeness of diverse parts, where coexists together both a struggle for resources to live and an ecological law that intricately checks the system, in order to maintain a relative balance[820]. Nevertheless, his contribution does not stay only in the ambit of the ecological implications[821], as Nash points out[822], but it goes further. As an educator, Colwell believes firmly '[w]*hat a genuine environmental education needs to do above all is to foster a recognition of the full implications of the simple and oft-repeated truth that man is part of Nature*'[823]. Moreover, his main ethical source is Dewey himself, the celebrated philosopher to whom several authors attribute being one of the founders of *pragmatism,* along with

[814] ibid (*Between the devil…*) 52, 92, 99; (*For Better or for Worse…*) 47, 120, 127, 132, 151, 169.
[815] ibid (*For Better or for Worse…*) 120.
[816] ibid 125.
[817] ibid (emphasis added).
[818] For example, the author upholds that '[t]*here is a point at which the conquest of nature becomes overkilled. At that point man jeopardizes his own life-support system*', ibid 120.
[819] See, for example, Thomas Colwell Jr., 'The Ecological Basis of Human Community' (1971) 21:4 *Educational Theory* 418, 425; Thomas Colwell Jr., 'The Laying on of Environmental Education (1975) 1:3 The Review of Education 390, 399; Thomas Colwell Jr., A Critique of Behavior Objectives Methodology in Environmental Education' (1976) 7:3 *The Journal of Environmental Education* 66-71, 67.
[820] ibid (*The Ecological Basis…*) 424.
[821] ibid 424-5, 428. Colwell cites repeatedly ecological principles to support his ideas, based on works of ecologists, such as Paul Sears 'Utopia and the Living Landscape', (1965) 94:2 *Daedalus* 474.
[822] Nash (1989) 249.
[823] Colwell, *The Laying on…* (n 975) 399. In the same sense Thomas Colwell Jr., 'Every school should have a garden' (1979) 43:3 *The Educational Forum* 345, 347.

Charles Sanders Peirce and William James[824]. Considering certain aspects concerning holism[825], Colwell devotes a book review about some commentators of Dewey's works, focusing mainly on how Dewey addresses the relationship between humans and nature, but also highlighting the notion about humans as part of a nature, assumed as a biological organism[826].

In 1971, Earl Murphy wrote a somehow obscure essay [by the way considering this research focus], '*Has Nature Any Right to Life?*', mainly aimed at contrasting the different dimensions between the urban areas and the countryside, in which one can find an assertion concerning the following idea: '*If ends are influenced by intermediate procedures, there seems to be forming out of nature a kind of entelechy implying a term to all things*'[827]. One should concur with Nash, however, about the fact that '[…] *the title is more provocative than the text*'[828].

Reviewing Roderick Nash's compilation, one can notice the inclusion of two additional sources within the context of what he calls the '*anticipation of Stone's inquiry*' in one of the footnotes[829]. At first sight, given that both are quoted immediately after the reference about Murphy, one would tend to think they are also useful to support the ideas about rights of nature. Nonetheless, after a brief examination, one can conclude that none can be deemed as a valid reference in this case. It transpires that Nash included them because these works denoted reflections about 'environmental rights', but the author himself seems to dismiss them. Atkinson's doctoral dissertation[830], Nash comments, '[…] *examines human rights **to**, rather than the rights **of**, nature*'[831], what entails that it is not a valid source to support the proposition about rights of nature; while Yannacone and Cohen, in their 1971 book, affirm in essence that '[e]*nvironmental rights are simply a further recognition of basic human rights* [or] *an extension of already recognized civil rights and a step toward judicial*

[824] Christopher Hookway, 'Pragmatism' in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Summer Edition 2016), <https://plato.stanford.edu/entries/pragmatism/> accessed 26 November 2018.
[825] A quite thorough analysis about Dewey's holism in Hugh McDonald, *John Dewey and Environmental Philosophy* (State University of New York Press 2004) 109-22.
[826] Thomas Colwell Jr., 'The Relevance of John Dewey: A Review of Four Books on Dewey' (1970) 10:1 *History of Education Quarterly* 113, 117.
[827] Earl Murphy, 'Has Nature Any Right to Life?' (1971) 22 *The Hastings Law Journal* 467, 482.
[828] Nash (1989) 248.
[829] ibid
[830] David Atkinson, *The relationship between man and nature: moral endorsement and legal recognition of environmental rights* (Thesis/dissertation, University of Maryland, College Park 1972).
[831] Nash (1989) 248.

protection of fundamental human rights'[832], what implies it is neither useful to underpin the dissertation aim.

5.1.3 Christopher Stone

In 1972, Christopher Stone explicitly wrote that he was quite seriously proposing *'*[…] *to give legal rights to forest, oceans, rivers and other so-called "natural objects" in the environment-indeed, to the natural environment as a whole'*[833]. His reasoning was intensely supported on the extension of certain rights towards 'natural life', as it had historically happened with new bearers before law, such as children, women, blacks, Indians, fetuses, among others. As recognized by Stone himself, granting legal standing to the 'natural environment' occurred to him on the merits of the famous case: Sierra Club v Morton[834], as a means to back up the claimant's allegation against that of the defendant's, relative to lack of right to sue, while it was pending appeal before the U.S. Supreme Court[835].

While the case's roots could be found in 1965, the controversy actually started in 1969, when the U.S. Forest Service granted a 30-year permit to Walt Disney Productions, Inc. to construct a complex and a ski-resort on eighty acres of Mineral King Valley, located in the Sierra Nevada Mountains, adjacent to Sequoia National Park. The whole project comprised installations for lodging, food, swimming, parking, and transportation, among other facilities. In addition, a 20-mile high speed road and a 66-kilovolt power line were expected to be built, approvals for which had to be issued by the Department of the Interior.[836]

Initially, the suit filed by Sierra Club[837] was successful, given that the Federal District Court granted a preliminary injunction grounded on possible '[…] *excess of statutory authority, sufficiently substantial and serious to justify* […]' it, and rejected the respondents'

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[832] Victor Yannacone and Bernard Cohen, *Environmental Rights and Remedies, Volume 1* (Lawyers Co-operative Publishing Company 1971) 344, 397. It is necessary a methodological clarification. The reference used by Nash corresponds to the next edition (1972) of the same book, in which there is an additional co-author, Steven Davison. The quotations, however, are identical. See Victor Yannacone, Bernard Cohen and Steven Davison, *Environmental Rights and Remedies, Volumes I and II* (Lawyers Co-operative Publishing Company 1972).

[833] Stone (n 2) 456.

[834] Sierra Club v Morton (n 3) 727

[835] Christopher Stone, 'Should Trees Have Standing? Revisited: How far will Law and Morals Reach? A Pluralist Perspective' (1985) 59:1 *Southern California Law Review* 2.

[836] Sierra Club v Morton (n 3) 729.

[837] ibid 730. The Sierra Club is a non-profit organization, founded by conservationist John Muir in 1892, that file the suit arguing *'*[…] *a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country,*[…]*'*. See Sierra Club (2016) <www.sierraclub.org/about-sierra-club> accessed 5 August 2017.

allegation with regard to the club's right to sue.[838] Nevertheless, the Ninth Circuit Court of Appeals reversed the previous judgment, reasoning that Sierra Club was not the proper plaintiff because their members did not allege any affectation, which somehow could financially harm or jeopardize them. Besides, the tribunal argued that the general interest in conservation was not enough *'...to challenge the exercise of responsibilities on behalf of all citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority'*[839].

Finally, the U.S. Supreme Court upheld the Ninth Circuit's judgment in April 1972, affirming that a mere 'interest in a problem' by itself cannot be invoked as the starting point of litigation, because the Court would not be able to refuse future law suits, brought purely on basis of good faith and a 'special interest'[840].

Despite this adverse decision, the whole process has always been seen as positive by Sierra Club members[841], maybe not only due to the fact that the project was never built, but essentially because Mineral King Valley was annexed into Sequoia National Park in 1978[842].

Within the Court's reasoning in Sierra Club v Morton, there are two key issues to address: representation and economic sense of nature's rights as requirements to legal standing.

Professor Stone profoundly analyzed the legal obstacles to represent natural objects, and especially wilderness areas, before courts, being aware of the importance of legal actions to promote their conservation. The author suggested that guardianship be handled in the same way it is used to represent incompetent people or corporations in their lawful businesses, even with regard to estates; namely through appointing a guardian (could be '*ad litem*'), a conservator or a committee, as appropriate[843]. '[I]*f standing were the barrier, why not designate Mineral King, the wilderness area itself, as the plaintiff "suffering legal wrong,* […]' allowing the club to be the legal representative, he continued stating twelve years later[844], and perhaps he would continue doing so nowadays, because it still seems to be the standard of the U.S. Courts. Indeed, during 2016, in Conservation Law Foundation Inc. v Continental Paving, Inc., the Court's main reasoning to deny the defendant's motion was

[838] Sierra Club v Morton (n 3) 731.
[839] *Sierra Club v Hickel* US 9th Cir. 433, Case F.2d 24 (1970)
[840] Sierra Club v Morton (n 3) 739.
[841] Lea Hartog*, Sierra Long Live the King* (Sierra Club 2009) <http://vault.sierraclub.org/sierra/200907/mineral king.aspx> accessed 5 August 2017.
[842] Public Law # 95-625, Appendix B, Sec. 314, Addition of Mineral King Valley to Sequoia National Park, 10 November 1978.
[843] Stone (n 2) 464.
[844] Stone (n 991) 2.

that '[t]*he "relevant showing for purposes of Article III standing* […] ***is not injury to the environment but injury to the plaintiff."*** […] *Therefore, some individualized specificity is required'.* In other words, the claimants were successful in Conservation Law Foundation Inc. v Continental Paving, Inc. but failed in Sierra Club v Morton for the same reason. While, the former were able to prove an 'actual injury' concerning their activities of swimming, canoeing, hunting, hiking and kayaking, given the pollution of the Soucook and Merrimack Rivers[845], the latter could not do the same. In conclusion, '[…] *the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured*[846].

5.1.4 What happened after Professor Stone?

A relevant opinion came from Justice William O. Douglas, one of the Supreme Court members who took part in Sierra Club v Morton. His dissent became an historic milestone among the promoters of nature's rights, because he compared the environmental issues with the role played by '*inanimate objects*', such as ships or corporations, whose legal personality was wide enough not only to be considered as legitimate adversaries before courts, but also to accomplish maritime or other business ends. In a certain way, legal standing would allow 'environmental objects' to sue for their own preservation and look after their interests, through legal representation. He even suggested the shift of the case label to '*Mineral King v Morton'*[847].

Douglas, for example, thought in a federal rule to allow litigating in the name of natural things '[…] *about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage*'[848], just as Stone had done it by affirming that '[t]*he rights of the environment could be enlarged by borrowing yet another page* […]' from the law[849]. It meant a future vision of at least thirty-five years concerning the course of certain legislation about this acknowledgement, as it ensued with the Ecuadorian Constitution of

[845] Conservation Law Foundation, Inc. v Continental Paving Inc. D/B/A Concord Sand & Gravel DNH 220 (2016).
[846] Sierra Club v Morton (n 3) 734-5.
[847] ibid 742-3.
[848] ibid 741.
[849] Stone was referring specifically to the Environmental Protection Act and not to the law in a general sense. See Stone (n 2) 484.

2008[850] or the Bolivian Rights of Mother Earth Act of 2010[851], whose contents are strongly related.

In his dissent opinion, Justice Douglas posited that it is not necessary to count on only economically valuable damages in order to protect environmental rights before courts, because there are other values to emphasize their importance, such as spiritual, aesthetic, recreational or ecological ones, inter alia. For instance, he quotes the case of the river, as '[…] *the living symbol of all the life it sustains or nourishes - fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life'*[852].

Other authors have tackled the question of standing from diverse outlooks. One of those voices corresponded to Professor Godofredo Stutzin, who suggested to stop thinking about the environment as a human right, such as it was conceived in the Stockholm Declaration[853], and asked if one had not '[…] *discovered the rights of a new legal entity called Nature (or the Environment) by admitting that the natural environment has to be protected against human activity'*.[854]

Shortly after, during the First National Congress of Environmental Law at the Catholic University of Valparaiso (Chile), carried out in 1977, Stutzin stated that recognition of nature as a juristic person was not only lawfully possible but imperative, '[…] *a genuine «sine qua non» condition to structure authentic Ecological Law, able to cease the accelerated process of Biosphere's destruction*'. Under similar reasoning as Justice Douglas', Stutzin focused on the feasibility of using the category of juristic person in nature, as though it would be a corporation, like a means to accomplish the ends of justice and public welfare. Indeed, he supported the idea that nature is not a fictitious entity, since it counts on worthier and higher interests to be protected, such as a real (natural) existence, an unmatched setting of organization, stability, vitality, autonomy, and a performance of vital functions that enables human existence.[855]

[850] Constitution of the Republic of Ecuador (n 11).
[851] Ley de Derechos de la Madre Tierra (n 9)
[852] Sierra Club v Morton (n 3) 743.
[853] Stockholm Declaration (1972).
[854] Godofredo Stutzin, 'Should We Recognize Nature's Claim to Legal Rights?' (1976) 2 *Environmental Policy and Law* 129.
[855] Godofredo Stutzin, 'Un imperativo ecológico: reconocer los derechos de la naturaleza' [An ecological imperative: tecognizing the rights of nature] (1984) 1:1 *Ambiente y Desarrollo* 97, 104.

5.1.5 The theory of Earth Jurisprudence

In 1999, the historian Thomas Berry wrote that the main cause of the planet's destruction could be found in a 'mode of consciousness' that had bestowed all rights only to humans to the detriment of non-humans, especially from the standpoint of the industrial-commercial world, emphasizing that the very existence of nature is aimed at human possession and use. Taking into account that American jurisprudence is oriented directly to personal human rights, Berry believed that '[…] *there can be no sustainable future, even for the modern industrial world, unless these inherent rights of the natural world are recognized as having legal status*'.[856]

At this point, with regard to Berry's argument about the close relationship between possession and the existence of nature, a profound economic significance reappears in its treatment, specifically referring to the judicial and administrative processes of environmental protection, derived mostly from the concept of non-human living things like mere objects and not as subjects of law. Consequently, living non-human beings are seen as goods, as it was mentioned, according to several laws and thus incapable to exercise any kind of rights. Meanwhile, humans are holders of rights over those goods, such as possession or use, but often also as property rights, as it has been pointed out by Susana Borràs, for whom '[t]*he consequence has been that environmental laws and regulations, despite their preventive approach, have developed so as to legalize and legitimate environmental harm'*.[857]

In this context, Berry's approach is aimed at encouraging a proportional distribution of the planet's great commons (land, water, air) among all the members of the Earth community, depending on their particular needs, where a human being is not the center, but only one more element within the processes of life. For that purpose, it is desirable to count on a 'new jurisprudence', as an alternative mechanism to enhance the human-earth relationship, through the articulation of adequate conditions for the integral functioning of those life processes[858].

Berry's call for a 'new jurisprudence' became crucial to lay the groundwork of 'Earth Jurisprudence', a relatively new '[…] *emerging legal theory based on the premise that rethinking law and governance is necessary for the well-being of Earth and all of its inhabitants*', '[…] *recognizes a kinship with the field of environmental ethics* […]' and '[…]

[856] Berry (1999) 4, 60, 61.
[857] Borràs (2016) 113-4.
[858] Berry (1999) 61.

embraces the connection between Earth justice and social justice'.[859] The initial and premature grounds of Earth Jurisprudence, included its own denomination, were originally agreed on by a group of philosophers who gathered with Berry in 2001, during a conference organized by GAIA Foundation in northern Virginia, USA.[860]

The most important theoretical contribution, elaborated by Thomas Berry, was to match the whole elements of Earth at the same level, by proposing a group of three fundamental rights: to be, to dwell, and to fulfill its role in the ever-renewing processes of the Earth community[861]. However, they are specific to every species, according to their own roles. So humans have human rights, birds have bird rights, rivers have river rights, and so on.[862]

From an ethical perspective, the conditions of equality proposed by Berry can only be understood by focusing on the role of each element of nature as an intrinsic value, in contrast to the traditional belief of classic Aristotelian philosophy, where natural elements are seen as mere instrumental values that are subordinated to higher ends.[863] Thus, the difference between standard principles and those of Earth Jurisprudence becomes substantial, given that no benefit is any more important than another.

Furthermore, to guarantee the accurate condition of Earth's existence, property rights flexibility should be necessary, given that they would not have more value than other rights. In case of conflict, it would be quite probable that existence rights prevail over property. Berry is rather precise in affirming that '[h]*uman rights do not cancel out the rights of other modes of being to exist in their natural state*'[864]. The criticism to private property and its functions in the market is much more severe from this current of thought.

Another important proponent of 'Earth Jurisprudence' is Cormac Cullinan, who drew international attention, through the publication of his book: 'Wild Law: A Manifesto for Earth Justice' in 2002. His work became relevant, due to his attempts to search for an explanation of the Earth Jurisprudence theory from a legal angle. To this author, the reference to the Wild Law is not contradictory as could be thought, given that the term 'wild' -in common parlance- is usually close in meaning to other expressions, such as 'unkempt',

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[859] Judith Koons, 'Key Principles to Transform Law for the Health of the Planet' in Peter Burdon (ed) *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011) 45.
[860] Bell (n 199) 70.
[861] There is somehow parallelism between Berry's ideas with Taylor's arguments about the respect for the existence of nature. See Taylor (2011).
[862] Thomas Berry, *Evening Thoughts: Reflecting on Earth as Sacred Community* (Sierra Club 2006) 149.
[863] Keller (2010) 5-6.
[864] Berry (n 1018) 150.

'barbarous', 'uncivilized', 'unrestrained', 'irregular' or 'out of control', among others; while 'Law' is an explicit reference to 'bind', 'constrain', 'regularize' or 'civilize', and so on. Wild Law should be understood more like a forthcoming to 'human governance' than a classic branch of law. In other words, it is about '[…] *laws that regulate humans in a manner that creates the freedom for all the members of the Earth Community to play a role in the continuing co-evolution of the planet*'.[865]

In the core of Cullinan's proposal is support for a change of the governance systems and philosophies as necessary to correct the disturbed relationship between Earth and mankind, inasmuch as old traditional systems have not been able to avoid, prevent or reduce the loss of biodiversity, pollution, deforestation, climate change and other contemporary environmental problems. In his own words, it is '[…] *needed to guide the realignment of human governance systems with the fundamental principles of how the universe functions* […]', and it is what the author calls: 'Great Jurisprudence'.[866]

According to Warren, Filgueira and Mason, an accurate interpretation of Cullinan's opinion about why the old systems do not work out efficiently to protect the planet is fully in harmony with the previous arguments on the concept of natural world; ergo, legal systems treat Earth as a 'resource' and '[…] *value it only as such when in fact it is the organism that sustains all forms of life*'.[867] Hence, again the response is a change in the concept of nature, from object to subject of law, to a holder of rights.

5.1.6 Conclusions

By and large, the recognition of the international legal personality of nature and the bestowal of rights are not a difficult juridical issue, at least from a theoretical perspective. In principle, the legal existence of States and other subjects of international law, such as non-governmental organizations, transnational corporations, and other entities in general, is supported in virtually the same tenets one could apply to the proposal concerning nature. Effectively, the scope and enforceability of duties and rights can be determined through the international legal instruments, either by the amendment or by the enactment of new regulations. It is enough remembering that only States could be traditionally subjects of

[865] Cullinan (n 841) 31.
[866] ibid 29.
[867] Lynda Warren, Begonia Filgueira and Ian Mason, *Wild Law: Is there any evidence of earth jurisprudence in existing law and practice?* (UK Environmental Law Association and the Gaia Foundation 2009) 3.

international law, but the emergence of new situations in the contemporary world has brought about the incessant necessity to recognize new actors in the international arena, whose juridical nature is quite different from the original participants. The contemporary tendency is aimed at acknowledging new legal subjects, being United Nations and World Trade Organization just a couple of aforementioned examples whose legal peculiarities could be compared to nature's ones, at least in terms of territorial scope. Nature, however, possesses the 'political' advantage of life.

The key question of legal personhood does not precisely lie on the law, but rather on the political sphere, and particularly on the notion of '*recognition from the others*'. Indeed, although the act of recognition has been questioned as a mechanism of endowing legal personality to states, '*statehood*', from an exclusively lawful point of view, in practice it is what has occurred to numerous international bodies, whose legal personality is undoubtedly valid nowadays.

Moreover, despite the Court decisions are not totally eco-friendly, as it has been seen, one can identify a very important coverage of the environmental issues and even a biased tendency to favor ecological motives, at least from the perspective of the European Court of Justice. In this framework, the question of public interest depicts the most problematic aspect to take into account because of the conflicts of interests derived from the environmental control and the execution of public policy. As it has been argued, the justification to exercise an independent representation of nature's interests relies on the fact that both activities are unfolded by the State. Therefore, the conferral of legal personality to nature constitutes a guarantee to maintain the impartiality of the administration of justice in those cases in which a dispute regarding this kind of public interests arises. It allows a more fair resolution of controversies.

In consequence, setting aside any political interference, one should affirm that the recognition of international legal personality in favor of nature does constitute a valid option to face the environmental crisis, from the legal standpoint, counting even on vast theoretical foundations in constant development.

In contradistinction to this feasibility of designing a legal structure to favor the recognition of rights of nature, one should also argue that a potential transmutation of the paradigm, in which nature is conceived as an object to be deemed as a subject, implies the consequent disappearance of property rights. Indeed, nature and ecosystems become fellows of humans within the concept of the Earth community, abandoning their legal status of goods for the sake of mankind. Namely, nature would not be able to be object of ownership

anymore, due to a subject could not belong to another subject, at least under the traditional principles of Western positivism.

Thus far, the theoretical possibility of abolishing property rights neither depicts an impracticable assumption, within the ambit of legislative parlance. Nonetheless, it is quite different from an empirical context. Therein, it should be said there is an unreal possibility of putting into action a worldview like this under the present political and social circumstances. In fact, it is quite probable that the long term not be enough to unfold such a change of legal system. It appears to be unlikely that humans renounce their property rights, although their own existence would depend on it. Maybe it will be so in the future, but not in the world today.

In any case, although the impracticability of the abolition of property rights could be considered as a permanent factual obstacle to bestow legal personhood to nature under a universal scope, the actual risk lies rather on the fact that national exertions become useless. The recognition of nature's rights is currently seen as another mechanism to defense natural resources from ecological degradation so that it would not be convenient its premature attrition. Therefore, albeit the enrichment of the legal debate is important, the political handle of the discourse and the diffusion of successful experiences are crucial to strengthening this proposal over time.

5.2 An ethical approach about the holistic thought

Chart # 11 Holistic approaches

<table>
<tr><td colspan="2">Holism (Ecocentrism)</td></tr>
<tr><td>Weak Holism
(Hierarchical biocentrism)
- Rolston III
- Ferré</td><td>Robust Holism
<table><tr><td>Deep Ecology
- Næss
- Sessions
- Devall</td><td>Land Ethic
- Leopold
- Callicott</td></tr><tr><td colspan="2">Earth Jurisprudence
(Ecotheology)
- Berry</td></tr></table></td></tr>
</table>

Based on Keller (2010) 15-6 and Sideris (n 1025) 294

To facilitate the analysis, it will be taken into account and employed Keller's didactic structure about ecocentrism alluded above, i.e. the split between weak and robust holism[868]. An illustration in the chart # 11.

5.2.1 The personification of the nonhuman in the ancient roots of holism

Although an important number of ethicists[869] identifies Aldo Leopold as the initiator of the ecocentric theories, or at least as one of its most transcendental exponents, it is feasible to track the theoretical and historical pedigree of the holism in much more ancient times, mainly hand in hand with scientific developments. Indeed, some authors have even reflected, for instance, about the contradictions of *molecular biology*[870], based on the teleological origin of the conflict between Democritus' atomism[871] and Aristotle's holism[872], characterized by the individuality of the atoms moving simply by virtue of neighboring forces in a void, in front of the idea about the final causation of objects and systems subordinating their behavior to a general plan or destiny[873]. From the ethical point of view, as it has been mentioned above, this idea is not necessarily shared by ethicists, such as Sessions[874], who attributes the early ecocentric developments to '[…] *the Nature-oriented* […] *cosmological speculations of the Pre-Socratics* […]' rather than the philosophical strand of Aristotle, which ends in the well-known hierarchical structure of the '*Great Chain of Being*'[875]. In either event, it would turn out paradoxical the possibility of both anthropocentrism and ecocentrism could share the same epistemological roots, at least in theory.

Greek knowledge, however, is not the only reference about holistic views of nature in the past, particularly regarding the question of moral values. In that sense, Callicott narrates the worldview around the '*Indian's social circle*'–Steiner prefers the expression '*circle of*

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[868] See § 135 and note 143. Earth Jurisprudence will be included as *Ecotheology,* according to the categorization by Sideris (2009) 294.
[869] For example, DesJardins (2013) 24-5; Keller (2010) 151; Jamieson (2008) 22. His philosophical repercussion is often equated with Rachel Carlson's.
[870] Paul Davies, *The Cosmic* Blueprint (Templeton Foundation Press 2004) 100.
[871] A synthesis in Sylvia Berryman, 'Ancient Atomism' in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter Edition 2016) sub-s 2 <https://plato.stanford.edu/archives/win2016/entries/atomism-ancient/> accessed 24 January 2019.
[872] In an aesthetic interpretation of the holism, the value of each part is a contribution to the value of the wholeness. See Anthony Price, 'Aristotle's Ethical Holism' (1980) 89:355 *Mind* 338, 344.
[873] Davies (n 1026) 6-7.
[874] This section has been mainly guided by the outstanding essay of George Sessions, 'Ecocentrism and the Anthropocentric Detour' in George Sessions (ed) *Deep Ecology for the Twenty-First Century* (Shambhala 1995) 156.
[875] ibid 159-60.

life'[876]–where nonhuman entities, like the '[…] *Earth itself, the sky, the winds, rocks, streams, trees, insects, birds, and all other animals* […]' possessed personalities, consciousness, reason and, volition as well as human beings[877]. Callicott even compares semantically the postulates of Land Ethics with certain assertions attributed to *Ojibwa* tribes[878], one of the largest indigenous peoples settled in Canada and United States[879], who conceive nature as a '[…] *congeries of societies* [where] *every animal, fish and plant species functioned in a society that was parallel in all aspects to mankind's*'[880].

Pursuant to Sessions[881], another remote reference about ecocentrism could be located in the thirteenth century, by means of Saint Francis of Assisi's thought. According to Lynn White Jr., Francis depicts a radical Christian view, mainly owing to his ideas about setting up '*a democracy of all God's creatures*'[882], an aspect interpreted as '[…] *a unique sort of pan-psychism of all things animate and inanimate, designed for the glorification of their transcendent Creator* […]'[883]. In this line, there are numerous stories about Francis speaking to animals and other nonhuman creatures, calling them brothers or sisters (e.g. brother sun, sister moon, brother fly, sister bird, brother fire, sister cricket, and so on)[884], which denotes in some way a perception of parity among human and nonhuman beings. A failed attempt, White Jr. says, to promote the equality among all creatures, including humans, to substitute the notion of man vastly governing the whole creation[885]. Notwithstanding, it has been preserved until present times, one of the most memorable remembrances of his thoughts and feelings, contained in the '*Canticle of Brother Sun*', among whose lines one can read: '*Praised be you, my Lord, through our Sister, Mother Earth, who sustains and governs us, and produces fruit with colored flowers and herbs*'[886].

One good manner to stress the philosophical contribution of Baruch Spinoza could consist of affirming, as Sessions has done, the philosopher constituted the second opportunity–three centuries after Saint Francis–to shift the anthropocentric course of

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[876] Stan Steiner, *The vanishing white man* (Harper & Row 1977) 111ff. Quoted by Sessions ibid 158.
[877] Callicott (n 198) 189.
[878] ibid 197.
[879] *Ojibwa*, also spelled *Ojibwe* or *Ojibway*, also called *Chippewa*, self-name *Anishinaabe*, is a tribe who used to live in what are now Ontario and Manitoba in Canada, and Minnesota and North Dakota in United States. See Encyclopædia Britannica, Ojibwa people <www.britannica.com/topic/Ojibwa> accessed 25 January 2019.
[880] Calvin Martin, *Keepers of the Game: Indian-Animal Relationships and the Fur Trade* (University of California Press 1978) 71.
[881] Sessions (n 1031) 160.
[882] White Jr. (n 252) 1206.
[883] ibid 1207.
[884] Augustine Thompson, *Francis of Assisi: The Life* (Cornell University Press 2013) 70-2, 158-9.
[885] White Jr. (n 252) 1207.
[886] Thompson (n 1040) 158.

Western culture[887]. Nevertheless, the reading of Spinoza is not readily comprehensible so that has brought about numerous interpretations, at least as far as his relationship with nature is concerned. In this regard, when one encounters, for example, a commentator asserting that Spinoza's overriding contributions about ecology could be construed from two thoroughly opposite dimensions; namely as a reductionist form of scientific reason, or as a holistic source of the deep ecologism[888], one can get hold of an idea about how wide could be the range of potential elucidations. Indeed, there is who adduces that one of the most eventful affirmations of Spinoza was the so-called '*incremental naturalism*', which would consist basically of the comprehensive study of humans (including their mind) and their interactions with other elements, within the ambit of nature and under the same governing principles[889]. This interpretation is based on a statement taken from Spinoza's Ethics, where one can read in a sort of sarcastic tone that those who '[…] *have written on the emotions, the manner of human life, seem to have dealt not with natural things which follow the general laws of nature, but with things which are outside the sphere of nature: they seem to have conceived man in nature as a kingdom within a kingdom*'[890]. As a consequence, under the umbrella of this incremental naturalism, one could explain certain human feelings–such as intentionality, desire, belief, understanding, and consciousness–from their most rudimentary expressions in the natural world. In other words, '[…] *humanity can be seen as a complex and sophisticated expression of nature* […]'[891], which in certain sense implies an interpretative reminiscence of anthropocentric extensionism. In any event, Arne Næss is principally who has stood up for the ecocentric connotations from Spinoza's philosophy, as one can observe through a great number of essays and other works come out the late twentieth century. The core idea revolves around how the term '*nature*' is defined and interpreted from the perspectives of both Spinoza and deep ecologism, emphasizing its connection with the theological notion of '*God*'. In his own words, '[…] *that eternal and infinite being we call* ***God or nature*** [Spinoza asserts] *acts by the same necessity as that by which it exists* […]'[892], which drives to reflect about some epistemological and semantic aspects, explained by Arne Næss mainly in his celebrated article '*Spinoza and Ecology*'[893]. Firstly, it seems that the words God and nature had the same meaning for Spinoza or, at least, were quite close. This semantic correlation is

[887] Sessions (n 1031) 162.
[888] Smith (2012) 50.
[889] Garrett (2008) 18.
[890] Spinoza (2008) 83.
[891] Garrett (2008)19.
[892] Spinoza (2008) 142.
[893] Næss (1977) 46ff.

crucial to Næss because it allows him to unfold the subsequent idea concerning the perfection of nature. Secondly, therefore, Næss believes that Spinoza's nature '*is perfect in itself*', like God, which implies the existence of an entity essentially '*creative*', '*infinitively diverse*', '*alive*' and '*structured*' according to the general '*laws of nature*'; namely, a notion of '*Nature*', very close to the gist of the deep ecology's. Indeed, Næss writes the word '*Nature*' with capital N to emphasize the depiction of God, maybe as a form of '[…] *secular divinity perfect in itself that has been unbalanced by the actions of humanity*', pursuant to Smith's reading[894]. Thirdly, all things are interconnected in the conception of deep ecology or *ecosophy*[895], which means that nothing is causally inactive[896]. If one reads what Spinoza affirms in this realm, the link is becoming self-evident, i.e. '[…] *by nature active we must understand that which is in itself and through itself is conceived, or such attributes of substance as express eternal and infinite essence, that is* […]*, God, in so far as he is considered as a free cause*'[897]. Finally, one last element of analysis refers to how Spinoza sees the relationship between humans and animals. To him, '[…] *brutes and* ***things which are different from*** *the human species in nature* […] *have the same right over us as we over them* [although] *as every one's right is defined by his virtue or power, men have far more right over beasts than beast over men*'[898]. At first glance, the idea about the balance of rights between animals and humans does not need too much explanation, at least from an ecological insight. Nevertheless, there are other elements that Næss has attempted to contextualize, mainly concerning the differences. Effectively, apropos of his comments about Genevieve Lloyd's article, Næss displays several examples to demonstrate a certain license of Spinoza to admit some similar, and even identical, characteristics shared by humans and animals, such as–for example–the desires of procreation, lusts and appetites[899], which eventually denotes an idea of moral community or fellowship, where humans can treat animals as valuable in themselves, such as it occurs in ecology with each '*living thing*'[900]. In the same line, one aspect that Næss does not take into account, perhaps just incidentally, comprises the semantic sense of the word '*thing*', copiously used by Spinoza in the first pages of his *Ethics*. Sometimes, he appears to consider both living and inanimate objects like '*natural*

[894] Smith (2012) 52.
[895] Ecosophy is used by Næss as an alternative terminology of philosophy of ecological harmony or equilibrium. See Næss (1973) 99.
[896] Spinoza (2008) 24.
[897] Næss (1977) 48.
[898] Spinoza (2008) 167 emphasis added.
[899] ibid 125
[900] Næss (1980) 317-8, 320.

things', although it is also perceivable the instrumental connotation of his argument. It occurs, for instance, when he asserts that humans '[…] *find in themselves* […] *many things useful to themselves, as, for example,* […] *vegetables and animals for food, the sun for giving light, the sea for breeding fish, they consider these things like all natural things to be made for their use* […]', in accordance with the idea about they are determined by God and are different from artificial things[901].

Much later, once in the nineteenth century, the philosopher Henry David Thoreau came on the scene. His importance has been even recognized by Callicott as one of the predecessors of Leopold himself, together with Charles Darwin and John Muir[902]. Despite the criticisms about the superficial character of Thoreau's writings in matters of natural world[903], Roderick Nash has also asserted he was '*an ecologists before* ***ecology***'[904], in reference to the argument set out by Worster, regarding the appearance of the term 'ecology' merely in 1860s, i.e. only two years before Thoreau pass away. In effect, Worster explains that the word '*oecology*', and later '*ecology*' as its current spelling, has been attributed to Ernst Haeckel in 1866[905] (Laferrière and Stoett affirm it was in 1867[906]), under the definition of '[…] *the science of the domestic side of organic life, of the life-needs of organisms and their relations to other organisms with which they live* […]', which one can read in Haeckel's works[907]. In general terms, although his experiences' book in the woods, '*Walden*'[908], reflects much of his convictions regarding the environmental matters, his opinion about the morality of nature could be better summarized probably in a widely quoted phrase[909] from his Journal, '[w]*hat we call wildness is a civilization other than our own*', which contradicts the generalized connotation, pursuant to Thoreau, of construing the terms wildness and civilization as antonyms, as the depiction of sin (*wildness*) and virtue (*tameness*)[910]. To him, living beings, such as pines or hen-hawks are '*friends*'[911]. Apropos of Thoreau's stories, one can find numerous references concerning this kind of '*wild community*', so to speak,

[901] Spinoza (2008) 25, 31, 142.
[902] Callicott (1987) 157.
[903] Nash (2014) 89.
[904] Nash (1989) 36.
[905] Worster (1994) 192
[906] Laferrière and Stoett (1999) 24.
[907] Haeckel (1904) 98.
[908] Henry Thoreau, *Walden and On the Duty of Civil Disobedience* (first published 1854, The Floating Press 2008).
[909] For example, Nash (1989) 37.
[910] Henry Thoreau, *The writings of Henry David Thoreau: Journal Volume XI July 2, 1858 - February 28, 1859* (Bradford Torrey, ed, Houghton, Mifflin and Company 1906) 450.
[911] ibid

disseminated around his prolific academic production. In his Journal's notes, for instance, Thoreau also refers to animals as '*companions*' or '*fellow-creatures*', even suggesting they could constitute some kind of *society* with humans; he actually came to equate cats and humans, affirming that albeit the latter '[…] *do not go to school, nor read the Testament; yet how near they come to doing so!* [Thoreau stated] *How much they are like us who do so!*'[912] As part of his often figurative discourse, he treats certain natural elements like his peers, either allies or enemies of labor. Effectively, while describing some of his summer activities in the woods, the author accounts that his '[…] *auxiliaries are the dews and rains which water this dry soil,* [while his] *enemies are worms, cool days, and most of all woodchucks*'[913], a sort of metaphor that revolves around the ecocentric symbolism, by including not only biotic elements. Finally, his vision about the relationship between nature and humans could be quite well complemented through another assertion, taken also from his Journal, [t]*he earth I tread on is not a dead, inert mass. It is a body, has a spirit, is organic, and fluid to the influence of its spirit,* [s]*he is not dead but asleep*'[914], which to some extent anticipates to the Gaia Theory.

Another remarkable figure of the ecocentric philosophy is undoubtedly John Muir, who was attracted strongly to nature after observing a group of rare white orchids, as it has been well-documented by his commentators[915]. His copious scholar work was published between the late nineteenth and early twentieth centuries. He has been also known as a co-founder and first president of Sierra Club[916], one of the oldest and most prestigious environmental organizations of United States. Muir, like Thoreau, used to write in an evocative language and also keep a journal, where one can discover some of his unrevealed beliefs and attitudes toward nature. When he is speaking about his experiences in Yosemite Park, for example, one distinguishes clear ecocentric parlance supported on characteristic expressions, such as brother or fellow, to make reference to nonhumans. '*Your animal fellow beings,* [Muir emphasizes] *so seldom regarded in civilization, and every rock-brow and mountain, stream, and lake, and every plant soon come to be regarded as brothers; even one learns to like the storms and clouds and tireless winds*'[917]. In terms of environmental ethics, his narration

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[912] Henry Thoreau, *The writings of Henry David Thoreau: Journal Volume IX August 16, 1856 - August 7, 1857* (Bradford Torrey, ed, Houghton, Mifflin and Company 1906) 178, 440.
[913] Thoreau (n 1047) 204-205
[914] Henry Thoreau, *The writings of Henry David Thoreau: Journal Volume III September 16, 1851 - April 30, 1852* (Bradford Torrey, ed, Houghton, Mifflin and Company 1906) 165.
[915] See Nash (1989) 39; Sessions (n 1031) 165.
[916] See note 993.
[917] John Muir, *John of the Mountains: The Unpublished Journals of John Muir* (Linnie Wolfe, ed, first published 1938, The University of Wisconsin Press 1979) 350

about the quest of a vessel in *Cedar Keys*[918], the sixth chapter of his '*A thousand-mile walk to the Gulf*' is quite probably the most alike portrayal of his beliefs regarding the interplay between nature and humans. Beyond the descriptions of the place [he even shows a hand-made picture by himself], the core of the text contains a severe criticism of the anthropocentric connotations of traditional ethics, arguing the planet had not been made exclusive for humans, as one could corroborate through the existence of venomous beasts, thorny plants or deadly diseases, which are invoked as incontrovertible evidence[919]. He assures that humans and other creatures are made from the same material so that they are '*earth-born companions*' and '*fellow mortals*'. In this line of reasoning, Muir poses the core question of ecocentrism about the moral value of beings, when he brings into question the existence of a particular value for humans, '*why should man value himself as more than a small part of the one great unit of creation?*'[920]. Moreover, he even casts doubt on the complete absence of sensations in abiotic elements, such as minerals, arguing the lack of mechanisms of communication with humans, which allow corroborating this circumstance. Muir also highlights the functional role of people, in comparison with other living beings, affirming that '[a]*fter human beings have also played their part in Creation's plan, they too may disappear without any general burning or extraordinary commotion whatever*'[921]. To conclude, some authors[922] have alluded Muir's yardsticks in favor of the recognition of the '*rights of animals*'[923] or the criticisms about its denial, aspects that lead to thinking about a biocentric connotation. Nevertheless, after a detailed search, it is possible to identify at least

[918] *Cedar Keys* is a cluster of small islands in Florida, USA. Muir uses the town's name as the title of his chapter.
[919] John Muir, *A thousand-mile walk to the Gulf* (Houghton Mifflin 1916) 140-1.
[920] ibid 139.
[921] ibid 140.
[922] See Nash (1989) 24; Lisa Mighetto, 'John Muir and the rights of animals' (1985) 29:2-3 *The Pacific Historian* 103, 110-1.
[923] There is an explicit reference about the recognition of rights of animals in a 1904-letter to Henry Fairfield Osborn, member of the *Boone and Crockett Club,* the oldest wildlife conservation organization in North America, founded in 1887 by Theodore Roosevelt and George Bird Grinnell. Muir, by calling the practice of hunting as the murder business, supposed that '[…] *because the pleasure of killing is in danger of being lost from there being little or nothing left to kill, and partly, let us hope, from a dim glimmering* ***recognition of the rights of animals*** *and their kinship to ourselves*'. Emphasis added. The same paragraph appears quoted in the compilation of random thoughts by Edwin Teale. On the other hand, Muir affirms ironically that doctrine has '[…] *taught that animals* […] *have no rights that we are to respect, and were made only for man, to be petted, spoiled, slaughtered, or enslaved*'. See William Badè, 'The life and letters of John Muir' in Terry Gifford (ed), *John Muir: his life and letters and other writings* (Bâton Wicks Publications 1996) 12, 347; Edwin Teale, *The wilderness world of John Muir* (Houghton Mifflin 1954) 314; John Muir, *The Story of my Boyhood and Youth* (Houghton Mifflin company 1913) 109-11; Boone and Crockett Club, *125-Year Snapshot: Boone and Crockett Club 1887-2012* <www.boone-crockett.org/about/about_overview.asp?area=about> accessed 30 January 2019; Boone and Crockett Club, Why should you join the Boone and Crockett Club? <www.boone-crockett.org/about/timeline.asp> accessed 30 January 2019.

an express allusion to the '*rights of the rest of creation*'[924], which would imply a strong ecocentric conception.

5.2.2 A methodological change from polycentrism to ecocentrism

As it has been already said, the extensionism has been traditionally the mechanism to be faced with the approaching challenges derived from the inclusion of new members within the range of morality. The progressive enlargement of the moral boundaries toward other people, such as slaves, women or children (e.g. anthropocentrism), or toward other living beings, such as animals or plants (e.g. biocentrism) has been pigeonholed, even in methodological terms, as part of the ecological evolution and the historical development of ethics. In the realm of ecocentrism, however, these traditional structures of moral philosophy are experiencing a deconstruction process in favor of a completely new paradigm[925], in which there is not any moral limit and everything and everybody are important in function of the moral community more than in themselves.

Effectively, certain contemporary authors see ecocentrism as a reaction against the '*atomism*'[926], in which the moral value is hierarchically located in the wholeness (e.g. ecosystems) rather than in the individuals (e.g. humans or animals)[927], coming even to cast doubt on the welfare of people in favor of the wellbeing of the holistic organism[928]. One could even argue it deals with the transference of moral considerability from the individuals to the wholes, instead of a mere extension of morality, which would convert the ecosystems somehow into the 'new agents' of the moral world, remembering that environmental ethics '[…] *locates ultimate value in the "**biotic community**" and assigns differential moral value to the constitutive individuals relatively to that standard*'[929]. In fact, if ones enquires more deeply, it is noticeable this indication coincides with the very origins of the concept of ecosystems, attributed to Alfred Tansley[930].

In this framework, albeit Aldo Leopold himself conceived of the moral community under the sequential effects of extensionism, arguing the widening of its ethical margins for

[924] Muir (n 1058) 98. The complete phrase is '*How narrow we selfish, conceited creatures are in our sympathies! How blind to the rights of all the rest of creation!*' Notice the Darwinist sense.
[925] Keller (2010) 15.
[926] Michael Nelson, 'Theory' in J. Baird Callicott and Robert Frodeman (eds), *Encyclopedia of Environmental Ethics and Philosophy, Vol. II* (Macmillan 2009) 312, 314.
[927] Keller (2010) 17.
[928] Kaufman (2003) 254.
[929] Callicott (n 178) 337
[930] Kaufman (2003) 246.

including biotic and abiotic elements, and even 'the land'[931], one should pay attention to the scope of his holistic perspective beyond the mere semantic sense of words. Namely, by bestowing moral value to the community instead of the individuals, the perspective of extensionism does not seem applicable to the entrance of newcomers, given that all moral barriers are being eliminated from the moral considerability. Leopold was somehow aware of this fact when he instanced that '[i]*n Europe, where forestry is ecologically more advanced, the non-commercial tree species are recognized as members of the native forest community, to be preserved as such, within reason*'[932]. Moreover, the 'land', in whose favor the extension of moral limits had been proposed, is not described by Leopold as a fellow, but rather '[…] *is not merely soil; it is a fountain of energy flowing through a circuit of soils, plants, and animals*'[933], which seems more a description of an ecosystem than an individual fellow, in accordance with the origins of the scientific context of the

According to contemporary interpretations, the importance of human wellbeing is cast in doubt in favor of the welfare of the ecosystem. as it has been mentioned, moral values are conferred to wholes instead of individuals, which This seems to be a generally accepted thesis.

If one reviews the ethical literature available therein has been already alluded, however, the existence of an ethical dichotomy between re is somehow a transposition central idea consists of attributing idea of *ecocentrism* had its origin in the very concept of 'ecosystem', attributed to Alfred Tansley, by means of a celebrated 1935-article.

5.2.3 The worldview of ecocentrism

The third worldview, proposed by Callicott, corresponds to '*ecocentrism*', understood as '[…] *moral consideration for the ecosystem* ***as a whole*** *and for its various subsystems as well as for human and nonhuman natural entities severally*'[934]. Methodologically, ecocentrism can be seen as a new paradigm for moral philosophy, given that it does not follow the mechanistic standards of extensionism towards an increasingly enlargement of moral limits. In other words, pertaining to Keller's explanation, ecocentrism does not deal with the process of expanding the moral circle toward different polycentric individuals,

[931] Leopold (n 85) 239.
[932] ibid 249.
[933] ibid 253.
[934] ibid 392.

depending on each theoretical tendency; i.e. to humans if it is humanism, to subjects-of-a-life or sentient beings, or just living beings if it is biocentrism[935], and so forth. Ecocentrism is holistic rather and opposed to polycentric individualism[936]. Nevertheless, it is worth it to clarify the technique of extending the thresholds of morality was actually one of its methodological antecedents in the beginning and currently is an escape route for the criticisms[937]. Indeed, Aldo Leopold, probably its more prominent forerunner, stated that '[t]*he land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land*'[938]. Modernly, authors like Næss, Rolston III, Sessions, and Callicott took over shaping the theory.

The starting point, however, is Leopold himself and his widely known work '*The Land Ethic*'. His celebrated statement, '[a] *thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise*'[939], constitutes an outstanding condensed version of his perspective about the biotic community, where an array of interdependent parts interact among them, but also somehow of the general postulates of holism in its more pure form. Here precisely lies its importance.

Given the significant number of authors addressing ecocentric outlooks, a simple classification of ethical trends is often a very useful support to expose the ideas in a more clear fashion. In this case, Keller's taxonomy seems to be quite accurate in didactic terms. He proposes a bifurcation between a '*weak holism*' and a '*robust*' one. Thinkers like Rolston III and Ferré, among others, would comprise the former, while the latter in turn could be split into two groups, the 'deep ecologists', such as Næss, Sessions, and Devall; and the '*land ethicists*' with Leopold and Callicott[940].

Thus, as far as 'weak holism' (also hierarchical biocentrism[941]) concerns, Rolston III advocates the theory of '*autonomous intrinsic value*'[942], in which [b]*iotic communities leave individuals "on their own" as autonomous centers, spontaneous somatic selves defending their life programs*'[943]. In addition, this autonomy implies a subjective conception of moral

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[935] Keller (2010) 15.
[936] ibid
[937] As shown below, Callicott uses this argumentation to champion the land ethic against the accusations of *ecofascism*. See J. Baird Callicott, *Beyond the Land Ethic: More Essays in Environmental Philosophy* (State University of New York Press 1999) 70-1.
[938] Leopold (n 85) 239.
[939] ibid 262.
[940] Keller (2010) 15-7.
[941] Supra note 124.
[942] Holmes Rolston III, Environmental Ethics: Duties to and Values in the Natural World (Temple University Press 1988) 114.
[943] ibid 183.

standing where only humans are responsible of protecting what they '[…] *have been given on the Earth*'[944]. Solely *Homo sapiens* are moral agents because they are the only beings who have the '*inherent moral capacity*'[945] to take care of the patients, who are in turn *objects* of moral concern[946]. Rolston III affirms emphatically that '[p]*lants and animals do not have such responsibilities, much less do rivers and mountains*'[947]. At any rate, the earth is valuable in a humanistic sense, what means that it can produce an instrumental value, endowing to humans a right to an environment with integrity[948]. Under Rolston III's vision, a conception of rights of nature is '[…] ***comical,*** *because the concept of rights is an inappropriate category for nature*'[949]. For his part, Ferré distinguishes '[…] *different degrees of value in a common scale, so that discriminating moral choices can be made* […]'. Inspired in Whitehead, he proposes the so-called '*Personalistic Organicism*', as an alternative worldview to combine the internal connections between human and natural principles and manage the existent conflicts between them. Despite the author denies the orientation of his stance completely or automatically toward humans, its hierarchical character is expressed through the different levels of intensity and experience, elements that end up usually favoring humans[950].

Broadly speaking, the expression '*deep ecology*' was coined by Arne Næss to characterize a movement aimed at the '[r]*ejection of the man-in-environment image in favor of the relational, total-field image*'[951], and whose activism has been guided by a platform of eight purposive principles that determine who is supporter and who is not[952]. It is all or nothing, thus half-measures do not work out in here. Despite its radicalism, or maybe because of it, its reputation has transcended the mere activist discourse, pushing its postulates through respectable academic circles. To that extent, deep ecology could be pigeonholed within '[…] *an egalitarian and holistic environmental philosophy founded on*

[944] Rolston III (1993) 262.
[945] ibid 263.
[946] Rolston III (n 146) 107-8.
[947] Rolston III (1993) 263.
[948] ibid 278.
[949] ibid 256 emphasis added.
[950] Frederick Ferré, 'Persons in Nature: Toward an Applicable and Unified Environmental Ethics' (1996) 1:1 *Ethics and the Environment* 15, 21, 24.
[951] Næss (1973) 95.
[952] The principles are agreed upon by Arne Næss and George Sessions. See Arne Næss, 'The Deep Ecological Movement: Some Philosophical Aspects' in Frederik Kaufman, *Foundations of Environmental Philosophy: A Text with Readings* (first published 1986, McGraw Hill 2003) 402, 404-5.

phenomenological[953] *methodology*'[954], i.e. focused on an egalitarian value system (axiology) and an ensemble of interconnected individuals within a whole (ontology). In a similar vein, Devall and Sessions prefer speaking about the ultimate norms of deep ecology, which are '*self-realization*' and '*biocentric equality*'[955]. To understand the apparent contradiction about biocentric equality, and principally Næss' stance, who sees himself as an '*ecological field-worker*', it is crucial to understand previously his profound respect for life, emphasizing that '[…] ***the equal right to live and blossom*** *is an intuitively clear and obvious value axiom*'[956] for people like him. Nevertheless, Næss himself has been completely conscious about the limits of such a recognition, or maybe its potential interpretation, so that he included a semantic clause in one of his core statements of the article: '*The Shallow and the Deep* […]', the second one that reads: '*Biospherical egalitarianism-**in principle***'[957], sustaining the fact that '[…] *any realistic praxis necessitates some killing, exploitation, and suppression*'[958]. The function of this '*in principle*' clause is quite powerful, above all considering it strikes at the essence of the theory, adding 'an exception to the rule'. It should be remembered that Richard Watson, for example, brought in question the biocentric egalitarianism, arguing it treated the human actions like anti-natural ones. If humans '[…] *destroy many other species and themselves in the process*, [Watson asserted] *they do no more than has been done by many another species*'[959]. Keller is in the right when he affirms that Næss is fairly shrewd due to the use of the '*qualifier "in principle"*'[960] because, although it has not avoided the criticisms, it allowed to deep ecologists endowed their theory with major

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[953] In philosophical terms, phenomenology is defined as the study of the '[…] *structures of conscious experience as experienced from the first-person point of view, along with relevant conditions of experience*' (Stanford Encyclopedia of Philosophy, sub-s 2). In this sense, when Næss refers to the '*intrinsic value*' of nonhumans, he often mentions his own intuition (first-person point of view) and the feelings for places or creatures (conditions of experience) as the sources of his conclusion (intrinsic value). Indeed, the methodological correlation becomes quite clear when, for example, Næss asserts the equal right to live is an '*intuitively*' clear and obvious value axiom of the '*egalitarian biocentrism*', the key precept of deep ecology. One can find another reference in '*Life's philosophy*', in which the author dedicates an entire chapter to the feelings for all living beings. There is an allusion about the phenomenological methodology in Keller, and an analysis more in detail in Diehm. See David Smith, 'Phenomenology' in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer Edition 2018) sub-s 2 <https://plato.stanford.edu/entries/phenomenology/> accessed 11 October 2018; Arne Næss and Per Ingvar Haukeland, *Life's philosophy* (first published in Norwegian, in 1998, The University of Georgia Press 2002) 109-10; Næss (1973) 96; David Keller, 'Deep Ecology' in J. Baird Callicott and Robert Frodeman (eds), *Encyclopedia of Environmental Ethics and Philosophy, Vol. I* (Macmillan 2009) 206; Christian Diehm, 'Deep Ecology and Phenomenology' (2004) 1:2 *Environmental Philosophy* 20.

[954] Keller, ibid 206-7.

[955] Bill Devall and George Sessions, *Deep Ecology: Living as If Nature Mattered* (Gibbs M. Smith 1985) 66.

[956] Næss (1973) 95-6.

[957] Emphasis added.

[958] Næss (1973) 95.

[959] Richard Watson, 'A Critique of Anti-Anthropocentric Ethics' (1983) 5:3 *Environmental Ethics* 245, 253.

[960] Keller (2010) 207.

philosophical consistency. George Sessions fully corroborates his fellow's avowal, assuring that none of the eight principles contains references about neither egalitarian biocentrism/ecology nor the equality of values. He argues that, in the ambit of deep ecology, humans and nonhumans have values in themselves but they are not equal[961]. Accordingly, Næss upholds that his '[…] *intuition is that the right to live is one and the same for all individuals, whatever the species, but the vital interests of our nearest, nevertheless, have priority*'[962]. Just in case, both argumentations neither can be construed as a hierarchical posture, because supposing something like this would imply, Sessions asserts, a reinforcement of Western anthropocentrism and a failure of the norm concerning the *"ecological egalitarianism in principle"*'[963]. For his part, Bill Devall, another important exponent of the theory, agrees with his colleagues about the scope of the nonhuman intrinsic value[964]. The other fundamental tenet of deep ecology concerns to the '*metaphysical holistic worldview*', unfolded by means of the '*self-realization*'. DesJardins explains it pretty clearly, '[s]*elf-realization is a process through which people come to understand themselves as existing in a thorough interconnectedness with the rest of nature* [so that] *all organisms and beings are equally members of an interrelated whole* […]'[965]. However, to all intents and purposes, Næss clarifies this process is not carried out in isolation. One's self-realization is hindered, he argues, if the self-realization of others, with whom one identifies, is hindered'[966]. In a certain way, the individual self-realization contributes to the Self-realization of the whole, as Devall and Sessions contend, '[a]*ll things in the biosphere have an equal right to live and blossom and to* ***reach their own individual forms*** *of unfolding and self-realization within the* ***larger Self-realization***'[967].

Finally, the general conception of '*the land ethic*' is at first sight probably what best describes the ethical transmutation from objects to subjects; something that promoters of the rights of nature pretend at a juridical level. The best one among the ecocentric perspectives, it is worth it to say. Indeed, Leopold's famous tract opens with a remembrance of Odysseus, coming back home after the Trojan War to hang a group of slave-girls for suspected

[961] George Sessions (ed), *Deep Ecology for the Twenty-First Century* (Shambhala 1995) 191.
[962] Arne Næss, 'Equality, Sameness, and Rights' in George Sessions (ed), *Deep Ecology for the Twenty-First Century* (Shambhala 1995) 222.
[963] George Sessions, 'Appendix D: Western Process Metaphysics (Heraclitus, Whitehead, and Spinoza)' in Bill Devall and George Sessions, *Deep Ecology: Living as If Nature Mattered* (Gibbs M. Smith 1985) 236.
[964] Devall and Sessions (n 159) 67.
[965] DesJardins (2013) 216.
[966] Arne Næss, 'Self-realization: An Ecological Approach to being in the World' in George Sessions (ed), *Deep Ecology for the Twenty-First Century* (Shambhala 1995) 225, 226.
[967] Devall and Sessions (n 159) 67 emphasis added.

misconduct. After all, '[t]*he girls were* [his] *property*', Leopold emphasizes, and '[t]*he disposal of property was then, as now, a matter of expediency, not of right and wrong*'[968]. The simile appears evident, nature is currently property, and its disposal is a matter of convenience, not of ethics. In Leopold's words, '[l]*and, like Odysseus' slave-girls, is still property. The land-relation is still strictly economic, entailing privileges but not obligations*'[969]. From this assumption, and as a result of following strictly the ethical sequence so skillfully proposed by Leopold, one cannot avoid deducing that transmutation of 'land/nature' from object to subject is going to be the next step. In other words, Leopold encourages to change the status of nature, from being property to being a fellow-member of the biotic community, grounded on the axiology of a '*value in the philosophical sense*', which is superior to the '*mere economic value*'[970]. This criticism about the banality of economic values in comparison to '[…] *love, respect, and admiration for land* […]'[971], along with the aforesaid tendency to preserve the *integrity, stability, and beauty of the biotic community*[972], embodies precisely the core of the theory, i.e. the existence of '[…] *many elements in the land community that lack commercial value, but that are* […] *essential to its healthy functioning*'[973]. Therein, J. Baird Callicott, the principal contemporaneous developer and advocate of the theory, published in 1980 a controversial interpretation of Leopold's work, arguing that, being '[…] *the good of the biotic community* […] *the ultimate measure of the moral value* […]', it would be ethically feasible and even recommendable, for example, to hunt a white-tailed deer to keep the wholeness of the ecosystem safe and sound, evading the harmful effects of a cervid population explosion[974]. This reasoning had a strong dissonance within certain philosophical circles, primarily among his detractors[975], who even branded it as '*environmental fascism*'[976], by inferring that reducing human population would be morally acceptable if '[…] *lower numbers are needed to uphold the healthy functioning of the community*'[977]. In response, Callicott denied emphatically the presumed *inhumane* or

[968] Leopold (n 85) 237.
[969] ibid 238. By the way, just for didactic purposes in this particular case, one could understand land as a synonym of nature.
[970] ibid 261.
[971] ibid
[972] Supra note 141.
[973] Leopold (n 85) 251.
[974] J. Baird Callicott, 'Animal Liberation: A Triangular Affair' (1980) Winter *Environmental Ethics* 311, 320.
[975] A thorough analysis of the holistic objection in Håkan Salwén, 'The Land Ethic and the Significance of the Fascist Objection' (2014) 17:2 Ethics, Policy & Environment 192.
[976] Regan (1983) 361-2.
[977] Eric Freyfogle, 'Land Ethic' in J. Baird Callicott and Robert Frodeman (eds), *Encyclopedia of Environmental Ethics and Philosophy, Vol. II* (Macmillan 2009) 24.

antihumanitarian character of Leopold's stance, arguing that this kind of conclusions would contradict absurdly the theoretical foundations of the land ethic[978]. But in the main, he advocated the extensionist character of the theory[979], pointing out that the moral value of the biotic community does not replace the individual moral values. Thus there is no substitution but accretion to the several accumulated social ethics, just like it occurs, for instance, to people who do not lose their citizenship in a republic due to being also residents of a municipality or family members[980]. Namely, there are different levels of communities, so-called '*nested communities*', which can have different structures and moral requirements but overlap among them, given that some are smaller than others. For example, a person is member both the human community and the biotic community, because the human community is 'nested' inside the biotic community ('*hyperholism of the land ethics*')[981]. Notwithstanding, based on Midgley's outlook, there are also certain ambits where two or more communities blend and coexist, understanding mutually certain social signals, such as it happens between humans and tamed animals, for instance. They are named '*mixed communities*'[982], and are also nested inside the biotic community[983]. Behind the scenes, this is a provocative way to suggest that subjects-of-a-life are in turn members of the biotic community, in contrast to Regan's opinion[984], given than in the end both perspectives would share common concerns[985]. Although there is no way to certainly know whether this suggestive affirmation is aimed only at undermining the criticisms, or also mitigating the initial extreme holism of the land ethic[986], it turns out clear that Callicott's pretension is to look for a common alignment against what he names '*the destructive forces at work ravaging the nonhuman world*'[987]. In general terms, although it does not seem to be a persuasive enough answer for his opponents and there is a series of alternative argumentations[988], formulated by different adherents to the theory[989], this is what usually appears in the

[978] Callicott (n 85) 206.
[979] Supra note 141.
[980] Callicott (n 141) 70-1.
[981] J. Baird Callicott, 'Animal Liberation and Environmental Ethics: Back together again' (1988) 4:3 *Between the Species* 163, 167-8; Callicott (n 85) 207.
[982] Mary Midgley, *Animals and why they matter* (*The University of Georgia Press* 1983) 112. The reference in 'Animal Liberation…' See Callicott, ibid 165.
[983] Callicott (n 185) 165.
[984] Regan had said that both visions were like water and oil, they do not mix. Regan (n 63) 362.
[985] Callicott (n 185) 163.
[986] Keller (2010) 18.
[987] Callicott (n 185) 163.
[988] Both aspects will be addressed later.
[989] A useful systematization of some replies to the land ethic's criticisms in DesJardins (2013) 189ff.

environmental literature in reply to the 'problem of ecofascism'[990]. In any case, convincing or not, Callicott's figure has not diminished regarding the preponderant position he occupies in the development of the land ethics. Indeed, more than a few commentators agree upon Callicott has contributed substantially to increase the philosophical consistency of 'the land ethic' through his interpretations[991], considering that, before him or at least before 1960s[992], Leopold's work had been completely ignored[993]. To recapitulate, Callicott has emphasized more than once that the key issue of land ethic, or the *summum bonum* in his words, '[…] *resides in the biotic community and moral value or moral standing devolves upon plants, animals, people, and even soils and waters by virtue of their membership in this (vastly) larger-than-human-society*'[994], what means that moral value corresponds to the whole, as explained by Keller, and [i]*ndividuals have no value in and of themselves independent of the biotic community*'[995].

5.2.4 Thomas Berry and the Great Jurisprudence

Earth Jurisprudence is quite probably one of the few philosophical cutting-edge movements, in matters of the wholeness of nature, whose roots can be located in the new millennium. In effect, most promoters agree upon its '*formal*' origin was a meeting organized by the London-based Gaia Foundation in Northern Virginia, occurred in April 2001. It was led by the philosopher Thomas Berry, counting on the participation of lawyers and educators coming from Canada, Colombia, South Africa, and U.S.A., whose expertise was primarily focused on environmental issues and aboriginal cultures[996]. Undoubtedly, Berry is the founder of the doctrine and his celebrated '*The Great Work*'[997] represents also its foundational book. A priori, if one reads the context of Earth Jurisprudence, it is not difficult

[990] Callicott (n 141) 70-1; Freyfogle (n 181) 24; Keller (2010) 17-8; Kaufman (2003) 255; Cochrane (2018) sub-s 1.d.
[991] Yeuk-Sze Lo, 'Callicott J. Baird' in J. Baird Callicott and Robert Frodeman (eds), *Encyclopedia of Environmental Ethics and Philosophy, Vol. I* (Macmillan 2009) 129; DesJardins (2013) 195, Kaufman (2003) 267.
[992] Roderick Nash, 'Island Civilisation: A Vision for Human Occupancy of Earth in the Fourth Millennium' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2012) 339, 342.
[993] The author himself has recognized the previous lack of attention. See Callicott (n 85) 186.
[994] J. Baird Callicott, 'Traditional American Indian and Western European attitudes toward nature: An Overview' in J. Baird Callicott, *In Defense of the Land Ethic: Essays in Environmental Philosophy* (State University of New York Press 1989) 177, 198.
[995] Keller (2010) 17.
[996] Mike Bell, 'Thomas Berry and an Earth Jurisprudence: An Exploratory Essay' (2003) 19:1 *The Trumpeter* 69, 71.
[997] Berry (1999).

to suppose its general approach tends to resemble the ecocentric perspectives, mainly the land ethic. For example, both doctrines coincide with seeing humans and nonhumans as members of the community. Indeed, Berry recognizes that the '[…] *single integral community of the Earth* […] *includes all its component members whether human or other than human*'[998]. Likewise, the human being, '[…] *as every species, is bound by limits in relation to the other members of Earth community*'[999], more or less as it occurs in the biotic community by means of the '[…] *ethical obligation on the part of the private owner* […]'[1000]. The corollary of their similarities is propounded by Cormac Cullinan, the other remarkable figure of the Earth Jurisprudence, who attributes explicitly to Leopold and Berry the '*deep roots*' of the theory[1001]. Now, if one can identify such an ensemble of commonalities between both perspectives, it begs the question of why one should address them separately. Initially, there are three main reasons to do it, concerning predominantly to the methodology employed at the present research. Firstly, the scope of Earth Jurisprudence refers factually to the philosophy of law, properly speaking, rather than ethics or moral philosophy. Consequently, Earth Jurisprudence is '[…] ***a philosophy of law and human governance*** *that is based on the idea that humans are only one part of a wider community of beings and that the welfare of each member of that community is dependent on the welfare of the Earth as a whole*'[1002], conception that definitively encompasses quite accurately the aims of the doctrines of nature's rights[1003]. Thus, it requires an examination in detail. Secondly, albeit both Leopold and Berry draw almost the same holistic conclusions about the idealistic functioning of earth/biotic community, both paths are methodologically dissimilar. In this sense, while Leopold emphasizes a scientific discourse, built on Darwinian principles, to outline the philosophical foundations and pedigree of the land ethics[1004], Berry prefers a historical reconstruction of the current environmental crisis, '[…] *to understand where we are and how we got here*'[1005]. To him, this understanding is crucial because the relationship

[998] ibid 4.
[999] ibid 3.
[1000] Leopold (n 85) 251.
[1001] Cormac Cullinan, 'A History of Wild Law' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2012) 12, 22.
[1002] ibid 13. Emphasis added.
[1003] In practice, Cullinan himself and other specialists, affiliated to different adherent institutions to EJ, such as GAIA Foundation or the Community Environmental Legal Defence Fund (CELDF), among others, have advised diverse procedures relating to the application of legislative measures, mainly in Africa and Latin America. Numerous references can be consulted in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2012).
[1004] Callicott (n 141) 66-7.
[1005] Berry (1999) ix.

earth-humanity is experiencing a decisive [almost apocalyptic] moment, in which [n]*atural selection can no longer function as it has functioned in the past*'[1006]. The end of the Cenozoic Era is looming and the planet will move towards the Ecozoic Era[1007], by means of a '[…] *transition from a period of human devastation of the Earth to a period when humans would be present to the planet in a mutually beneficial manner*'[1008]. Thirdly, in addition to the theoretical foundations provided by Leopold and Berry, Earth Jurisprudence is also deeply rooted in '[…] *the cosmologies of many indigenous peoples* [and] *the customary practices of rural people in Africa, India and elsewhere* […]'[1009], which has entailed a resurgence of ancient traditions towards the modernity of law, being particularly effective in the aforementioned cases of Bolivia, Colombia, Ecuador, India, New Zealand, and U.S.A.

In this regard, the concept of Pachamama[1010] is precisely the epitome of an ancient aboriginal conception of the wholeness, whose symbolic meaning has been recognized as such in the domestic law[1011], and even in the Constitutional one[1012]. The terminology ontologically comes from the Andean traditional cosmology and other native cultural worldviews, depending on the region where the word is employed. It should be taken account of the term can be translated into Aymara, Kichwa or Quechua, languages mainly spoken in Bolivia, Ecuador, and Peru[1013]. Currently, notwithstanding Gudynas' caveat about the imprecise scope of the interpretation[1014], *pachamama* has been construed as 'mother earth' both in legal parlance[1015] and in the environmental one[1016]. Philosophically speaking, one of the most remote references about *pachamama* belongs to Rodolfo Kusch, who discovered that ancient natives used to associate the term with a visible or day-to-day perception of '*land*', i.e. '*what there is here*', '*what one sees growing*', separately from the idea of *pacha* (meaning '*cosmos*' or '*habitat*'). In effect, he highlights its suggestive verbatim translation: '*mother or wife of the pacha*', which could be interpreted as a segregation from major

[1006] ibid 4.
[1007] Supra note 23.
[1008] Berry (1999) 3.
[1009] Cullinan (n 204) 22.
[1010] Supra note 29.
[1011] In the Bolivian law, supra note 9.
[1012] In the Ecuadorian Constitution, supra note 11.
[1013] Eduardo Gudynas, *Derechos de la Naturaleza: Ética biocéntrica y políticas ambientales* [Biocentric ethics and environmental policies] (Abya Yala 2016) 137-8.
[1014] ibid
[1015] Supra notes 9 and 11.
[1016] Vicenta Mamani-Bernabé, 'Spirituality and the *Pachamama* in the Andean Aymara Worldview' in Ricardo Rozzi and others (eds) *Earth Stewardship: Linking Ecology and Ethics in Theory and Practice* (Springer 2015) 65, 65-6.

divinities[1017]. Kusch is part–probably the forerunner–of a group of philosophers (Mignolo, Escobar, Boff, among others) who conform '[…] *the ancient ethos and biocultural landscapes of Amerindian people*', in contrast to those who have been attempting to incorporate the environmental philosophical thinking into the South American academic circles[1018]. In any event, current commentators are tending to articulate this approach with ecocentric worldviews, mainly deep ecology and the land ethics[1019].

For its part, another archetype of a uniqueness originated in the traditional native worldview of the Maori people is the so-called *Te Awa Tupua,* recognized as a legal person by law in 2017[1020]. Unlike the previous case, there is no place to semantic interpretations of the terminology in here, not even in common parlance, mainly because the spirit of aboriginal believes has been incorporated to the letter of the law in the proper Maori language, in addition to English. This idiomatic combination, albeit could be seen as a mere declarative aspect, can break down into two remarkable purposes: it boosts the social visibility of the indigenous cosmology about the *Whanganui* River ecosystem, and minimizes the misunderstanding about the contents of the law, especially among the Maori communities[1021]. In this way, the holistic conception of the *Te Awa Tupua* applied squarely to the river ecosystem becomes close in philosophical extension[1022] to the ecocentric perspective, chiefly Earth Jurisprudence, as noticed by certain commentators[1023] and according to what the normative in itself reads: '*Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the health and well-being of* […]'[1024] the ecosystem, this is to say the biotic and abiotic factors standing along the river, from the mountains to the sea, including all the physical, metaphysical and spiritual elements, which permit to support life and people communities[1025].

[1017] Rodolfo Kusch, 'El pensamiento indígena y popular en América' [Indigenous' and people's thought in America] en *Obras Completas Tomo II* (publicación original en 1970, Editorial Fundación Ross 200) 255, 400-1.
[1018] Ricardo Rozzi, 'South America' in J. Baird Callicott and Robert Frodeman (eds), *Encyclopedia of Environmental Ethics and Philosophy, Vol. II* (Macmillan 2009) 262, 264.
[1019] For example Gudynas (n 216) 102
[1020] Supra note 10.
[1021] Catherine Magallanes, 'Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that protects the Environment' (2015) 21:2 *Widener Law Review* 273, 311.
[1022] See Waitangi Tribunal (n 28) 36.
[1023] Abigail Hutchison, 'The Whanganui River as a Legal Person', (2014) 39:3 Alternative Law Journal 179, 180
[1024] *Te Awa Tupua* Act (2017) para. 13rd (d).
[1025] ibid para. 13rd (a) and (b).

5.2.5 The links between laws and ethics

In contradistinction to the systematic and profuse production of philosophical knowledge about moral considerability of nature, whose scholar extension can be deemed universal, there has not really been a comparable performance pertaining to its legal standing, especially from the international law viewpoint. As Cullinan asserts, the issue reached international visibility barely in 2008, since the enactment of the Ecuadorian Constitution and the subsequent diffusion of the draft Universal Declaration of Rights of Mother Earth in 2010[1026]. However, even from then, the bulk of authors have devoted their efforts to the local ambits in which these promulgations and adjudications have unfolded[1027], while others have preferred addressing the matters by means of the comparative method[1028], which not necessarily implies a worldwide perspective. Cullinan himself, in his renowned work '*Wild Law*', tackles sideways glance the question of legal international personhood of nature, though his book has been conceived under the idea of the comprehensive governance of earth[1029]. Notwithstanding, it is worth it to mention Prudence Taylor, who is one of the very few authors who explicitly[1030] wrote about the relevance of discussing the recognition of nature as a '*new subject*' of international law[1031], at least ten years before that idea catches on. To this author, if rights of animals[1032] or future generations can be part of the debate

[1026] Cullinan (n 42) 189.
[1027] For example, the work by Stone (n 2) is often the most quoted and remote case *par excellence* regarding the U.S.A. However, one can find a good amount of examples from other countries in books, articles and other similar material (including some links), which has been compiled in the virtual platform of the Global Alliance for the Rights of Nature <http://therightsofnature.org/ron-conference-articles/> accessed 20 October 2018. Another smaller reference, in form of a compilation of case studies based on Ecuador, India, and Greece can be found in Anna Tabios and María Berros (eds), *Can nature have rights? Legal and Political insights No. 6* (Rachel Carson Center Perspectives 2017).
[1028] For example, Gordon (n 1), Borràs (2016), Erin O'Donnell and Julia Talbot-Jones, 'Creating legal rights for rivers: lessons from Australia, New Zealand, and India' (2018) 23:1:7 *Ecology and Society* <www.ecologyandsociety.org /vol23/iss1/art7/ accessed 19 October 2018; Lidia Cano, Rights of Nature: Rivers That Can Stand in Court (2018) 7:1:13 *Resources* <www.mdpi.com/2079-9276/7/1/13> accessed 20 October 2018.
[1029] Although Cullinan does not expressly mention any idea concerning the recognition of legal personality of nature, let alone at an international level, he does address the global implications of a legal system of rights, grounded on the worldview of the Earth as a set of objects. See, particularly, chapters five and eight. Cullinan (n 42) 62-73, 95-109.
[1030] Although Birnie and Boyle referred about the legal personhood of nature within the ambit of the so-called '*eco-rights*', before Taylor did it, they did it only indirectly. See Patricia Birnie and Alan Boyle, International Law and the Environment (Oxford University Press 1992) 212-3.
[1031] Taylor (1998) 373-4.
[1032] Taylor exemplifies the case of whales as potential subjects of international law, quoting D'Amato and Chopra. However, one can currently find in the environmental literature the use, for instance, of great apes, many cetaceans and even elephants to support the argument of the legal personality of animals. See Anthony D'Amato and Sudhir Chopra, 'Whales: Their Emerging Right to Life' in *Faculty Working Papers. Paper 63* (first published 1991, Northwestern University School of Law 2010) 1; Paul Waldau, 'Animals as Legal Subjects' in Linda Kalof, *The Oxford Handbook of Animal Studies* (Oxford University Press 2017) 167, 183

about their consideration as subjects of international law, there is no consistent reason to deny a possible argument about rights of nature[1033]. Moreover, this kind of discussion would allow contributing new theoretical elements to the issue of state sovereignty concerning natural resources, re-orientate the relationship between humans and nature, and overcome prospective confusions among national legal systems[1034].

In this framework, the lawful section of this dissertation will mostly aim at establishing a valid connection between the theoretical foundations of the legal personhood and its regulation in the practice of international law.

5.2.6 Conclusions

If one observes the course of events, it is noticeable that the current tendencies of legal frameworks aimed at the environmental protection are being supported indistinctively by biocentric and ecocentric approaches, which are even considered as synonyms, as it has been already mentioned. It entails a methodological effect in terms of analysis, given that biocentric theories are based on a mechanism of extensionism, i.e. an expansion of moral thresholds towards new agents, while theorists of ecocentrism opt for vanishing the limits of morality, in order to include the wholes, either ecosystems or even the planet.

In this context, the importance of selecting an accurate theoretical structure to support the proposal of granting legal rights to nature consists of avoiding the empirical confusions. In this regard, it has been argued, as part of this research, several arguments against the moral recognition of animals as subjects of law, mainly due to the inconvenience and the risks of potential decisions among the superiority of humans in comparison to animals. The granting of rights to birds in India could be considered as a modern example. In either event, the idea is avoiding to recreate old-fashioned and inaccurate practices, such as the judgements of animals.

In contradistinction to these perils of a misunderstood ethical approach, the notion of ecocentrism promotes an elimination of the limits of morality, in which humans and animals play a differentiated role that cannot be evaluated under the same terms. Humans possess human rights and animals have animal rights. There is not a conflict of interests, there is an harmony of coexistence.

[1033] Taylor (1998) 373.
[1034] ibid

Therefore, from the ethical point of view, it will be necessary to avoid swallow analyses that could lead to interpret wrongly the theoretical fundamentals that support the conferral of rights of nature.

Sixth Chapter
Conclusions

General conclusions

There is not a complete congruence in the interconnectedness among the ethical parlance, the legal framework and the judicial decisions. While one could affirm that the normative structure of international law follows almost exactly the contents of ethical aspects, the judicial decisions usually provoke a different effect. They are usually eco-friendly. It does not means that judicial resolutions follow ecocentric principles, otherwise they are strongly predicted on anthropocentric structures. However, their scope turns out protective of nature.

6.1 About the anthropocentric ethics and its implications

6.1.1 Is the discourse of property rights influencing traditional ethics?

The discursive analysis shows in a quite plain manner that natural resources were deemed as goods, even as commodities, no matter the current of thought or the historical period in question. In effect, from Aristotle to Kant, the same conceptual structure in which nature is the source of nourishment, attire, and dwelling, among other human demands, repeats over and over again.

The traditional ethical interconnection between humans and nature along the years has been strongly based on the use of natural resources for the human benefit–thus '*for human sake*'–is a recurrent phrase, which denotes an unequivocal sense of ownership. It is sometimes explicit, such as in Aristotle, who came even to associate pretty clearly the process of acquiring property rights with human activities of utilization (e.g. hunting or fishing) or it is simply tacitly addressed as it occurs, for example, with the control of natural processes (e.g. mineral crystallization of gemstones) elucidated by Bacon. Of course, the icing on the cake is represented by Lockean ideas about the process of private appropriation.

6.1.2 Are the traditional tenets enough to face the environmental crisis?

From the 1970s on, the idea about the '*responsible use*' of natural resources spread among the defenders of traditional tenets, where Passmore and the Catholic Church, among others, can be mentioned. Nonetheless, albeit their assertions were, are in fact, much more eco-friendly, the essence continues to be basically the same. Natural resources are goods to use for human sake, certainly with more responsibility, but goods in the end. Furthermore, there is a fallacy revolving around this argument, considering it promotes the protection of nature for continuing to utilize it as a kind of supplier of goods and services. The detractors of anthropocentrism employ precisely this circular argument to uphold the absurdity of attempting to solve the environmental dilemmas by means of what is considered as the cause. In other words, it is difficult to think about the depletion of natural resources could diminish following this logic of consumption.

In a similar vein, the comprehensive structure of the human right to a healthy environment illustrates quite well the somehow dogmatic sense of anthropocentric principles governing the exercise of rights and the scope of the law. Indeed, it does not deal only with the semantic connotation of the expression 'human right' preceding the notion of the environment (which in a certain way turns out symbolic in itself), but it goes beyond, reaching even the teleological meaning of the right; i.e. protection of nature for sake of humans, not for sake of nature itself. In essence, the protection of the human right to a healthy environment involves the possibility of guaranteeing another set of human rights because– one more time–nature is a source of food, clothing, and housing, among others.

6.1.3 Is it possible to extend moral borders to nature?

Another common affirmation by philosophers consists of the fact that only humans deserve moral standing, once again, no matter the ethical tendency nor the historical period. It has been mentioned the authors are still intensely discussing about the human nature and moral recognition of fetuses and embryos, so they are hardly going to include animals, plants or even ecosystems into the ethical debate.

In this state of affairs, it has turned out pretty understandable that the environmental debate, from an anthropocentric angle, have tended toward the recognition, or at least the discussion, of future generations as subjects of moral status because they are expected human beings, who are clearly meeting the ethical conditions needed to be included into the circle of morality. Therefore, the protection of nature will make sense in terms of constituting somehow great storage of goods and services to favor the newcomers, to their own benefit.

But even so, one has to bear in mind there are still philosophical deliberations about the character and the moral compliance of this human duty from the current people to the forthcoming ones.

It is worth it to clarify that it does not mean, however, that the philosophers have not employed this mechanism of extension of moral boundaries to include animals, plants and other beings or set of beings into the circle of moral standing. Certainly, one can find examples mainly regarding sentientism and biocentrism, although these theoretical trends are addressed from a non-anthropocentric outlook.

To conclude, methodologically speaking, although the discursive analysis of the healthy environment, conceptualized as a human right, could be enough to determine the anthropocentric character of traditional ethics, the hindsight of different philosophical currents of thought has been very useful to corroborate the existence of similar theoretical patterns along the history of moral philosophy.

6.2 About the current international legal framework

6.2.1 Are property rights legally influencing the international arena?

Notwithstanding there is specific evidence of the international normative ruling natural resources as mere goods, even subject to trade as it occurs, for one, in the CITES, the idea about the influence of property rights upon nature in both binding and non-binding international legal instruments can be widely demonstrated through the notion of national sovereignty over natural resources. Effectively, the variation of the sovereign right to exploit the natural resources according to the 'environmental policy' of the country, as it was stood in the Stockholm Declaration of 1972, toward the inclusion of the term 'developmental' to the conditions for the exploitation of natural resources, promoted twenty years later, in the Rio Declaration of 1992, can be deemed as a convincing evidence of the influential role of the property rights.

The fact that a country can exploit its natural resources according to not only environmental considerations, but rather to environmental 'and' developmental altogether reasons leads the debate to a discretional disjunctive, where the decision-makers have the final word. Therefore, if the priority of any government is development, in financial, economic, or even political terms, environmental protection will be unfailingly in jeopardy, mainly because, from 1992 on, both conditions are, at least, at the same level.

The significance of this change did not have only discursive implications but also political ones, given that both declarations are probably the most decisive expressions of the international trends in the subject matter. While it is true they are not legally compulsory, their immense prestige in the international arena is an undeniable indicator of influence. In either event, this shift is also noticeable among mandatory conventions in force. For example, while the body of the Convention on Biological Diversity contains an identical provision as Stockholm Declaration's, the Convention on Climate Change encompasses the same statement provided by the Rio Declaration, although within the recitals of the preamble. Curiously, the difference exists despite both instruments came from the same source, the Earth Summit of 1992.

On the whole, beyond the ambit of state sovereignty, there is not really such a comparable reference about the tensions between property rights and nature within the texts of international instruments. As it has been seen, there are specific points of interest whose scope has been analyzed punctually and does not merit deeper inferences.

6.2.2 Are there enough mechanisms to protect nature at present?

Although one could uphold the argument that there are sufficient mechanisms to protect nature in contradistinction to the influence of property rights, predicated on the contents of the international instruments in force, a deeper analysis shows these legal tools could be more rhetorical than practical. In other words, despite it is clearly demonstrable the existence of innumerable eco-friendly lawful measures supporting the combat of environmental depletion, there is not necessarily a specific provision or a set of provisions oriented to settle the cases in which property rights and environmental protection can be in conflict.

On the contrary, it has been easier to find certain rules whose contents could be construed in the sense of favoring property. The archetype is the right to utilize fully and freely the natural resources of a country, established in parallel provisions coming from both covenants regarding human rights. The precision of the provisions turns out somehow indisputable, inasmuch as when one reads the expression 'nothing' shall be interpreted as impairing that right, one could hardly leave out the possibility that environmental protection is part of the term 'nothing'. Therefore, environmental protection could not impede the exercise of ownership, represented by the fully and freely use of natural resources.

In addition, if one connects this conclusion with the former, i.e. states or peoples are able to decide how to use fully and freely their natural resources, according to their

environmental or developmental policies, the result will be a dramatic dependence of environmental measures upon the willing of national authorities, who will have the sovereign power to decide what it is better for the public or general interest.

In parenthesis, one has to bear in mind the quest of public or general interest represents always, or almost always, implicitly the wellbeing of humans, what means the laws only replicate the anthropocentric tenets of ethics.

6.2.3 Does nature really need legal representation?

There is probably not a better situation in which the representation of nature's interests can be explained than before a court of justice. In consequence, the results of the judicial decisions' examination are crucial to conclude if there is or not really a systematic and organized defense of nature before tribunals, and accordingly if it is necessary or not to count on an express recognition of its legal personality so that it can look after its own interests and rights. For the moment, built on the above arguments, it is inevitable to think about a lack of representation in favor of nature, at least in those cases in which the states are bounded to decide over the disjunctive between the environmental protection and the property rights–the latter of course depicted by the idea of sovereignty. It turns out really difficult to avoid the assumption about a conflict of interests.

By way of a theoretical confirmation of the said points of view, all the key international environmental instruments, or at least all those have been reviewed into this dissertation, are subscribed to the settlement of disputes by the International Court of Justice, a tribunal in which solely states may be parties. Therefore, under the current state of affairs and in the same line of reasoning, the existence of a specific instance to protect nature's interests turns out imperative.

6.3 About the international system of justice

6.3.1 Does the CJEU rule in favor of property rights?

Although there is a statistically strong correlation between property rights and environmental protection, there is no manner to corroborate any directly proportional interdependence between both variables. Namely, the existence of a significant number of environmental adjudications in which one can identify some implications concerning property rights, no

matter the real degree of incidence within the case (e.g. public or private property; claimant's, defendant's or third-party's ownership, and so on) could not be construed as a direct interconnection between property and nature. The correlation solely shows the frequency of appearance of the term property and other semantic associations within environmental rulings, without detailed specificities about its scope, occurrence or prevalence.

In effect, the posed research question was initially pretty simple. The idea consisted of analyzing a set of decisions conducive to determining if the judges ruled in favor of property rights and in detriment of natural resources. To some extent, the question gave somehow the impression that the defense of property was directly proportional to the detriment of nature. Therein, in light of data, one is able to formulate several important remarks. The first issue of significance lies in the fact that decisions are heterogeneous so that they do not necessarily follow a specific pattern, and they are not absolute, which means their scope is changing over time. In practice, it essentially signifies that the CJEU does not always rule against nature in those cases where one can perceive any kind of tension with property rights. In fact, it seems the bulk of situations are settled through an eco-friendly decision. Nevertheless, the explanation of this result does not predicate on the international law, strictly speaking, but rather in the community one, where the notion of the 'social function of property' has played a remarkable role limiting the scope of ownership.

In addition, when one scrutinizes the apparent direct proportionality between the defense of property and the depletion of natural resources, so to speak, it curiously seems to be true under this logic of reasoning, but not otherwise. In other words, when the court's ruling is favorable to the protection of property, it indefectibly has negative implications for nature. However, it does not occurs on the contrary, i.e. a decision in favor of environmental protection does not necessarily involves a negative connotations to property rights.

Summing up, the theoretical and legal preeminence of property rights over natural resources, alleged by defenders and promoters of rights of nature actually appears to be more rhetorical than empirically demonstrable in the international field. It does not mean, of course, there is not any decision contrary to nature's wellbeing. Indeed, there are some unfavorable judgments but they are not definitively the majority.

6.3.2 Are owners the only people who can obtain eco-friendly decisions?

As it has already been explained, this research question stemmed from drawing inference about the allegations of national courts in the paradigmatic cases quoted in this dissertation. On the one hand, among the main reasons to reject the lawsuit in Sierra Club v Morton, the court adduced that the plaintiff lacked standing to bring the action due to it could not demonstrate a genuine economic interest in the Mineral King Valley. On the other hand, in the cases of Colombia and New Zealand, the petitioners were natives who utilized the natural resources, particularly the rivers Atrato and Whanganui respectively, under ancestral traditions, although they also exerted certain property rights or had some economic interests upon surrounding territories. Accordingly, the association between both premises led to believe that the probability of obtaining an eco-friendly decision increased if the claimant was the proprietor of the natural resources whose protection was been demanded; or if - at least – s/he exerted some kind of associated right to ownership or some economic interest. Nonetheless, one should reject eloquently this hypothesis, predicated on the data. Indeed, although there are some cases in which the applicant is, at the same, time the owner, they are clearly the minority of the selected adjudications. Moreover, from the total applicants who are owners of the natural resources, only the half of cases could achieve an environmentally favorable decision. The rest was mainly neutral or its impacts were insignificant.

6.3.3 Who represents nature's interest before international courts?

In the particular case of the CJEU, the response is lawfully and statistically affirmative. Effectively, the power to bring a lawsuit before the Court, by the Member States, institutions, or natural and legal people, constitutes an actual possibility of judicially defending nature's interests or promoting environmental protection. Statistics account for the exercise of this right when one can notice that a little less than a half of the claims are filed by the Members States, while four of each ten are brought by the European Commission, on average, and one of each ten is filed by some institution or natural person, approximately. On the balance of probabilities, these data tend to diminish the state interference in the disputes regarding property and nature, unlike what occurs, for example, before the International Court of Justice, where only states are legitimized to bring an action, which is not always guided by environmental motivations.

In this scenario, the legal openness of the CJEU to rule those claims coming from a variety of litigants, different from the ambit of states, depicts an environmentally favorable

provision, even to be replicated. But one has also to admit there is a second side of the same coin, which occurs when nobody is interested in taking the legal actions to protect nature. In those cases, it would be important to count on a specific instance in charge of taking care of natural resources, without depending on someone's good will. The issue becomes even more evident when it deals with the ambit of the International Court of Justice, for example, in whose case an independent representation of nature would not be only necessary but rather imperative.

In this framework, it is worth it to mention the heterogeneity of positions that different states assume with respect to the disjunctive between environmental protection and property rights. In effect, while some national public entities firmly champion the environmental protection over a certain economic interest, others defend openly the opposite under the umbrella of the 'public interest', or 'general interest' as well, which often means some economic interests entailing property rights. Moreover, while some states show divergences between their institutions of government and their entities in charge of the administration of justice about this subject matter, others even display aligned stances in defense of property rights instead. Under these circumstances, the fact that certain national public institutions take sides could be a matter of criticisms, probably severe ones, but it does not constitute a situation too much disturbing, at bottom, because they are obliged to protect the '*public interest*', whose definition depends directly on themselves. Among other important aspects, environmental issues should be part of that definition, but it does not always occur in practice. However, the fact that a tribunal of justice assumes one or another position is really disquieting, owing to justice has to independently decide. Therein, one has found some requests of preliminary rulings, apropos of the information displayed in this corresponding chapter, in which the arguments coming from national courts tend noticeably to defend economic interests over nature's ones. Although one could understand, but not certainly justify, a state policy biased toward some kind of public interest that places nature in jeopardy, an administration of justice in the same line would be definitively unacceptable. This assumption leads gravely to think about a conflict of interests, and consequently to the lack of representation with respect to the nature's interests.

To recapitulate, in the framework of the European Court of Justice, the question of the absence of legal representation is not necessarily a problem of international law, not even of the Union law. It deals with a problem of national law. The interferences in the common course of the public policy and the administration of justice spring from local legislation. Nevertheless, although state is responsible for the implementation of the environmental

public policy, there are several examples–among the selected data–accounting for the questionable impartiality of the said states to represent nature's interests.

In addition, beyond the institutional disagreement of ideas with regard to environmental protection in the inner country, the assortment of views proves the bestowal of legal personality to nature should not be local, but global, which corresponds better to its comprehensive character. Namely, if nature is recognized as a subject of law in a certain country, but it there is not the same acknowledgment within the 'neighborhood', so to speak, it will not matter the scope or the strictness of the ecological efforts the green country takes owing to they are not going to be enough. By a way of an example, the environmental measures and actions one can take to maintain the river clean will not properly work if the neighbor, who is located upstream, dumps pollutant substances. Water will unfailingly come dirty. In other words, individual actions in this ambit turn out usually ineffective, no matter the level of endeavor.

In that regard, the role assumed by the CJEU has been crucial orienting a more homogeneous and reasoned issuing of green decisions in this type of disputes. Without its intervention, the implementation of numerous environmentally protective actions would not have been possible, in detriment of nature. Notwithstanding, one has to be aware enough to admit that the root of the balance between its independence and influential power lies especially in its regional character, and consequently in the legitimacy it possesses in front of the Member States. This particular circumstance endows the Court a peripheral vision about ecological issues that adapts in a better fashion to the comprehensive character of nature and facilitates it more appropriate enforcement of community and international law. Concomitantly, it also demonstrates the incidence in the inner policy of a country requires a certain level of legitimacy, at the public level, in order to it can be effective to such an extent. In the scheme of things, although the projects are full of the best intentions, such as it occurs in the Tribunal of the Rights of Nature for example, mentioned in the next chapter, their actions will be limited to the scope they are able to attain considering the fact it is a private platform, with a highly restricted power of incidence. Therefore, the environmental relevance of the actions taken by this kind of entities will tend to be more rhetorical than really practical.

6.3.4 Are there enough judicial warranties to protect nature these days?

If one directs one's attention exclusively to the CJEU's selected data, the response would be statistically affirmative given that a little less of the ten percent of the sample obtained unfavorable decisions. On the contrary, what one can actually appreciate, based on the review of the said data, is that the critical cases correspond rather to the local level. Therein lies the tensions between the [public] economic interests and the protection of nature, in which the intervention of the states plays a crucial role. As it has been previously mentioned, if the national public policy's objectives are well defined, and the independence of the national administration of justice is guaranteed, there would not be reason enough to concern. Nevertheless, the problem occurs when one can bring into question serious errors of procedure, either administrative or judicial, or the event brings about far-reaching environmental impacts, among others. Additionally, if states incline to prioritize those public interests over the welfare of nature, the immediate effect will be the absence of defense mechanisms in its favor, meaning somehow lack of representation as well. Consequently, the international arena would seem the best ambit to look for alternatives.

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