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**Trabalho e proteção de
migrantes brasileiros no exterior:
abordagens multisituadas e
perspectivas teóricas**

Leonardo Cavalcanti da Silva

Maria José Rigotti

Nitish Monebhurrun

VOLUME 22 • N. 3 • 2025
TENSÕES REGULATÓRIAS NO DIREITO
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Entrevistas com os palestrantes do Seminário Internacional “Trabalho e proteção de migrantes brasileiros no exterior” organizado pelo Tribunal Regional do Trabalho da 10ª Região (TRT-10)*

Leonardo Cavalcanti da Silva**

Maria José Rigotti***

Nitish Monebhurrun****

1 Trabalho e proteção de migrantes brasileiros no exterior: abordagens multisituadas e perspectivas teóricas

Como estratégia metodológica complementar às atividades do Seminário Internacional “Trabalho e proteção de migrantes brasileiros no exterior”, ocorrido no dia 26 de novembro de 2025, promovido pelo Tribunal Regional do Trabalho da 10ª Região (TRT-10), com a curadoria científica do Observatório das Migrações Internacionais (OBMigra) da Universidade de Brasília (UnB), foram realizadas entrevistas com participantes selecionados, definidos a partir de critérios de expertise acadêmica, atuação institucional e reconhecimento profissional nos campos da migração internacional, do trabalho e dos direitos humanos. A incorporação desse instrumento qualitativo teve como objetivo aprofundar analiticamente os debates produzidos nos painéis do evento, ampliando sua capacidade explicativa e contribuindo para a sistematização de diagnósticos sobre os desafios contemporâneos relacionados à proteção de trabalhadores e trabalhadoras migrantes brasileiros no exterior.

Do ponto de vista metodológico, as entrevistas se inscrevem no campo da pesquisa qualitativa interpretativa, funcionando como técnica de produção de conhecimento situada, capaz de articular evidências empíricas, trajetórias institucionais e marcos normativos. Essa opção dialoga com a tradição das ciências sociais crítica da migração, que enfatiza a necessidade de compreender os fenômenos migratórios a partir das experiências concretas dos sujeitos e das estruturas sociais que moldam suas possibilidades de ação (Sayad, 1998; Castles; Haas; Miller, 2014).

O roteiro das entrevistas foi estruturado em torno de cinco eixos analíticos centrais, comuns a todos os participantes, concebidos de modo a assegurar coerência interna e comparabilidade das respostas:

- i. a identificação da principal problemática no campo da proteção de migrantes brasileiros no exterior;
- ii. a análise de suas implicações práticas para os sujeitos migrantes e para os sistemas institucionais de proteção;
- iii. a explicitação dos fatores estruturais, históricos, socioeconômicos e normativos que contribuem para a persistência dessas situações;

* Trata-se de Entrevistas com os palestrantes do Seminário Internacional “Trabalho e proteção de migrantes brasileiros no exterior” organizado pelo Tribunal Regional do Trabalho da 10ª Região (TRT-10) no dia 26/11/2025.

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- iv. a avaliação crítica das políticas, programas e instrumentos institucionais existentes; e
- v. a proposição de estratégias diante da ausência, insuficiência ou fragmentação das respostas atualmente disponíveis.

As entrevistas foram respondidas pelos palestrantes do seminário, a partir de suas experiências empíricas e referenciais analíticos, o que confere ao material elevado grau de legitimidade epistêmica. A análise do corpus evidencia convergências significativas em torno da compreensão de que as violações de direitos enfrentadas por migrantes brasileiros no exterior não se configuram como eventos isolados ou excepcionais, mas como expressão de vulnerabilidades estruturais, produzidas na interseção entre desigualdades de classe, raça, gênero, nacionalidade e status migratório.

Essa leitura dialoga diretamente com a noção de vulnerabilidade social e laboral desenvolvida por Castel (1998), segundo a qual a precarização do trabalho e a fragilização dos vínculos de proteção social produzem zonas de instabilidade e desfiliação. No caso dos migrantes, tais processos são agravados pela condição de estrangeiria, que, conforme argumenta Sayad (1998), coloca o migrante em uma posição estruturalmente ambígua, marcada pela provisoriedade jurídica e pela subordinação social.

As respostas também reforçam análises da economia política da migração que identificam a migração laboral como elemento funcional à segmentação dos mercados de trabalho e à reprodução de regimes de trabalho precário em escala transnacional (Sassen, 2001; Harvey, 2005). Nesse contexto, trabalhadores migrantes tendem a ser incorporados em setores caracterizados por baixa proteção social, alta rotatividade e maior exposição a práticas exploratórias, incluindo o trabalho em condição análoga à escravidão e o tráfico de pessoas.

Do ponto de vista normativo, os depoimentos analisados evidenciam tensões recorrentes entre a aplicação formal do direito e a efetivação material de direitos, especialmente em contextos transnacionais. Essa constatação dialoga com abordagens críticas dos direitos humanos que destacam a existência de hierarquias de acesso a direitos, mesmo em sistemas jurídicos formalmente universalistas (Fraser, 2009; Brown, 2015). No campo migratório, tais hierarquias se expressam na seletividade das políticas de proteção e na dificuldade de

reconhecimento pleno dos migrantes como sujeitos de direitos.

As entrevistas também problematizam a atuação do Sistema de Justiça em casos envolvendo tráfico de pessoas, trabalho forçado e subtração internacional de crianças, indicando a necessidade de interpretações jurídicas contextualizadas e sensíveis às condições concretas de vida dos sujeitos migrantes. Essa perspectiva converge com a literatura que defende uma abordagem baseada em direitos humanos e sensível ao gênero, especialmente no tratamento de mulheres migrantes em situação de violência (OIM, 2019; OIT, 2017).

Do ponto de vista analítico, o conjunto das entrevistas constitui um corpus qualitativo relevante, capaz de articular teoria social, análise institucional e produção de conhecimento aplicado. Ao integrar reflexão acadêmica e experiência institucional, o material produzido contribui para o debate teórico sobre migração e trabalho e, simultaneamente, oferece subsídios para a formulação e o aprimoramento de políticas públicas e políticas judiciárias orientadas à redução de vulnerabilidades e à efetivação de direitos.

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2 Entrevista com os palestrantes do Seminário

2.1 Entrevista com Álvaro Lima – Diretor de Pesquisa da Prefeitura de Boston (EUA)

Álvaro de Castro e Lima é Diretor de Pesquisas da Prefeitura de Boston e Fundador do Instituto Diáspora Brasil (IDB). Recentemente, ele atuou como Senior Vice Presidente e *Director* de Pesquisas da *Initiative for a Competitive Inner City* (ICIC), uma organização fundada pelo Professor Michael Porter, da Universidade de Harvard. Economista com mestrado na *New School for Social Research* em Nova York, foi chefe do Departamento Econômico do Ministério da Indústria e Energia em Moçambique e coordenador de projetos de desenvolvimento regional do Instituto Paranaense de Desenvolvimento Econômico e Social (IPARDES) em seu país natal, Brasil.

2.1.1 Qual é a principal problemática associada ao tema?

A principal problemática reside na visibilidade insuficiente, metodologicamente inconsistente e politicamente subvalorizada da presença brasileira no exterior, em especial nos Estados Unidos — país que abriga cerca de 2,1 milhões de brasileiros e constitui, sozinho, quase um quarto do volume total de remessas enviadas ao Brasil. Apesar de sua magnitude demográfica, econômica e sociocultural, essa presença continua marcada por lacunas estruturais de dados, altos níveis de não cidadania, elevada vulnerabilidade socioeconômica entre aqueles sem naturalização, e uma sub-representação política crônica.

O conjunto de evidências que reuni mostra que grande parte dos brasileiros permanece sem acesso pleno aos direitos, enfrentando desigualdades expressivas em renda, propriedade habitacional, pobreza e estabilidade ocupacional, além de sofrer com a persistente subestimação estatística, tanto nos sistemas censitários nacionais quanto nas bases internacionais.

Assim, a problemática central é dupla: de um lado, a disjunção entre a relevância real da diáspora e sua representação institucional; de outro, a ausência de políticas públicas transnacionais capazes de incorporar integral-

mente esse contingente à agenda internacional de direitos, desenvolvimento e participação democrática.

2.1.2 Quais são as implicações práticas decorrentes dessa problemática?

A subvalorização e os déficits de reconhecimento institucional da diáspora brasileira implicam efeitos concretos e multidimensionais:

a) Vulnerabilidade socioeconômica ampliada

Os dados mostram que brasileiros não cidadãos nos EUA apresentam:

- renda pessoal e domiciliar significativamente inferiores,
- maior incidência de pobreza (aproximadamente o dobro da observada entre naturalizados),
- taxas muito menores de propriedade de moradia,
- alta sobrecarga com aluguel (mais de 63% comprometem mais de 30% da renda com moradia).

Essas desigualdades têm efeitos diretos sobre segurança econômica, mobilidade intergeracional e capacidade de planejamento familiar.

b) Barreiras de integração e acesso a direitos

Embora muitos apresentem níveis elevados de escolaridade, cerca de um terço não fala inglês “bem”, o que limita:

- acesso a serviços,
- participação cívica,
- competitividade no mercado de trabalho formal.

A falta de cidadania restringe o pleno exercício dos direitos políticos.

c) Sub-representação política e déficit democrático

Apesar dos avanços, como a eleição de representantes brasileiros em Massachusetts, a participação política permanece restrita e insuficiente diante da escala demográfica. A ausência de naturalização contribui diretamente para essa sub-representação.

d) Subaproveitamento da contribuição econômica

Os brasileiros nos EUA geram:

- mais de US\$ 35 bilhões em PIB por meio de trabalho e consumo,
- mais de 277 mil empregos diretos e indiretos,
- mais de US\$ 6,8 bilhões em impostos.

No entanto, essa contribuição permanece pouco reconhecida e raramente incorporada às políticas públicas bilaterais.

e) Tensões sociais e incremento das resistências

Os dados evidenciam o crescimento de mobilizações e protestos, inclusive com pautas diretamente relacionadas à imigração, refletindo a tensão acumulada pela ausência de respostas institucionais adequadas.

2.1.3 Quais fatores contribuem para a persistência dessa situação?

A persistência da problemática deriva de um conjunto articulado de fatores estruturais:

a) Invisibilidade estatística e dificuldades de mensuração

O subregistro histórico dos imigrantes brasileiros em levantamentos censitários — tanto no Brasil quanto no exterior — impede diagnósticos precisos e desestimula o desenho de políticas dirigidas.

b) Barreiras legais e institucionais

A ausência de cidadania para cerca de dois terços dos brasileiros nos EUA perpetua:

- restrições ao exercício de direitos,
- posições mais precárias no mercado de trabalho,
- impedimentos à representação política.

c) Estruturas socioeconômicas desiguais

Setores de maior concentração de trabalhadores brasileiros — construção, serviços administrativos, serviços pessoais — tendem a apresentar:

- baixa proteção trabalhista,
- volatilidade ocupacional,

- risco elevado de exploração.

d) Fragmentação das políticas transnacionais

O Brasil não possui uma política de Estado de médio e longo prazo voltada para sua diáspora, e a cooperação bilateral com os EUA permanece limitada e episódica.

e) Racismo estrutural e xenofobia

Os dados demonstram, ainda que implicitamente, a intensificação da resistência social à imigração nos EUA, com mobilizações massivas e discursos públicos polarizados.

f) Falta de articulação entre produção de conhecimento e formulação de políticas

A vasta produção acadêmica, assim como a participação comunitária, não tem sido incorporada de forma sistemática à institucionalidade brasileira ou à diplomacia consular.

2.1.4 Que medidas foram implementadas até o momento para enfrentá-la?

Ainda que não exista uma política integrada, é possível identificar iniciativas relevantes:

a) Construção de infraestrutura cívica, cultural e social

Cerca de 250 organizações comunitárias brasileiras atuam em áreas como direitos trabalhistas, empoderamento feminino, assistência social e apoio empresarial.

Entre 150 e 200 veículos de mídia brasileiros nos EUA compõem uma rede ativa de comunicação, identidade e mobilização social — uma verdadeira “infraestrutura de mediação transnacional”.

b) Aumento da participação política local

Massachusetts se destaca com a eleição de:

- três deputados estaduais,
- uma vereadora,
- um membro do comitê escolar.

Trata-se de um passo fundamental para ampliar a representação política no país onde reside a maior comunidade brasileira do mundo.

c) Avanços em produção de dados e análise socioeconômica

O uso sistemático do *American Community Survey* (U.S. Census Bureau) e de bases internacionais, aliado ao monitoramento contínuo do Ministério das Relações Exteriores, permite hoje compreender com maior precisão:

- perfil demográfico,
- distribuição territorial,
- inserção ocupacional,
- renda e pobreza,
- padrões de naturalização.

d) Organizações que articulam direitos e *advocacy*

Instituições como o Instituto Diáspora Brasil, o *Brazilian Women's Group* e outras redes comunitárias têm ampliado o debate público e a produção de evidências.

e) Reconhecimento crescente da importância econômica da diáspora

A documentação das contribuições para o PIB, o emprego e as receitas fiscais dos EUA têm fortalecido a agenda de valorização da diáspora na arena pública. A importância das remessas para o desenvolvimento das regiões brasileiras, mesmo que reconhecidas, ainda não foi catalisada de forma adequada.

2.1.5 Na ausência de iniciativas consolidadas, quais estratégias deveriam ser propostas?

O diagnóstico apresentado aponta para a necessidade de um conjunto de estratégias estruturantes capazes de transformar a diáspora em sujeito político e econômico pleno. As principais são:

a) Institucionalização de uma Política Nacional para a Diáspora Brasileira

Um marco legal e institucional que articule entre outras ações:

- direitos transnacionais,
- proteção consular,
- acesso a serviços públicos,
- programas de retorno voluntário e reintegração,

- cooperação federativa entre governos locais no Brasil e no exterior.

b) Fortalecimento de mecanismos de cidadania e participação democrática

- Campanhas coordenadas de naturalização.
- Expansão de conselhos de imigrantes em cidades norte-americanas.
- Parcerias com universidades e *think tanks* para formação política.

c) Criação de um Observatório Transnacional da Diáspora Brasileira

Voltado para:

- monitoramento contínuo de dados,
- pesquisa aplicada,
- avaliação de políticas locais e internacionais,
- elaboração de indicadores anuais de bem-estar e vulnerabilidade.

d) Programas de integração econômica e qualificação profissional

Incluindo:

- certificação de competências,
- apoio a empreendedores brasileiros,
- acesso a crédito,
- parcerias com sindicatos e associações profissionais.

e) Estratégias de proteção trabalhista e combate à exploração

- Acordos bilaterais em setores de maior precarização.
- Expansão de clínicas de direitos trabalhistas.
- Protocolos consulares de atendimento a violações.

f) Consolidação da presença cultural e comunitária

Dada a importância dos mais de 150 veículos de mídia e da intensa vida cultural:

- fortalecer redes de mídia comunitária,
- promover intercâmbio cultural institucional,

- apoiar museus, centros culturais e iniciativas de memória da diáspora.

g) Cooperação internacional voltada ao desenvolvimento

Utilizar a diáspora como elo estratégico nas agendas de:

- inovação,
- investimento,
- cooperação científica,
- sustentabilidade,
- desenvolvimento territorial.

2.2 Entrevista com Tânia Tonhati – Professora Universidade de Brasília (UnB), Pesquisadora (OBMIGRA)

Tânia Tonhati é Professora adjunta do Departamento de Sociologia da Universidade de Brasília (UnB), onde coordena o Bacharelado em Sociologia, atua também como coordenadora do Laboratório de Estudos sobre as Migrações Internacionais (LAEMI-UnB) e pesquisadora do Observatório das Migrações Internacionais (OBMigra-UnB), fruto de cooperação técnica entre a UnB e o Ministério da Justiça e Segurança Pública.

Concluiu o doutorado em Sociologia na Goldsmiths, University of London, com pesquisas sobre migração internacional e políticas destinadas a mulheres migrantes brasileiras, analisando dinâmicas laborais e familiares em contextos transnacionais entre o Reino Unido e o Brasil. No Reino Unido, atuou como coordenadora assistente e pesquisadora na Universidade de Oxford, no projeto THEMIS, e liderou investigações vinculadas ao Grupo de Pesquisa sobre Migração Brasileira para o Reino Unido (GEB), que resultaram em relatórios e artigos publicados em periódicos indexados.

No Brasil, coordenou pesquisas para organismos internacionais como a Organização Internacional para as Migrações (OIM), a Organização Pan-Americana da Saúde (OPAS/OMS) e o Alto Comissariado das Nações Unidas para Refugiados (ACNUR), com ênfase nos novos fluxos migratórios e nas políticas correlatas.

2.2.1 Qual é a principal problemática associada ao tema?

A principal problemática enfrentada por mulheres imigrantes brasileiras no exterior pode ser compreendida a partir de uma perspectiva interseccional, na qual gênero, classe, raça e nacionalidade operam de forma articulada na produção de vulnerabilidades sociais. Essas mulheres encontram-se majoritariamente inseridas em setores marcados pela divisão sexual do trabalho, especialmente o trabalho doméstico, o cuidado e os serviços, espaços nos quais a precarização laboral, a informalidade e a exposição à violência de gênero são estruturalmente reproduzidas. Ademais, processos de racialização das mulheres brasileiras nos países de destino contribuem para a naturalização de sua exploração e para a invisibilização das violações de direitos.

2.2.2 Quais são as implicações práticas decorrentes dessa problemática?

Do ponto de vista das trajetórias das mulheres migrantes, a inserção laboral predominantemente em nichos associados ao cuidado, ao trabalho doméstico e à limpeza acarreta restrições significativas à autonomia econômica, além de limitar as possibilidades de mobilidade ocupacional. Ademais, quando se encontram em situação migratória irregular, o acesso à justiça torna-se severamente comprometido, assim como a possibilidade de denunciar contextos de exploração e violência. A condição migratória, nesse cenário, opera de forma interseccional com normas de gênero e processos de racialização, reforçando dinâmicas de dependência, vulnerabilidade e silenciamento. Para os sistemas institucionais de proteção, tais especificidades evidenciam os limites de políticas públicas formuladas a partir de uma lógica universalista e supostamente neutra, incapaz de enfrentar adequadamente as desigualdades estruturais que atravessam as experiências das mulheres migrantes.

2.2.3 Quais fatores contribuem para a persistência dessa situação?

A persistência dessas problemáticas está ancorada em fatores estruturais e históricos relacionados à divisão sexual e internacional do trabalho, que posiciona mulheres migrantes em ocupações desvalorizadas e pouco reguladas. A racialização das mulheres latino-americanas,

associada a estereótipos de gênero e sexualidade, reforça hierarquias sociais e legítimas práticas exploratórias. No plano normativo, observa-se uma dissonância entre o reconhecimento formal de direitos humanos e a limitada incorporação da interseccionalidade nas políticas migratórias, trabalhistas e de enfrentamento à violência de gênero.

2.2.4 Que medidas foram implementadas até o momento para enfrentá-la?

Em alguns países, como Portugal e Espanha, destacam-se iniciativas da sociedade civil que atuam especificamente na defesa dos direitos e na visibilização das necessidades das mulheres migrantes brasileiras. Em Portugal, organizações como a Casa do Brasil de Lisboa, e coletivos feministas migrantes têm desenvolvido ações de acolhimento, orientação jurídica, enfrentamento à violência de gênero e incidência política. Na Espanha, experiências como a Associação de Mulheres Brasileiras na Espanha (AMBE) e REVIBRA/Casa da gente, que cumprem papel relevante ao articular apoio comunitário, produção de informação e advocacy em torno das condições de vida e trabalho das brasileiras migrantes. Em contraste, em outros países observa-se a escassez de políticas públicas e de mobilização organizada voltadas especificamente à proteção desse grupo, sendo predominantes iniciativas de caráter meramente informativo. Nesse contexto, torna-se fundamental avançar na formulação de políticas estruturantes, protagonizadas pelo Estado brasileiro e por suas instituições no exterior, capazes de contribuir de forma efetiva para a melhoria das condições de vida, trabalho e acesso a direitos das mulheres migrantes brasileiras.

2.2.5 Na ausência de iniciativas consolidadas, quais estratégias deveriam ser propostas?

A partir dos estudos realizados noto ser fundamental a formulação de estratégias de políticas públicas que adotem explicitamente uma abordagem interseccional, reconhecendo os efeitos combinados da divisão sexual do trabalho, da racialização e da condição migratória. Isso implica fortalecer mecanismos de proteção sensíveis ao gênero, promover a capacitação de agentes públicos, ampliar a cooperação internacional e valorizar o papel das organizações da sociedade civil e das redes

de mulheres migrantes na construção de respostas mais eficazes, equitativas e orientadas pela justiça social.

2.3 Entrevista com Eduardo Siqueira

Eduardo Siqueira possui graduação em Medicina pela Universidade Federal do Rio de Janeiro (1979), Mestrado em Saúde Pública na Johns Hopkins University (1986) e doutorado em Work Environment Policy - University of Massachusetts Lowell (1998). Atualmente é professor emérito no Departamento de Planejamento Urbano e Desenvolvimento Comunitário da Escola de Meio Ambiente (School for the Environment) da Universidade de Massachusetts Boston. Tem experiência na área de Saúde Coletiva, com ênfase em Políticas de Saúde do Trabalhador e Políticas de Saúde, atuando principalmente nos seguintes temas: saúde do trabalhador, políticas de saúde do trabalhador e ambientais, saúde ambiental, políticas de saúde, e saúde do imigrante brasileiro nos Estados Unidos.

2.3.1 Qual é a principal problemática associada ao tema?

A principal problemática associada à proteção de trabalhadores imigrantes brasileiros nos Estados Unidos em 2025 é a deportação de milhares de brasileiros como resultado da verdadeira caçada a imigrantes indocumentados levada a cabo pela órgão do governo dos Estados Unidos conhecido como Immigration and Customs Enforcement (ICE). O ICE é parte do Department of Homeland Security (DHS), que tem utilizado medidas repressivas, arbitrárias, e questionadas como ilegais por defensores do Estado de Direito no país.

Segundo dados do órgão Office of Homeland Security, existiam em 2022 cerca de 230 mil brasileiros indocumentados residindo no país. A base de dados intitulada Deportation Data (<https://deportationdata.org>) revela que houve aumento do número de deportações de brasileiros em 2025, que atingiu 2, 051 entre janeiro e fim de julho.

Os agentes de imigração do ICE tem dado batidas em ambientes de trabalho e prendido imigrantes brasileiros sem autorização legal para tanto e sem identificarem-se como agentes do ICE. Alguns inclusive usam máscaras para cobrir suas faces, impossibilitando a sua identificação, como ocorre em sequestros. Este tipo de

cumprimento da lei (enforcement) tem gerado medo e insegurança em todas as comunidades com grande número de imigrantes indocumentados, mas tem também afetado todos os imigrantes documentados nos Estados Unidos.

Um exemplo de tal prática ocorreu com a prisão em junho de 2025 do estudante Marcelo Gomes, morador da cidade de Milford, em Massachusetts. Marcelo foi preso um dia antes da sua formatura no segundo grau (high school), quando se dirigia para um jogo de volleyball. Segundo informou a diretora do escritório local do ICE, o alvo da busca era o pai de Marcelo, mas como os agentes estão na comunidade procurando criminosos, prendem todos aqueles que se encontram no país sem autorização legal.

2.3.2 Quais são as implicações práticas decorrentes dessa problemática?

As implicações práticas decorrentes dessa problemática são multifacetadas. O medo generalizado nas comunidades de imigrantes brasileiros afetadas tem levado pais de crianças a evitarem levar seus filhos a escolas com medo de serem presos e deportados. Muitos adultos evitam assistência médica e faltam a consultas também pelo medo de serem deportados, o que pode agravar seu estado de saúde por falta de cuidados preventivos ou curativos precocemente. A política de perseguição a imigrantes diminui as oportunidades de lazer e remuneração adequada para viver nos Estados Unidos. Em resumo, a vida do imigrante é muito afetada pelas ameaças constantes de prisão e deportação. Em alguns estados dos Estados Unidos, torna-se praticamente inviável para trabalhadores manterem as suas rotinas normais no dia a dia.

Aqueles que são deportados sofrem abusos, maus tratos, e violências na prisão antes de serem deportados, sofrem humilhações durante o processo de deportação, e sofrem dificuldades de readaptação depois de retornar ao Brasil. A deportação gera traumas sérios em muitos e pode significar separação familiar e perda de renda e moradia nos Estados Unidos entre aqueles que já haviam estabelecido algum nível de integração à sociedade estadunidense.

2.3.3 Quais fatores contribuem para a persistência dessa situação?

Entre os fatores que contribuem para a persistência desta situação podemos listar os seguintes:

- a) O racismo contra imigrantes da América Latina faz parte da história da sociedade dos Estados Unidos há mais de um século, tradicionalmente dirigido contra os mexicanos. Nas últimas décadas ampliou-se para os demais países da América Central e do Sul, incluindo os brasileiros.
- b) A economia dos Estados Unidos não pode funcionar sem a presença de imigrantes indocumentados em diversos setores, como a agricultura, a construção civil, serviços domésticos, e o setor de serviços como um todo. A atração da mão de obra de brasileira para alguns nichos econômicos está relacionada com a situação da economia brasileira em cada período. Não seria exagero afirmar que o Brasil exporta mão de obra e os Estados Unidos importa mão de obra de acordo com os ciclos econômicos de boom e retração nos dois países.
- c) As crises econômicas ou recessões são usadas pela elite dos Estados Unidos para acusar os imigrantes indocumentados de roubar empregos dos cidadãos. Os imigrantes indocumentados são criminalizados e se tornam bodes expiatórios para explicar o desemprego estrutural, o aumento da criminalidade, o aumento dos custos de programas sociais, entre outros argumentos falsos para justificar a deportação. Lideranças políticas, principalmente do partido republicano como o presidente Trump, adotam narrativas xenófobas para atrair o voto conservador nas eleições para cargos eletivos em todos os níveis de governo.
- d) A existência de um verdadeiro complexo industrial de detenção de imigrantes, conforme descrito no livro *Immigration Detention Inc.: The Big Business of Locking Up Migrants*. Já há algumas décadas a detenção de imigrantes gerou

uma rede de interesses econômicos e parcerias financeiras público-privadas que rendem lucros para empresas privadas e órgãos públicos em diversas cidades dos Estados Unidos.

- e) O complexo arcabouço legal e as dificuldades burocráticas para regularizar a situação de milhões de imigrantes contribuem para o crescimento do número de imigrantes indocumentados. Em muitos casos, a autorização de imigrantes para trabalhar e residir legalmente no país pode demorar uma década, o que em parte explica a presença de cerca de 14 milhões de imigrantes indocumentados nos Estados Unidos. Os brasileiros passaram a fazer parte deste contingente nas últimas décadas, quando a emigração para os Estados Unidos cresceu e consolidou-se como parte das opções de milhares de brasileiros que decidiram emigrar por diversos motivos.

2.3.4 Que medidas foram implementadas até o momento para enfrentá-la?

Nenhuma medida foi implementada pelo atual governo dos Estados Unidos para enfrentar a deportação de imigrantes indocumentados brasileiros. Organizações da sociedade civil, como igrejas e centros de apoio a imigrantes, e alguns governos municipais e estaduais implementaram a política que se chama de “cidades santuários” para proteger imigrantes contra batidas e prisões por parte do ICE. Em algumas dessas cidades e estados onde residem grande número de brasileiros, como em Boston e Massachusetts, foram aprovadas leis e decretos proibindo a colaboração das polícias estaduais e locais com o ICE, impedindo assim que violações de leis civis por imigrantes brasileiros sejam ligadas com status o imigratório dos infratores.

Organizações não governamentais comprometidas com a defesa dos imigrantes criaram materiais educativos informando os imigrantes brasileiros sobre seus direitos civis e como reagir a eventuais encontros com agentes da imigração. Ativistas pelos direitos civis tem também feito manifestações e protestos contra o ICE e organizado vigílias e grupos de vigilância ativa para

proteger comunidades onde há grande presença de imigrantes indocumentados.

O governo brasileiro, através da Embaixada e Consulados do Brasil nos Estados Unidos, tem prestado serviços a imigrantes brasileiros detidos através de visitas a prisões onde eles se encontram, comunicação com autoridades dos Estados Unidos e apoio financeiro em alguns casos. Os brasileiros deportados tem recebido acolhimento por diversos serviços de apoio quando em território brasileiro; porém este acolhimento ainda não dá conta da reintegração completa dos deportados aos locais de onde partiram. A ênfase tem sido em medidas emergenciais imediatamente após a chegada dos imigrantes ao território brasileiro nos voos especiais destinados a repatriá-los.

2.3.5 Na ausência de iniciativas consolidadas, quais estratégias deveriam ser propostas?

Embora já existam algumas iniciativas de apoio, ainda há necessidade de uma estratégia transversal de Estado para apoio ao imigrante brasileiro, que inclua os três níveis de governo e os três poderes, capaz de dar conta das necessidades dos imigrantes brasileiros durante e após a deportação. Além disto, é necessário implementar uma estratégia educacional que informe os imigrantes brasileiros das leis imigratórias e civis dos Estados Unidos antes da emigração, para que possam avaliar corretamente os riscos envolvidos na emigração não autorizada. Minha experiência convivendo por duas décadas com trabalhadores imigrantes brasileiros em Massachusetts deixou claro que a maioria deles tinha muito pouco conhecimento das proteções oferecidas pelas leis trabalhistas, imigratórias e civis dos Estados Unidos.

Como acompanhamento e estudo a imigração de brasileiros para os Estados Unidos há mais de duas décadas, considero que o governo brasileiro há cerca de 20 anos aprovou políticas públicas amplas sobre a emigração brasileira para o exterior, mas tem havido descontinuidade e morosidade na implementação dessas políticas. Por outro lado, houve conflitos entre ministérios em relação ao protagonismo no gerenciamento das políticas aprovadas em governos anteriores. Em resumo, ainda não existe uma política de Estado para enfrentar a problemática do trabalho e proteção a imigrantes brasileiros nos Estados Unidos.

2.4 Entrevista com a Márcia Baratto - REVIBRA Alemanha

Márcia Baratto é coordenadora-geral da Rede europeia de apoio às vítimas brasileiras de violência doméstica. Doutora em ciência política pela Unicamp, especialista em direitos humanos e judiciário, trabalha com migrantes brasileiras vítimas de violência doméstica e de gênero em disputas internacionais de guarda e processos de retorno pela convenção 28 de Haia desde 2019. Também coordena o departamento de pesquisa da Revibra.

2.4.1 Com relação à primeira pergunta, sobre qual seria a problemática associada ao tema?

O principal problema com a aplicação do Tratado 28 de HAIA é que ele é um tipo de regulação de direitos humanos, de direito internacional privado, que foi criado sem perspectiva de gênero e sem endereçar o problema da violência doméstica, na análise do que seria o melhor interesse da criança. Não existe proteção de direitos humanos se uma legislação obriga crianças a conviverem com agressores domésticos. E essa perversão dos objetivos do próprio tratado é o problema a ser enfrentado. Quando Haia 28 não considera o problema da violência doméstica, que atinge uma parcela significativa de mães brasileiras que são enquadradas como subtratoras pelo tratado, essa legislação que deveria proteger o melhor interesse da criança, na verdade, acaba por reforçar o poder e as lógicas de violência de agressores domésticos, desrespeitando direitos humanos básicos de crianças e mulheres. Agressores domésticos usam do tratado para afastar mães e crianças sobreviventes.

2.4.2 Com relação à segunda pergunta, quais são as implicações práticas decorrente dessa problemática?

É que mães e crianças que sobreviveram a processos de violência doméstica na Europa são separadas, e volta a viver nos processos de violência doméstica, especialmente as crianças que retornam para conviver com agressores domésticos, e não vivem mais com suas mães, que na maioria esmagadora dos casos que acompanhamos, também são as cuidadoras primárias dessas crianças. Quando mães migrantes decidem retornar ao

Brasil com seus filhos, numa tentativa de proteger a si e essas crianças, e são consideradas subtratoras pela justiça brasileira e obrigadas a devolver seus filhos para o agressor e vê-los partir para o exterior, essa medida que deveria acontecer para proteger a criança, acaba sendo um ato de violência que vai garantir o isolamento da criança da sua mãe, e permitir que o agressor doméstico use a criança para controlar ou punir a mãe que fugiu por conta da violência doméstica. Com isso a gente tem o reforço de novas lógicas de violência doméstica, o trauma da interrupção do convívio entre mães e crianças, e a convivência exclusiva de crianças com agressores domésticos. Na prática, a violência migra da mãe para a criança.

2.4.3 Quais são os fatores que contribuem para a persistência dessa situação?

Questões estruturais como o racismo, especialmente na sua face da discriminação antimigrante, a discriminação de gênero, a invisibilidade de formas administrativas de violência doméstica, e a falta universal de acesso a justiça para mulheres migrantes (o regime de direitos fundamentais do Brasil que também se estende a migrantes é exceção no direito ocidental, infelizmente), e penalização da subtração - em paralelo ao procedimento civil de retorno são formas de violência institucional e estrutural que permitem o mau uso da convenção 28 de Haia. Ainda é preciso citar as seguintes ausências jurídicas protetoras para vítimas de violência doméstica: o fato de que a violência doméstica não é nomeada como uma exceção ao retorno, o fato de que o Brasil ainda não possui uma lei dizendo que dentro do rol das atuais cinco exceções -, a violência doméstica deve ser considerada dentro da exceção ao retorno por representar grave risco à criança, a falta de protocolos unificados nas autoridades centrais para garantir que relatos de violência doméstica sejam citados sempre nos procedimentos administrativos, são ausências que contribuem para invisibilidade da violência doméstica nos casos de subtração internacional.

2.4.4 Que medidas foram implementadas até o momento para enfrentar essa situação?

Nós temos uma decisão do Supremo Tribunal Federal que diz que o Tratado 28 de Haia é constitucional, mas que a violência doméstica deve ser considera-

da como uma exceção ao retorno. Nós temos algumas portarias do Conselho Nacional de Justiça que também já minoram possíveis efeitos do mau uso do tratado internacional, mas nós ainda precisamos determinar quais vão ser as formas de prova que as mães vão ter para poder dizer que seus filhos não devem retornar para lares onde eles vivenciaram violência doméstica.

2.4.5 Na ausência de iniciativas consolidadas, quais estratégias deveriam ser propostas?

Primeiro porque deve haver um ciclo internacional de políticas públicas sobre o assunto envolvendo os países que ratificaram o tratado.

É óbvio que é muito importante que o Brasil faça o dever de casa, aprove uma lei nacional tal qual o Uruguai e a Austrália, ter a decisão do Supremo Tribunal Federal já é um avanço, mas o Brasil precisa melhorar a qualidade dos serviços consulares no acesso a vítimas de violência doméstica, bem como aprofundar políticas globais e também dados bilaterais como outros países para que vítimas migrantes de violência doméstica possam encontrar acolhimento no território em que elas estiverem. Mesmo quando elas migrem ou mesmo quando seus agressores migrem.

2.5 Entrevista com a Patrícia Trindade Maranhão Costa - UnB/OBMigra

Patrícia Trindade Professora substituta do Departamento de Antropologia da Universidade de Brasília (UnB). Pesquisadora Plena do Programa de Pós-Graduação em Ciência Política da UnB. Pesquisadora Sênior do Observatório das Migrações Internacionais (OBMigra) da UnB. Pesquisas realizadas sobre: política local de prevenção do trabalho escravo em comunidades afetadas pela Rede Global de Produção do aço na Amazônia Oriental; estratégias para a construção do dever de devida diligência corporativa para prevenção do tráfico de pessoas e do trabalho escravo em cadeias produtivas e avaliação de políticas públicas de enfrentamento ao tráfico de pessoas. Doutora em Antropologia Social pela UnB (2006), com etnografia sobre os congados mineiros. Pesquisa de pós-doutorado em Antropologia (2013) realizada na Université Laval, Canadá, como parte da rede internacional de investigadores reunida no projeto “Escravidão, Memória e Cidadania”.

2.5.1 Qual é a principal problemática associada ao tema?

A incidência de violações de direitos humanos, como trabalho escravo contemporâneo e tráfico de pessoas, em atividades laborais associadas a Redes Globais de Produção (RGP), notadamente na RGP do aço que afeta comunidades situadas em territórios com a presença de siderúrgicas. Minha pesquisa concentra-se na análise de comunidades dos municípios do estado do Maranhão que compõem o Pólo Siderúrgico Carajás. Com a presença de siderúrgicas, a produção de carvão vegetal seguidas vezes realizada pela derrubada de mata nativa tornou-se uma das principais atividades produtivas da região com o objetivo de abastecer as siderúrgicas. O carvoejamento para fins industriais é marcado pela incidência de trabalho escravo e, frequentemente, pela degradação ambiental. Este problema reflete os termos adversos ou desvantajosos da incorporação dos territórios amazônicos na lógica de produção capitalista global.

2.5.2 Quais são as implicações práticas decorrentes dessa problemática?

Entender a escravidão contemporânea a partir do enfoque em Redes Globais de Produção contribui para a percepção desse problema como fenômeno global com causas e dinâmicas que extrapolam os lugares onde os escravizados estão fisicamente situados, afetando diferentes territórios interligados por meio de cadeias de abastecimento e valor. Desse modo, o trabalho escravo que produz carvão vegetal na Amazônia Oriental permeia produtos consumidos em diversos países, cujo aço utilizado em sua fabricação possui insumos provenientes desse carvão. As cadeias de abastecimento são parte do desenvolvimento da economia política global. Nelas, empresas, produtores, trabalhadores e consumidores atuam como agentes que conectam lugares geograficamente dispersos, porém, interdependentes de produção, distribuição e consumo de bens e serviços. Nem todo trabalho escravo está relacionado às RGPs, mas é comum identificá-lo em setores e atividades altamente integrados a essas redes, o que ocorre, sobretudo, nos pontos de menor valor agregado das cadeias de abastecimento.

2.5.3 Quais fatores contribuem para a persistência dessa situação?

Esses pontos, via de regra, reúnem pessoas afetadas pela pobreza crônica, isto é, sem possibilidade de acúmulo e mobilização de recursos, por meio do trabalho, que assegure a satisfação de suas necessidades e a manutenção de direitos a longo prazo. A ausência dessa capacidade leva à pobreza crônica, que gera a vulnerabilidade para situações de trabalho precárias e exploratórias capazes de suprir apenas carências práticas imediatas. Essa vulnerabilidade, por sua vez, é aproveitada pelas empresas que compõem as RGP's e que, para atender às pressões comerciais, buscam os menores custos de produção a serem obtidos por meio do trabalho mal remunerado e facilmente explorado. A intensa competitividade entre as empresas tem como premissa a redução dos custos. Isso fatalmente recai sobre os trabalhadores pobres e pequenos produtores, partes mais frágeis dessa cadeia, na forma de relações de trabalho precárias, abusivas e informais, como o trabalho escravo. A exploração dessa mão de obra vulnerável, na forma de trabalho escravo, é uma estratégia de negócio lucrativa e vantajosa. A extrema vulnerabilidade das pessoas escravizadas contribui para uma espécie de economia moral da escravidão, justificando e tornando aceitável a prática na perspectiva de quem a realiza.

2.5.4 Que medidas foram implementadas até o momento para enfrentá-la?

A superação, no entanto, requer ações articuladas de repressão e prevenção. Se a repressão tem sido majoritariamente realizada por instituições estatais dedicadas à inspeção do trabalho, a prevenção do trabalho escravo na região do Pólo Siderúrgico Carajás tem sido protagonizada por organizações da sociedade civil dedicadas à defesa dos direitos humanos, dentre elas o Centro de Defesa da Vida e dos Direitos Humanos/Carmen Bascarán (CDVDH/CB) de Açailândia. As iniciativas de prevenção visam construir capacidades individuais e comunitárias para reduzir vulnerabilidades para o trabalho escravo. Seu objetivo é transformar pessoas vulneráveis em agentes de direitos, cientes do seu valor social

2.5.5 Na ausência de iniciativas consolidadas, quais estratégias deveriam ser propostas?

Criação de alternativas de sobrevivência sem incorrer em formas contemporâneas de escravidão e a pressão sobre os poderes públicos para que seja ampliado o acesso às suas políticas e serviços, notadamente nos lugares de origem e residência de pessoas vítimas e vulneráveis ao trabalho escravo contemporâneo¹.

2.6 Entrevista com o Nitish Monebhurrin. Professor titular (Centro universitário de Brasília), Pesquisador (OBMIGRA)

Nitish Monebhurrin Doutor e Pós-Doutor em direito internacional pela Escola de Direito de Sorbonne, Paris (Universidade de Paris 1, Panthéon-Sorbonne) e Professor Titular do Centro Universitário de Brasília. Possui mestrado em Direito Internacional Econômico pela mesma instituição e mestrado em Direito Internacional pela Universidade Jean Moulin Lyon III, também na França, além de diploma da Academia de Direito Internacional da Haia. É professor titular de Direito Internacional no Centro Universitário de Brasília (Brasil), onde coordena a Clínica de Empresas, Direitos Humanos e Políticas Públicas. Também é professor visitante na Universidad de La Sabana, na Colômbia. Nitish é pesquisador associado no Departamento de Estudos Latino-Americanos da Universidade de Brasília e pesquisador do Observatório das Migrações Internacionais (Brasil). Atua como consultor e árbitro em direito internacional. Integra o Grupo de Especialistas do Processo Regular das Nações Unidas para a Elaboração de Relatórios Globais e Avaliação do Estado do Meio Ambiente Marinho, incluindo Aspectos Socioeconômicos. Foi professor visitante ou conferencista em diversas universidades ao redor do mundo e publicou amplamente sobre direito internacional público, direito internacional dos investimentos, direito internacional ambiental, empresas e direitos humanos, responsabilidade social corporativa e deveres das empresas no direito internacional.

¹ COSTA, P. T. M. Por um Modelo Nacional de Prevenção do Trabalho Escravo? Desafios e conflitos na nacionalização do Projeto Ação Integrada. *Revista Sociedade e Estado*, v. 35, n. 3, pp. 837-860, 2020. PHILLIPS, N.; SAKAMOTO, L. The dynamics of adverse incorporation in global production networks: poverty, vulnerability and 'slave labour' in Brazil. *Chronic Poverty Research Centre Working Paper*, n.175, 2011.

2.6.1 Qual é a principal problemática associada ao tema?

A principal problemática reside no caráter extraterritorial da Diretiva Europeia sobre Devida Diligência em Sustentabilidade Corporativa (CSDDD) e nos seus efeitos sobre Estados não pertencentes à União Europeia. Embora a Diretiva tenha como objetivo legítimo prevenir violações de direitos humanos e danos ambientais ao longo das cadeias globais de valor, ela projeta um padrão normativo europeu para além do território da União, afetando atividades econômicas realizadas em Estados terceiros. Essa projeção ocorre sem mecanismos adequados de coordenação institucional, diálogo normativo ou reconhecimento das competências regulatórias e jurisdicionais desses Estados. O resultado é uma forma de imperialismo normativo e jurisdicional, na medida em que a União Europeia passa a definir, de modo unilateral, os parâmetros de conduta corporativa aplicáveis a atividades desenvolvidas sob outras soberanias.

2.6.2 Quais são as implicações práticas decorrentes dessa problemática?

As implicações práticas são múltiplas. Em primeiro lugar, há um deslocamento da competência para fiscalizar, julgar e sancionar condutas ocorridas fora da União Europeia para autoridades administrativas e tribunais europeus, o que fragiliza o papel das instituições dos Estados não membros. Em segundo lugar, surge um risco concreto de decisões judiciais conflitantes: um mesmo fato pode ser apreciado simultaneamente por tribunais europeus e não europeus, com conclusões divergentes quanto à responsabilidade, ao nexo causal ou aos padrões probatórios. Em terceiro lugar, a Diretiva produz efeitos regulatórios indiretos sobre empresas de países terceiros, que passam a ser compelidas, por via contratual e econômica, a adotar padrões europeus de devida diligência para manter acesso às cadeias de valor ligadas ao mercado da UE. Isso gera insegurança jurídica, custos de adaptação elevados e uma padronização forçada que nem sempre corresponde às realidades locais.

2.6.3 Quais fatores contribuem para a persistência dessa situação?

Diversos fatores explicam a persistência desse quadro. Um deles é a assimetria regulatória global: muitos Estados não dispõem de regimes obrigatórios de devida diligência equivalentes ao europeu, o que facilita a projeção externa do padrão da UE. Outro fator é o peso econômico do mercado europeu, que confere à União um poder regulatório indireto significativo sobre cadeias globais de valor. Soma-se a isso a ausência de instrumentos internacionais vinculantes e harmonizados em matéria de responsabilidade corporativa e direitos humanos, o que leva a União a agir unilateralmente. Por fim, contribui também uma narrativa institucional europeia que apresenta suas normas como universalmente benéficas, reduzindo o espaço para questionamento crítico ou para a consideração de soluções normativas alternativas oriundas de Estados terceiros.

2.6.4 Que medidas foram implementadas até o momento para enfrentá-la?

Até o momento, as medidas adotadas concentram-se essencialmente no interior do sistema europeu. A Diretiva prevê a criação de autoridades nacionais de supervisão nos Estados-membros, integradas em uma rede europeia, bem como um regime de responsabilidade civil aplicável a empresas europeias e a certas empresas de países terceiros economicamente vinculadas ao mercado da UE. No plano externo, porém, não foram instituídos mecanismos robustos de cooperação com autoridades de Estados não membros, nem fóruns estruturados de diálogo normativo ou judicial. A abordagem predominante tem sido a da governança privada por meio de contratos e da pressão de mercado, em vez de soluções baseadas em cooperação institucional internacional.

2.6.5 Na ausência de iniciativas consolidadas, quais estratégias deveriam ser propostas?

Seria desejável avançar para estratégias mais cooperativas e sensíveis ao contexto. Em primeiro lugar, a União Europeia poderia investir em mecanismos formais de cooperação com Estados terceiros, envolvendo autoridades administrativas, judiciárias e regulatórias, a fim de evitar conflitos de jurisdição e decisões contradi-

tórias. Em segundo lugar, deveria haver maior abertura para o reconhecimento de regimes nacionais de devida diligência equivalentes ou mais exigentes, evitando a imposição automática do padrão europeu como referência mínima universal. Em terceiro lugar, iniciativas multilaterais, no âmbito das Nações Unidas ou de acordos internacionais específicos, poderiam oferecer um espaço mais legítimo para a construção de normas comuns sobre responsabilidade corporativa. Por fim, é fundamental abandonar a presunção de superioridade normativa e adotar uma abordagem dialógica, que reconheça que diferentes contextos podem justificar diferentes níveis e formas de devida diligência, sem prejuízo da proteção efetiva dos direitos humanos e do meio ambiente.

2.7 Entrevista com a Natalia Camba Martins, Advogada Geral da União²

Doutora em Direito pelo Centro Universitário de Brasília (UniCEUB - 2020). Mestre em Direito das Relações Internacionais pelo Centro Universitário (UniCEUB), Brasília/DF (2012). Graduação em Direito pela Universidade de São Paulo (2003). Especialista em Interesses Difusos e Coletivos pela Escola Superior do Ministério Público de São Paulo (2005). Especialista pela Escola Superior do Ministério Público da União, em convênio com a Universidade de Bochum, Alemanha, em Globalização, Justiça e Segurança Humana (2009). Intercâmbio Institucional na Missão do Brasil em Genebra junto ao órgão de solução de controvérsias da Organização Mundial de Comércio - OMC (2007, 3 meses). Participou do Programa “Legal Education Exchange Program - Fundamentals of U.S. Law”, promovido pela Thomas Jefferson School of Law em San Diego, CA - EUA (2011). Deste 2005 é Advogada da União, com exercício no Gabinete do Advogado-Geral da União (2005-2006), na Procuradoria-Seccional da União em São José dos Campos/SP (2006-2008) e no Departamento Internacional da AGU, inclusive como Diretora Substituta e Coordenadora do Núcleo de Disputas Domésticas (2008-2015).

² As opiniões desta entrevista expressam exclusivamente as posições da pesquisadora. Em especial, as posições aqui expressas não refletem as posições da Advocacia-Geral da União, órgão em que a entrevistada atua, como Advogada da União, desde o ano de 2005.

2.7.1 Qual é a principal problemática associada ao tema?

No campo da subtração internacional de crianças e adolescentes, a questão que mais tem gerado preocupação junto à comunidade internacional — e que reverbera no âmbito interno brasileiro — é o alcance de interpretação uniforme, pelos países signatários, para as exceções à obrigação de retorno imediato previstas na Convenção da Haia de 1980 (CH80). Este tratado, elaborado sob os auspícios da Conferência da Haia de Direito Internacional Privado e internalizado ao ordenamento jurídico brasileiro por intermédio do Decreto nº 3.413/2000, visa proteger direitos humanos fundamentais.

Especificamente, a “exceção de grave risco” (artigo 13, I, b), que em certos casos tangencia a temática da violência doméstica, ganhou ainda maior relevo no Brasil com os recentes julgamentos do Supremo Tribunal Federal das Ações Diretas de Inconstitucionalidade nºs 4.245 e 7.686, em 28.08.2025.

A CH80 regula os aspectos civis da transferência ou retenção ilícita de menores de 16 anos fora de seu país de residência habitual. Esse cenário configura-se, em regra, pela subtração parental: um dos genitores remove a criança sem autorização do outro ou da autoridade judicial competente, ou a retém indevidamente após um período de viagem autorizado. A premissa da Convenção é que, em atendimento ao melhor interesse da criança, o retorno ao status quo ante (residência habitual) é a medida mais adequada ao seu desenvolvimento integral, salvo se configuradas exceções estritas.

2.7.2 Quais são as implicações práticas decorrentes dessa problemática?

As exceções ao retorno da criança vítima de subtração ilícita estão taxativamente descritas nos artigos 12, 13 e 20 da CH80 e, conforme cânone hermenêutico consolidado, devem ser interpretadas restritivamente. A interpretação e aplicação do tratado exigem observância tanto à Convenção de Viena sobre o Direito dos Tratados quanto ao nível de consenso alcançado pelos Estados-Partes, consubstanciado, em especial, nos Guias de Boas Práticas da Conferência da Haia (aprovados pelo Conselho de Assuntos Gerais e Política da Conferência da Haia de Direito Internacional Privado (A “Assembleia Geral” desta organização internacional). Inclusive,

dediquei meus estudos de Mestrado à exceção do art. 12 (adaptação da criança) e meu Doutorado, defendido em 2020, à interpretação do “grave risco” (art. 13, I, b).

A implicação prática mais severa reside na insegurança jurídica. Tratando-se de Direito Internacional Privado, a uniformidade da aplicação da norma, entre seus Estados-Parte, é da própria essência do instrumento. Quando a jurisprudência de um país cria um *corpus* interpretativo que distorce o conteúdo do tratado — ampliando excessivamente as exceções, por exemplo —, geram-se disparidades sistêmicas.

Vale ressaltar que o artigo 18 da CH80 faculta às autoridades do Estado de refúgio ordenar o retorno mesmo quando configurada uma exceção, desde que o país de residência habitual ofereça garantias seguras de que o risco será eliminado (ou mitigado consideravelmente). Ignorar essa mecânica pode levar a alegações de descumprimento do tratado, impactando relações bilaterais (pelo princípio da reciprocidade, o país B pode negar cooperação ao Brasil em represália) e, no limite, ensejar a responsabilidade do Estado brasileiro perante a Corte Internacional de Justiça ou a Corte Interamericana de Direitos Humanos.

2.7.3 Quais fatores contribuem para a persistência dessa situação?

A persistência desse cenário deve-se, em parte, à tensão entre a necessária proteção às vítimas de violência doméstica e a técnica do Direito Internacional Privado. A proliferação da violência contra mulheres, crianças, pessoas trans etc. exige, sem dúvida, os mais altos níveis protetivos estatais. Contudo, a aplicação adequada da CH80 requer o abandono da lógica de “proteção ao nacional” em favor da proteção ao ser humano, independentemente de sua nacionalidade.

No entanto, a jurisprudência brasileira atual parece caminhar na contramão desse cânone, privilegiando a proteção da ‘mulher e criança brasileiras’ sem sopesar os impactos sistêmicos. Ao avocar uma espécie de ‘jurisdição universal’ sobre eventos ocorridos inclusive fora do território nacional, o Brasil pode aproximar-se de uma postura de ‘chauvinismo jurídico’, sinalizando desconfiança na capacidade jurisdicional e protetiva dos demais Estados-Partes. Essa atitude parece assemelhar-se à criticada posição de ‘polícia do mundo’, muitas vezes adotada, por exemplo, pelos Estados Unidos da

América — e veementemente criticada por muitos de nós.

Ademais, atuando há mais de 20 anos, profissional e academicamente, no campo da Cooperação Jurídica Internacional, percebo ainda desconhecimento das autoridades brasileiras sobre os sistemas jurídicos dos nossos parceiros de tratado. O isolamento e o baixo intercâmbio — inclusive acadêmico — com países de *civil law* e, mormente, de *common law*, alimentam noções estereotipadas e sem respaldo científico, como a falácia de que “todas as mulheres brasileiras são discriminadas no exterior” ou que “crianças brasileiras não podem ser extraditadas”.

2.7.4 Que medidas foram implementadas até o momento para enfrenta-la?

Têm sido adotadas medidas focadas em dois eixos: difusão do conhecimento e fortalecimento da cooperação jurídica internacional, formal e informal. No primeiro eixo, destacam-se a realização de seminários e congressos (globais, regionais e nacionais), muitos patrocinados pela Conferência da Haia de Direito Internacional Privado. No Brasil, o Ministério da Justiça, através do DRCI (Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional, que hospeda a Autoridade Central Administrativa Federal/ACAF), promoveu eventos significativos de capacitação, ao menos até meados de 2021.

No eixo da cooperação, houve o fortalecimento de canais formais e informais. O auxílio direto consolidou-se como o mecanismo por excelência para a tramitação de pedidos da CH80, superando a burocracia das cartas rogatórias por ser mais célere e flexível.

No campo informal, destaca-se a criação da Rede de Juízes de Enlace. Trata-se de magistrados designados pelos Estados-Partes que se comunicam diretamente para trocar informações sobre casos de subtração, guarda e visitas, visando soluções mais ágeis e coerentes, transpondo barreiras burocráticas em prol do melhor interesse da criança.

2.7.5 Na ausência de iniciativas consolidadas, quais estratégias deveriam ser propostas?

Embora as iniciativas existentes sejam valiosas, ainda soam tímidas frente aos desafios hermenêuticos que a CH80 enfrenta no Brasil. A estratégia fundamental deve ser a conscientização dos operadores do direito e da sociedade civil sobre a bilateralidade do tratado e os impactos sistêmicos de sua aplicação.

É crucial compreender que a CH80 é uma via de mão dupla: serve tanto para retornar crianças trazidas ilícitamente ao Brasil quanto para restituir crianças (muitas brasileiras) subtraídas para o exterior. Estatísticas da ACAF indicam que o Brasil está deixando de ser apenas um país “demandado” (Estado de refúgio, que tem recebe um maior número de pedidos de cooperação jurídica internacional) para se tornar cada vez mais um país “demandante”, o Estado de residência habitual que solicita o retorno de suas crianças.

Para que o Brasil tenha legitimidade e postura coerente para pleitear o retorno de crianças (em geral, brasileiras) retidas no exterior, é imperativo que nossa aplicação interna do tratado seja técnica, coerente e alinhada ao nível de consenso alcançado pela comunidade internacional. A melhor estratégia, portanto, é a reciprocidade na excelência: para exigir cooperação, precisamos dar o exemplo.

Doméstica: o fato de que a violência doméstica não é nomeada como uma exceção ao retorno, o fato de que o Brasil ainda não possui uma lei dizendo que dentro do rol das atuais cinco exceções -, a violência doméstica deve ser considerada dentro da exceção ao retorno por representar grave risco à criança, a falta de protocolos unificados nas autoridades centrais para garantir que relatos de violência doméstica sejam citados sempre nos procedimentos administrativos, são ausências que contribuem para invisibilidade da violência doméstica nos casos de subtração internacional.

2.7.6 Que medidas foram implementadas até o momento para enfrentar essa situação?

Nós temos uma decisão do Supremo Tribunal Federal que diz que o Tratado 28 de Haia é constitucional, mas que a violência doméstica deve ser considerada como uma exceção ao retorno. Nós temos algumas portarias do Conselho Nacional de Justiça que também

já minoram possíveis efeitos do mau uso do tratado internacional, mas nós ainda precisamos determinar quais vão ser as formas de prova que as mães vão ter para poder dizer que seus filhos não devem retornar para lares onde eles vivenciaram violência doméstica.

2.7.7 Na ausência de iniciativas consolidadas, quais estratégias deveriam ser propostas?

Primeiro porque deve haver um ciclo internacional de políticas públicas sobre o assunto envolvendo os países que ratificaram o tratado.

É óbvio que é muito importante que o Brasil faça o dever de casa, aprove uma lei nacional tal qual o Uruguai e a Austrália, ter a decisão do Supremo Tribunal Federal já é um avanço, mas o Brasil precisa melhorar a qualidade dos serviços consulares no acesso a vítimas de violência doméstica, bem como aprofundar políticas globais e também dados bilaterais como outros países para que vítimas migrantes de violência doméstica possam encontrar acolhimento no território em que elas estiverem. Mesmo quando elas migrem ou mesmo quando seus agressores migrem.

2.8 Entrevista com o André de Carvalho Ramos

André de Carvalho Ramos é Professor Associado da Faculdade de Direito da Universidade de São Paulo (Largo de São Francisco). Professor Titular de Pós-Graduação *Stricto Sensu* e Coordenador de Mestrado Acadêmico em Direito Constitucional Econômico da UNIALFA. Doutor e Livre-Docente em Direito Internacional (USP). Subprocurador-Geral da República (Ministério Público Federal). Acadêmico Titular da Academia Paulista de Letras Jurídicas.

2.8.1 Qual é a principal problemática associada ao tema?

A Convenção da Haia sobre os Aspectos Cíveis do Sequestro Internacional de Crianças (incorporada internamente no Brasil pelo Decreto n. 3.413/2000) enfrenta um desafio central, que repercute em sua aplicação cotidiana: a inexistência de uma interpretação uniforme de seus dispositivos, à luz dos direitos humanos, nos diversos Estados Partes.

Cada Estado interpreta a Convenção segundo parâmetros nacionais e nem sempre à luz dos direitos humanos, o que pode gerar desigualdade no tratamento da situação transnacional e afetar os direitos dos envolvidos na retirada e retenção ilícitas de crianças. Vou dividir os principais pontos controvertidos.

Em primeiro lugar, há controvérsia sobre como interpretar o melhor interesse da criança, em especial seu direito à vida familiar e ao desenvolvimento sadio de sua personalidade, o que se reflete, sobretudo, nos debates, nos Estados, acerca de como interpretar as diversas exceções ao retorno da criança. Nesse ponto, a questão da violência de gênero tem sido central e, no Brasil, é frequentemente apontada por mães que se veem na posição de “abductoras” ao buscar proteção para si e para seus filhos. Muitas relatam ter saído do país em contexto de violência doméstica, ameaça, controle coercitivo ou abusos psicológicos e, ainda assim, deparam-se com respostas institucionais que tratam o caso de forma predominantemente formal, com baixa sensibilidade para o risco e para a assimetria de poder subjacente. A consequência prática é que a análise das exceções ao retorno — sobretudo quando vinculadas a risco grave e à proteção da criança e do genitor cuidador — varia significativamente entre Estados, podendo agravar a vulnerabilidade de mulheres e crianças justamente quando mais necessitam de tutela efetiva.

Em segundo lugar, há divergências, nos Estados, sobre como assegurar o devido processo legal em prazo razoável para a devolução e, ao mesmo tempo, garantir o direito à ampla defesa, ao contraditório e à produção de provas do(a) abductor(a), em um contexto em que a demora judicial pode gerar o enraizamento da criança (mesmo nas ações de subtração recente) e, conseqüentemente, um fato consumado que impede a devolução. Essa indefinição sobre como equilibrar direitos nos processos de análise da devolução pode gerar delonga e a superação do marco temporal de 16 anos de idade da criança, fazendo cessar a aplicação da Convenção (art. 4^o).

Em terceiro lugar, há divergência quanto à estrutura a ser disponibilizada para o cumprimento da Convenção, especialmente no que se refere à assistência jurídica em processos judiciais de devolução de crianças aos Estados de residência habitual. O Brasil, por exemplo, entende que o cumprimento da Convenção é questão de Estado e interessa à União. Assim, além da Autoridade Central Federal, há a atuação da Advocacia-Geral

da União (AGU), caso haja interesse do(a) genitor(a) abandonado(a) (*left-behind parent*). Trata-se de atuação altamente qualificada, especializada na aplicação da Convenção, capilarizada, integral (a AGU atua desde o 1^o grau até, eventualmente, os tribunais superiores) e democratizada, pois é gratuita. Em diversos Estados, porém, no máximo se apresenta uma lista de advogados *pro bono* para prestar assistência jurídica aos genitores abandonados sem recursos financeiros.

Em quarto lugar, há divergências entre os Estados quanto à tipificação da conduta em análise. Vários Estados criminalizam a conduta do(a) abductor(a) — inclusive o Brasil, no art. 249 do Código Penal. Assim, o(a) genitor(a) abductor(a) pode ser processado(a) criminalmente ao retornar ao Estado de residência habitual da criança, o que pode impedir que as visitas se concretizem. Há também Estados que negam visto de entrada a genitores abdutores. Tais comportamentos estatais configuram ofensa ulterior ao direito à vida familiar da criança.

Assim, como cada Estado interpreta isoladamente seus deveres convencionais e, ainda, os direitos humanos envolvidos no fato transnacional da retirada ilícita da criança do Estado de sua residência habitual, criou-se, nessas décadas, o que denomino de “*truque de ilusionista*” no *Direito Internacional*³ resultando em um “tratado internacional nacional” — o que, naturalmente, prejudica os indivíduos e põe em risco a centralidade dos direitos da criança, que deveria ser a essência da interpretação da Convenção.

2.8.2 Quais fatores contribuem para a persistência dessa situação?

O principal fator foi a recusa dos Estados, no âmbito da Conferência da Haia de Direito Internacional Privado, em inserir, na Convenção de 1980, uma cláusula de solução obrigatória de controvérsias. Assim, inexistente uma via imparcial para sanar as divergências acima apontadas e fixar uma *interpretação internacionalista* única sobre os direitos dos envolvidos e os deveres dos Estados Partes. Soma-se a isso, até o momento, a baixa expectativa de que os Estados se sensibilizem para incorporar tal mecanismo ao texto convencional.

³ RAMOS, André de Carvalho. *Processo Internacional de Direitos Humanos*. 7. ed., São Paulo: Saraiva, 2022. p. 33.

Claro que é possível processar os Estados faltosos perante os sistemas regionais europeu e interamericano de direitos humanos — como demonstram diversos precedentes da Corte Europeia de Direitos Humanos e, mais recentemente, o primeiro precedente da Corte Interamericana sobre o tema, que resultou na condenação do Paraguai pela demora em devolver à Argentina a criança ilicitamente retirada (Corte Interamericana de Direitos Humanos, Caso Córdoba vs. Paraguai, sentença de 4 de setembro de 2023).

Contudo, essa via é estruturalmente limitada, pois acrescenta uma etapa adicional para viabilizar o cumprimento da Convenção — o acionamento dos mecanismos internacionais de direitos humanos — e, no caso brasileiro, tende a ser morosa, já que depende, necessariamente, do processamento do caso e do convencimento prévio da Comissão Interamericana de Direitos Humanos para que, então, a Corte Interamericana possa ser provocada e exigir o cumprimento da Convenção.

Essa morosidade ficou evidente no pioneiro “Caso Córdoba”: a sentença interamericana de direitos humanos, relativa à subtração ilícita ocorrida antes de a criança completar dois anos, foi prolatada apenas no ano em que ela completou 18 anos.⁴ Em outras palavras, a demora esvazia o cerne da Convenção — impedir que subtrações ilícitas se consolidem — e, por consequência, pode produzir um efeito indesejável de incentivo a tais condutas.

2.8.3 Que medidas foram implementadas até o momento para enfrentá-la?

Como não é possível a adoção de uma interpretação internacionalista vinculante, a Conferência da Haia de Direito Internacional Privado adota a estratégia da persuasão, buscando (i) divulgar e, em seguida, (ii) convencer os atores internos envolvidos acerca da melhor interpretação da Convenção. Nesse sentido, foi editado o Guia de Boas Práticas pela Conferência e, além disso, realizam-se reuniões periódicas dos juízes de enlace e outros atores estatais envolvidos. Trata-se de um esforço de persuasão, necessariamente limitado, pois depen-

⁴ RAMOS, André de Carvalho; ABADE, Denise Neves. Subtração internacional de crianças e celeridade na cooperação jurídica internacional de restituição: lições do caso Córdoba para o Brasil. *Revista Direitos Fundamentais & Democracia*, v. 29, n.3, p.159-183, 2024.

de do voluntarismo dos atores envolvidos e da efetiva vontade do Estado de cumprir a Convenção.

2.8.4 Na ausência de iniciativas consolidadas, quais estratégias deveriam ser propostas?

As estratégias a serem propostas devem combinar (i) mecanismos de harmonização interpretativa e (ii) medidas institucionais capazes de tornar essa harmonização efetiva no plano doméstico. Em primeiro lugar, seria desejável avançar para um instrumento complementar à Convenção de 1980 — um protocolo ou cláusula facultativa de adesão — que preveja um mecanismo de solução de controvérsias (ou, ao menos, de interpretação autorizada), capaz de produzir orientação internacionalista consistente, reduzindo assimetrias nacionais e oferecendo parâmetros mínimos vinculados aos direitos humanos da criança.

Na falta de consenso para um mecanismo plenamente jurisdicional, uma alternativa intermediária seria fortalecer mecanismos de “*soft law*” com maior densidade normativa, como comentários oficiais, enunciados interpretativos e parâmetros uniformes sobre exceções ao retorno, participação da criança, violência de gênero e ponderação de direitos.

Em segundo lugar, é essencial investir em estratégias de implementação: formação continuada e especialização de magistratura, Ministério Público, advocacia e autoridades centrais; padronização de fluxos procedimentais para assegurar celeridade com contraditório efetivo; estruturação de assistência jurídica adequada e gratuita (ou fortemente subsidiada) para as partes e busca de mediação e fórmulas de consenso entre os genitores; e criação de redes estáveis de cooperação (juízes de enlace, pontos focais e canais diretos) com metas e indicadores de desempenho.

Por fim, devem ser propostas diretrizes para evitar “sanções colaterais” que comprometam a futura vida familiar da criança — como criminalização da conduta do abductor(a), impedimentos migratórios ou medidas estatais que inviabilizem visitas —, privilegiando respostas proporcionais e compatíveis com o objetivo da Convenção, sempre com centralidade no melhor interesse da criança e em garantias processuais efetivas.

2.9 Entrevista com o Luciano Aragão – MPT

Procurador do Trabalho. Coordenador de Erradicação do Trabalho Escravo e Enfrentamento ao Tráfico de Pessoas do MPT. Mestre em Direito pela Universidade Católica de Brasília.

2.9.1 Qual é a principal problemática associada ao tema?

A principal problemática reside na vulnerabilidade estrutural de trabalhadores brasileiros no exterior ou no próprio território nacional diante de práticas de trabalho análogo ao de escravo e tráfico de pessoas. No caso do tráfico Internacional, a situação é agravada pela natureza transnacional desse crime, que impõe barreiras jurisdicionais significativas à proteção e à responsabilização. A exploração laboral manifesta-se tipicamente através da servidão por dívida, jornadas exaustivas, condições degradantes e restrição de locomoção, frequentemente precedidas por aliciamento fraudulento para o exterior (tráfico internacional) ou para outra parte do território nacional (tráfico interno).

A complexidade do problema aumenta quando considerada a falta de transparência das cadeias produtivas globais, que envolvem inúmeras camadas de subcontratação e dificultam a comunicação e identificação da conexão entre o trabalhador explorado e as empresas beneficiárias finais. A situação migratória irregular de muitas vítimas, o desconhecimento de direitos e idiomas, o isolamento geográfico e social, e o controle exercido pelos exploradores sobre documentos e comunicações constituem obstáculos adicionais à identificação e ao resgate das vítimas. Soma-se a isso a limitação da jurisdição brasileira em relação a fatos ocorridos integralmente no exterior, restringindo o alcance das instituições nacionais de proteção.

2.9.2 Quais são as implicações práticas decorrentes dessa problemática?

Do ponto de vista institucional, a fragmentação entre órgãos governamentais com competências distintas e a insuficiência de mecanismos de cooperação internacional efetivos comprometem a capacidade de resposta coordenada. No caso do Ministério Público do Trabalho - MPT, a comunicação tardia dos fatos pelas outras instituições e a não oportunização da participação no

processo de instrução probatória pode dificultar a abordagem cível/trabalhista, cujo foco principal é a reparação dos direitos das vítimas.

Sob a ótica econômica, a exploração laboral de brasileiros alimenta cadeias produtivas globais que se beneficiam de práticas ilegais, gerando vantagens competitivas para empresas que externalizam custos através da violação de direitos fundamentais. Esta dinâmica mantém padrões de desigualdade e enfraquece os esforços de promoção do trabalho decente tanto no Brasil quanto nos países de destino.

2.9.3 Quais fatores contribuem para a persistência dessa situação?

A persistência da exploração laboral de brasileiros tanto no exterior quanto no próprio território nacional resulta da conjugação de fatores estruturais. Em primeiro lugar, as assimetrias econômicas entre o Brasil e países desenvolvidos e entre unidades da federação (UFs) dentro do próprio país geram fluxos migratórios de trabalhadores em busca de melhores condições de vida, propiciando um ambiente que facilita a atividade de aliciadores, que se aproveitam da vulnerabilidade socioeconômica. A precarização do mercado de trabalho e o desemprego estrutural em determinadas regiões do país intensificam a disposição de trabalhadores a aceitar propostas de emprego no exterior (ou em outros locais do próprio país) sem a devida verificação das reais condições de trabalho.

2.9.4 Que medidas foram implementadas até o momento para enfrentá-la?

No âmbito nacional, o Brasil dispõe de marco normativo, como a tipificação penal do trabalho análogo ao de escravo e do tráfico de pessoas, além da Política Nacional de Enfrentamento ao Tráfico de Pessoas. No âmbito do Ministério Público do Trabalho foi desenvolvido o “Projeto Reação em Cadeia”, metodologia de rastreamento de cadeias produtivas que permite identificar e responsabilizar empresas beneficiárias de exploração laboral. Através do “Reação em Cadeia” o MPT exige que grandes empresas, detentoras de poder econômico relevante nos setores em que operam, realizem uma efetiva devida diligência em direitos humanos, prevenindo a ocorrência de impactos adversos em direitos humanos em suas cadeias de fornecimento.

2.9.5 Na ausência de iniciativas consolidadas, quais estratégias deveriam ser propostas?

A capacitação e articulação de redes, o fortalecimento de organizações da sociedade civil brasileira no exterior, a criação de programas de capacitação para disseminação de informações sobre direitos e canais de denúncia e a criação de caninas de comunicação direcionadas a regiões de origem de trabalhadores que migram para setores de alto risco.

Além disso, a criação de um marco legal internacional (*hard law*) e nacional sobre devida diligência em direitos humanos é essencial para prevenção ao tráfico de pessoas para fins de exploração laboral.

2.10 Entrevista com o Antônio Carlos Melo - ONG Verité

Country Lead do Brasil e co-líder do Grupo de Prática de Assistência Técnica a Governos, Antônio Rosa tem liderado as iniciativas da Verité no Brasil desde 2022. Nesse período, ele dirigiu o Projeto de Cooperação para o Emprego Justo, Livre e Equitativo (COFFEE), desenvolvendo e implementando o Toolkit COFFEE e conduzindo projetos-piloto no Brasil, na Colômbia e no México.

2.10.1 A principal problemática a partir da perspectiva da sociedade civil

Do ponto de vista da sociedade civil, a problemática central associada ao tráfico de pessoas e ao trabalho escravo reside na fragilidade das políticas de prevenção e de reinserção socioeconômica. Embora o Brasil tenha avançado significativamente na repressão dessas práticas ao longo das últimas três décadas, a ausência de uma atuação consistente junto ao setor privado e a dificuldade de transformar dados e informações em conhecimento aplicado limitam a efetividade das ações. A sociedade civil também reconhece a necessidade de que os referidos temas estão vinculados a uma desigualdade social estruturada e histórica no Brasil e que o ciclo do trabalho infantil e do trabalho escravo está diretamente ligado à exclusão social, à falta de acesso à educação de qualidade e à vulnerabilidade estrutural de famílias e comunidades.

2.10.2 Implicações práticas decorrentes da problemática

As consequências práticas dessa realidade são múltiplas e afetam diretamente o desenvolvimento humano e social. Crianças submetidas ao trabalho precoce enfrentam impossibilidade de qualificação, baixo rendimento escolar, evasão e analfabetismo, perpetuando a pobreza e a desestruturação familiar. Já os trabalhadores escravizados, em geral jovens homens no meio rural e urbano e mulheres em contextos urbanos, sofrem exclusão social, desconhecimento de seus direitos, falta de documentação e ausência de acesso a políticas de emprego e aprendizagem. Essa vulnerabilidade facilita o aliciamento e o tráfico de pessoas, gerando impactos como violência física e sexual, doenças crônicas, consumo de drogas e álcool e desagregação familiar.

2.10.3 Fatores que contribuem para a persistência da situação

Entre os fatores que mantêm essa problemática estão a desregulamentação que vem acontecendo gradualmente desde a reforma trabalhista, sem uma ação corretiva de garantia de uma proteção social mínima adequada, a ausência de políticas públicas integradas voltadas para os grupos mais vulneráveis, a falta de monitoramento efetivo do ambiente de trabalho e a baixa capacidade de sindicatos e representações de trabalhadores em atuar de forma abrangente. Soma-se a isso a insuficiência de políticas de fortalecimento familiar e de meios de vida, o desconhecimento dos direitos básicos por parte dos grupos mais vulneráveis, decorrentes da negação histórica de direitos e a dificuldade de acesso a serviços públicos como educação, saúde e emprego. No plano internacional, a persistência da situação também se relaciona à necessidade de maior monitoramento das cadeias produtivas com a implementação efetiva de processos de devida diligência em direitos humanos e à responsabilização solidária das empresas que se beneficiam, direta ou indiretamente, dessas práticas.

2.10.4 Medidas já implementadas para enfrentamento

O Brasil desenvolveu políticas importantes, como campanhas informativas sobre trabalho infantil, trabalho escravo e tráfico de pessoas, a inclusão de temas

de direitos humanos e mundo do trabalho em escolas e universidades como no caso das clínicas de trabalho escravo em faculdades de direito, e a formação, ainda que precária, de implementadores de políticas públicas. Houve também avanços normativos, como decretos e normas técnicas que consolidaram a proteção contra o trabalho infantil e escravo, além da atuação da inspeção do trabalho e forças repressoras. No plano internacional, legislações como a Lei de Transparência em Cadeias de Suprimento da Califórnia (2010), a Lei sobre Trabalho Escravo Moderno do Reino Unido (2015) e a Lei de Devida Diligência em Cadeias de Suprimento da Alemanha (2021) reforçam a pressão sobre empresas para que adotem práticas responsáveis. No Brasil, a jurisprudência evoluiu para reconhecer a responsabilidade solidária das empresas no topo da cadeia produtiva, como varejistas e indústrias, pelas violações cometidas por fornecedores e subcontratados.

2.10.5 Estratégias que deveriam ser propostas na ausência de iniciativas consolidadas

Sendo um dos deságios a existência de integração de políticas públicas, torna-se necessário propor estratégias que articulem prevenção, proteção e reinserção. Entre essas medidas, destaca-se a intensificação de campanhas de informação e educação voltadas para comunidades vulneráveis, com foco nos direitos humanos e no mundo do trabalho. Também é fundamental a criação e o fortalecimento de políticas públicas intersetoriais que integrem educação, saúde, assistência social e emprego, garantindo atendimento específico aos grupos mais vulneráveis. O fortalecimento da atuação da sociedade civil organizada deve ser incentivado, ampliando sua capacidade de monitoramento e intervenção. Além disso, é preciso estabelecer mecanismos de recrutamento ético e de monitoramento contínuo das cadeias produtivas, assegurando transparência e prestação de contas por parte das empresas. Outro ponto essencial é a ampliação das políticas de fortalecimento familiar e de geração de meios de vida, reduzindo a vulnerabilidade socioeconômica que alimenta o ciclo do trabalho infantil e escravo. Por fim, a consolidação de processos de devida diligência em direitos humanos, envolvendo identificação, prevenção, mitigação e responsabilização de danos, com participação ativa de todos os atores sociais, representa um passo decisivo para a construção de um sistema de proteção mais robusto e eficaz.

2.11 Entrevista com o Leonardo Cavalcanti. Professor titular (Centro universitário de Brasília), Pesquisador (OBMIGRA)

Leonardo Cavalcanti Professor Associado da Universidade de Brasília (UnB), no Instituto de Ciências Sociais, onde coordena o Observatório das Migrações Internacionais (OBMigra) e atua como pesquisador do Centro de Estudos Avançados em Governo e Administração Pública (CEAG). Foi Professor Ayudante Doctor (tenure track) na Universidad Autónoma de Barcelona (2008-2013) e realizou estudos de pós-doutorado na Columbia University e na University of Oxford (Centre on Migration Policy and Society COMPAS), instituições com as quais mantém intercâmbios regulares de pesquisa e docência. Coordenou diversos projetos científicos voltados à ciência de dados, transferência tecnológica e formulação de políticas públicas em perspectiva comparada sobre migrações internacionais e refúgio, resultando em ampla produção acadêmica. Entre suas publicações, destacam-se artigos em periódicos indexados em bases internacionais de prestígio (JCR, Scopus, Latindex, Qualis, DOAJ, REDIB, entre outras), além de livros e capítulos publicados por editoras de referência na América Latina como Anthropos, Editora da UnB, FLACSO, entre outras.

2.11.1 Identificação da principal problemática

No âmbito das políticas públicas, a principal problemática relacionada à proteção de migrantes brasileiros no exterior consiste na limitada capacidade do Estado de formular e implementar respostas integradas, contínuas e preventivas frente a situações de exploração laboral, trabalho análogo à escravidão e tráfico de pessoas. Essa limitação decorre, em grande medida, da fragmentação institucional, da baixa prioridade conferida ao tema e da dificuldade de atuação estatal em contextos extraterritoriais.

2.11.2 Implicações práticas para os migrantes e para os sistemas de proteção

Para os migrantes, essas fragilidades se traduzem em acesso desigual ou inexistente a serviços de proteção, informação e assistência, bem como em obstáculos à ativação de mecanismos de denúncia e reparação. Para os sistemas de políticas públicas, os efeitos manifestam-

-se na dificuldade de coordenação intergovernamental e intersetorial, na ausência de fluxos operacionais claros e na limitada capacidade de monitoramento, avaliação e resposta a violações que ocorrem fora do território nacional.

2.11.3 Fatores estruturais, históricos, socioeconômicos e normativos

A persistência dessas problemáticas está associada a fatores estruturais, como desigualdades socioeconômicas que impulsionam a migração laboral, e a arranjos institucionais historicamente orientados por lógicas setoriais pouco integradas. Do ponto de vista normativo, observa-se a coexistência de marcos legais relevantes com lacunas na sua operacionalização, além de limitações nos instrumentos de cooperação internacional e nos mecanismos de responsabilização de atores públicos e privados.

2.11.4 Avaliação crítica das políticas, programas e instrumentos existentes

As políticas e programas existentes revelam avanços normativos importantes, porém predominam iniciativas pontuais e reativas. É necessário uma maior articulação entre políticas migratórias, trabalhistas, consulares e de direitos humanos, a fim de garantir a efetividade das ações e a capacidade do Estado de produzir respostas estruturadas e sustentáveis.

2.11.5 Proposição de estratégias

Diante desse cenário, torna-se fundamental o fortalecimento de estratégias de políticas públicas baseadas na integração intersetorial, na cooperação internacional e na adoção de abordagens preventivas. Recomenda-se o aprimoramento da governança institucional, o desenvolvimento de sistemas de informação e avaliação, a capacitação de agentes públicos e o fortalecimento da participação da sociedade civil, visando à construção de respostas mais eficazes, coordenadas e orientadas por direitos.

CRÔNICA

REVISTA DE DIREITO INTERNACIONAL
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Crônica a respeito das negociações preparatórias para a entrada em vigor do Acordo sobre a conservação e o uso sustentável da biodiversidade marinha além da jurisdição (BBNJ): destaques das Comissões Preparatórias I e II de 2025 e desafios para a 3ª PrepCom

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* A crônica é resultado de pesquisas no âmbito dos seguintes projetos: Edital n. 18 de 2024, PQ, Processo: 307185/2025-7, título: A interface entre o conhecimento, a política e o direito na governança costeira e marinha; Edital 35 de 2022 da Capes, processo 88881.714741/2022-01, título: Governança da Amazônia Azul: métodos interdisciplinares de humanidades e ciências naturais; Edital n. 16 de 2024, Processo: 404162/2024-0, título: As contribuições da América Latina para a litigância socioecológica e climática na proteção de Biomassas.

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As Comissões Preparatórias (PrepComs) 1 e 2 estabelecidas para auxiliar a entrada em vigor do Acordo de implementação, vinculado à Convenção das Nações Unidas sobre Direito do Mar, sobre a conservação e o uso sustentável da diversidade biológica marinha em áreas além da jurisdição nacional (BBNJ), ocorreram entre os dias 14-25 de abril e 18-29 de agosto de 2025, na sede da ONU, em Nova York. As PrepComs marcam o início de uma nova etapa crítica¹, durante a qual há a expectativa de operacionalização do Acordo BBNJ, com foco na primeira Conferência das Partes (COP 1) e nos parâmetros para estabelecimento dos cinco órgãos subsidiários². A última sessão desse processo ocorrerá em março de 2026, considerando que o Acordo BBNJ já possui 55 ratificações³ e entrará em vigor 120 dias após a 60ª ratificação, prazo esse que se aproxima rapidamente, em comparação com o processo de ratificação de outros acordos multilaterais⁴. Houve um ambiente de cooperação e reforço do multilateralismo, com consideráveis progressos a respeito dos objetivos estabelecidos para a PrepCom. Este cenário colaborativo promoveu avanços particularmente quanto a regras procedimentais para a implementação do Acordo.

¹ DALAKER, Kristine; LOTHIAN, Sarah. Key takeaways and insights from the first session of the BBNJ Preparatory Commission. *Ocean & Climate News – Global Ocean Forum*.

² UNITED NATIONS. Access and Benefit-sharing Committee, the Capacity-building and Transfer of Marine Technology Committee, the Finance Committee, the Implementation and Compliance Committee and the Scientific and Technical Body (STB), as well as on the Rules of Procedure of the BBNJ COP. Resolutions A/RES/78/272 of 24 Apr. 2024, A/RES/78/560 of 13 Aug. 2024, and A/RES/79/271 of 4 Mar. 2025. Ver ainda: CREMERS, Klaudija; ROCHELETTE, Julien; COCCORESE, Elisa; KACHELRIESS, Daniel; PAYNE, Cymie R. The first substantive BBNJ Agreement Preparatory Committee: preparing the ground for future implementation. IDDRI; High Seas Alliance; Rutgers University; IUCN-WCEL-Ocean Law, 2025.

³ UNITED NATIONS. *United Nations Treaty Collection: Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction – Status of Ratification*. Disponível em: https://treaties.un.org/PAGES/ViewDetails.aspx?chapter=21&clang=_en&mtdsg_no=XXI-10&src=TREATY. Acesso em: 31 ago. 2025.

⁴ BLASIAK, Robert; JOUFFRAY, Jonas B. When will the BBNJ Agreement deliver results? *npj Ocean Sustainability*, v. 3, art. 21, 2024. Disponível em: <https://www.nature.com/articles/s44183-024-00058-6>. Acesso em: 31 ago. 2025.

De modo geral, as duas reuniões foram bastante cordiais e construtivas. As divergências se referem a questões que já haviam sido levantadas durante o processo de elaboração do texto adotado por consenso em 2023 e, portanto, não são novas. Cita-se, por exemplo, o tema das regras de financiamento e dos direitos e deveres de Estados nas suas diversas categorias como Estados insulares em desenvolvimento (SIDS); Países de menor desenvolvimento relativo (LDCs), Países em desenvolvimento sem litoral, entre outros, e processos decisórios.

Todo o processo das PrepComs está sendo mediado por dois Co-chairs de Belize e da Austrália (Janie Coye-Felson de Belize e Adam McCarthy da Austrália) que prepararam documentos e questões orientadoras para manter o debate focado nos resultados necessários, com o apoio da Divisão de Oceano e Direito do Mar da ONU (DOALOS). Os temas gerais preparados pelos Co-chairs e pela DOALOS foram: 1) Regras de procedimento; 2) Mecanismo de intercâmbio de informações (Clearing-House Mechanism); 3) Mecanismos financeiros; 4) Cooperação institucional; 5) Mecanismos de reporting.

Ao longo do processo negociador, o Brasil atuou em conjunto com o grupo regional conhecido como “Core Latin American Countries” (CLAM) formado por: Argentina, Brasil, Chile, Colômbia, Costa Rica, El Salvador, Guatemala, Honduras, México, Panamá, Paraguai, Peru, República Dominicana e Uruguai. Além de compartilhar interesses comuns, a coordenação regional amplia o alcance das posições brasileiras e favorece as negociações juntamente a outros Estados e grupos — procedimento também adotado por outras regiões, que negociam em bloco como forma de fortalecer seus respectivos pleitos estatais. Destacam-se os seguintes grupos: Aliança dos Pequenos Estados Insulares (AOSIS), Pequenos Estados Insulares em Desenvolvimento do Pacífico (PSIDs), Grupo Europeu e Grupo Africano. Todos foram bastante ativos, com maior destaque para os dois primeiros que sempre se manifestavam bem no início das sessões seguidos do CLAM, do Grupo Europeu e do Grupo Africano.

Seguem abaixo os principais destaques das negociações das PrepComs I e II com posterior indicação dos principais desafios para a próxima rodada de negociações.

1 Destaques das negociações das PrepComs

1.1 Regras de procedimento

As negociações relacionadas às regras de procedimento trataram sobretudo de termos de referência e modalidades de operação da Conferência das Partes, do Secretariado e dos órgãos subsidiários.

As delegações discutiram elementos ligados à frequência e ao local da COP, bem como aos órgãos subsidiários, à participação de observadores e à composição do Bureau. Em relação à frequência e ao local das COPs, a maioria das delegações se mostrou favorável à realização de reuniões anuais nos primeiros anos, passando depois para encontros bienais. Houve sugestões de que as COPs fossem rotacionais entre as regiões, como ocorre no contexto de COPs ambientais. Essa proposta recebeu contestações em razão dos custos e da logística envolvidos. A possibilidade de reuniões virtuais e híbridas também foi levantada, restringindo-se apenas a circunstâncias excepcionais, como no caso da pandemia. Esse caráter virtual ou híbrido permitiria maior flexibilidade em termos de participação, mas levantou questões quanto ao direito de voto dos que não estivessem pessoalmente presentes.

Na PrepCom I houve ainda debates relacionados à diferenciação entre aspectos substanciais e procedimentais. Por exemplo, houve um debate sobre a proposta chinesa de incorporar provisões substantivas dos artigos 6 do tratado BBNJ (no prejudice) e do art. 18 (area of application) nas regras procedimentais da COP. Tal proposta engendrou forte oposição de muitos delegados e demonstrou um dos grandes desafios para a construção de consenso⁵. Na PrepCom II também houve momentos de manifestação no sentido de que o artigo 7 do Acordo, relacionado aos princípios e abordagens gerais, deveria ser adicionado em alguns dos dispositivos dos documentos procedimentais. Houve manifestação

⁵ “This issue served as a reminder of the distinct possibility that there may be some issues upon which the PrepCom may have difficulty reaching consensus in meeting its mandate to provide recommendations to the first meeting of the COP”. DALAKER, Kristine; LOTHIAN, Sarah. Key takeaways and insights from the first session of the BBNJ Preparatory Commission. *Ocean & Climate News – Global Ocean Forum*. Acesso em: 30 ago. 2025.

no sentido de que não haveria necessidade de repetir as alíneas dos princípios já previstos no Acordo BBNJ.

Com relação ao Secretariado, Bélgica e Chile reiteraram a sua intenção de sediarem o Secretariado. Durante as duas PrepComs o Chile fez eventos paralelos para demonstrar todos os detalhes físicos e procedimentais relacionados à implantação do Secretariado no país. A Bélgica foi mais ativa em sua proposta na PrepCom I do que na PrepCom II, enquanto o Chile foi ativo nas duas sessões.

Foram discutidos três possíveis modelos de Secretariado para o BBNJ: o primeiro, um Secretariado operando de forma autônoma em relação à ONU; o segundo, um Secretariado vinculado institucionalmente à ONU, ao mesmo tempo, dotado de uma certa autonomia; e por fim, um terceiro modelo, administrado por alguma entidade da ONU já existente. A sugestão do Secretariado com algum vínculo institucional com a ONU foi apoiada por muitos delegados, enquanto outros apoiaram um modelo *ad hoc*, a fim de atender às necessidades do Acordo com certo grau de independência em relação à ONU. O CLAM apoiou um Secretariado com personalidade jurídica internacional e com nomeação de um Secretário-Geral com rodízio regional e mandato de 4 anos. Os delegados ressaltaram a necessidade da aplicação dos princípios da transparência, eficácia, inclusão, autonomia funcional, visibilidade e adaptabilidade, além disso, muitos mencionaram a necessidade da participação plena e efetiva dos SIDS, LDCs e de Estados e observadores com necessidades especiais.

No que tange aos órgãos subsidiários, na PrepCom I houve debates gerais sobre todos os 5 órgãos subsidiários que serão criados a partir da entrada em vigor do tratado. Na PrepCom II houve foco nos termos de referência e nas modalidades de operação do Órgão Científico e Técnico. As negociações foram construtivas e avançaram nos detalhes da composição do órgão e da possibilidade desse modelo poder ser replicado para os outros 4 órgãos subsidiários, sempre em conexão às regras de procedimento tanto do Secretariado quanto das COPs.

Em relação aos Termos de Referência para os órgãos subsidiários (ToR, na sigla em inglês), na PrepCom I alguns delegados enfatizaram que a PrepCom deveria redigi-los para adoção na COP1, enquanto muitos expressaram flexibilidade quanto ao formato dos documentos a serem desenvolvidos. Na PrepCom II já

houve negociação do Termo de Referência que serviria como draft para a primeira COP deliberar.

Quanto aos observadores, foi levantada, por exemplo, a questão da participação específica dos povos indígenas e das comunidades locais. Além disso, houve manifestação no sentido de que deveriam ter uma categoria própria, por possuírem direitos específicos. Houve manifestações a favor tanto de grupos (como PSIDS e AOSIS), Estados (como Suíça e Costa Rica), como das próprias ONGs presentes na negociação. Um dos pontos sensíveis foi o status de Estados não-Partes depois da entrada em vigor do Acordo BBNJ. Sugeriu-se que eles teriam o status de observadores.

Houve, portanto, bastante avanço significativo entre a PrepCom I e II. Na segunda PrepCom já houve negociação de texto que será utilizado como draft para a primeira COP. Houve avanços, também, na negociação sobre o Mecanismo de intercâmbio de informações.

1.2 Mecanismo de intercâmbio de informações (Clearing-House Mechanism)

O último texto circulado pelos Co-Chairs ao final da sessão da PrepCom II reflete um esforço de equilíbrio entre representatividade dos Estados e inclusão na composição do working-group responsável por elaborar as diretrizes (guidelines) para o desenvolvimento do Clearing-House Mechanism (CHM). A proposta ancora-se no Artigo 51 do BBNJ, que define o CHM como uma plataforma digital transversal aos quatro pilares substantivos do tratado, recursos genéticos marinhos (MGR), instrumentos de gestão baseados em áreas (ABMTs), avaliações de impacto ambiental (EIA) e capacitação e transferência de tecnologia marinha (CBTMTI).

Com base nas propostas debatidas durante as sessões dos pequenos grupos de trabalho, os Co-Chairs propuseram um arranjo institucional que assegurasse assentos reservados para Estados com necessidades especiais, em especial Estados Insulares em Desenvolvimento (SIDS), países de menor desenvolvimento relativo (LDCs) e países em desenvolvimento sem litoral, ao mesmo tempo em que mantivesse o grupo de especialistas em uma escala funcional e equilibrada.

Apesar desse esforço de inclusão, divergências surgiram em torno da cláusula de objeção prevista no Artigo 7(b). A parte final desta alínea poderá permitir que a objeção de um único Estado impeça a nomeação de

um especialista. Para alguns, trata-se de uma salvaguarda contra potenciais conflitos de interesse; para outros, é um mecanismo de veto político que ameaça o caráter técnico e especializado do grupo. Como indicam análises críticas, esse dispositivo pode intensificar assimetrias epistêmicas, sobretudo ao excluir representantes de Povos Indígenas e comunidades locais (IPLCs), cuja participação é essencial para um CHM inclusivo.

Esta objeção nas nomeações de experts pelos Estados requereu um esforço constante dos facilitadores do pequeno grupo de trabalho sobre questões do CHM. Representantes do Reino Unido e de Barbados desempenharam papel central: ao compilar e sistematizar as propostas dos Estados, destacaram tanto as áreas de consenso como as fissuras mais sensíveis, incluindo a controvérsia sobre o veto.

Outro aspecto relevante do texto é a previsão de participação de especialistas provenientes de atores não-estatais, como sociedade civil, setor privado e IPLCs. Ao propor essa abertura, os Co-Chairs reforçam a ideia de que o CHM não deve ser concebido apenas como um repositório de dados, mas como uma infraestrutura de governança plural, ancorada nos princípios FAIR (Findable, Accessible, Interoperable, Reusable) e CARE (Collective Benefit, Authority, Responsibility, Ethics). Nas consultas conduzidas pelo pequeno grupo de trabalho, vários Estados apoiaram fortemente a integração de múltiplos sistemas de conhecimento, enquanto outros expressaram receio de que isso pudesse gerar sobrecarga institucional ou sobreposição de mandatos com organismos já existentes.

No período interseccional, o papel dos Estados será de estabelecer um grupo de trabalho informal com competência para consolidar *guidelines* que definam os requisitos técnicos, jurídicos e administrativos para o CHM, criando uma base clara para sua futura operacionalização. Garantir assentos reservados para SIDS e outros Estados com interesses e necessidades especiais será fundamental para assegurar legitimidade, ao passo que a revisão da cláusula de objeção poderá reduzir riscos de politização no processo de seleção. A síntese das propostas feita pelos facilitadores fornece material concreto para esse exercício, permitindo que as diretrizes finais ampliem, e não restrinjam, a diversidade de vozes e conhecimentos que deverão estruturar o CHM. Dessa forma, o grupo de trabalho não só produzirá um manual técnico, mas também um instrumento político-

-epistêmico capaz de orientar uma implementação futura mais justa e inclusiva. Outro tema que avançou bastante nas discussões foram os mecanismos financeiros.

1.3 Mecanismos financeiros

Os mecanismos financeiros foram tema central durante a PrepCom I do Acordo BBNJ, reconhecendo-se que a implementação eficaz do regime e o alcance dos objetivos depende de bases financeiras estáveis, previsíveis e transparentes. Importante destacar que por diversas vezes foi ressaltado que os mecanismos financeiros dependiam da estrutura do Secretariado, o que até aquele momento não tinha sido definido. Diante disso, o G77+CHINA pediu que a DOALOS preparasse quadros comparativos acerca dos modelos de secretariado, permitindo assim que as discussões acerca dos mecanismos financeiros considerassem diferentes cenários.

Nesse contexto, o Grupo europeu destacou que mecanismos e regras financeiras para uma entidade independente, como a Autoridade Internacional dos Fundos Marinhos (ISA), é tarefa complexa. Respondendo a isso, a Austrália sugeriu a adoção das regras já aplicadas pela Convenção-Quadro das Nações Unidas sobre Mudança do Clima (UNFCCC da sigla em inglês), enquanto o Japão pediu esclarecimentos sobre o modelo da ISA, destacando que os vínculos com sistema ONU seriam positivos nesse contexto. Já a China sugeriu um modelo independente de regras financeiras, o qual poderia se basear em alguma extensão no modelo da ISA.

As diferentes condições entre os Estados também foi tema recorrente: G77+CHINA apontaram para necessidade de instrumentos para garantir a participação de Estados insulares em desenvolvimento (SIDS); países de menor desenvolvimento relativo (LDCs) e Países em desenvolvimento sem litoral (LLDCs)⁶. Circunstâncias especiais para os SIDS foram defendidas pela Aliança de Pequenos Estados Ilhas (AOSIS)⁷, pelos Pequenos

⁶ São 39 SIDS: List of SIDS | Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States . São 32 Estados sem litoral: List of LLDCs | Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States . São 44 países de menor desenvolvimento relativo: List of LDCs | Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States . Acesso em: 30 ago. 2025.

⁷ A Aliança tem 44 membros, representando todos os oceanos. Member States – AOSIS. Acesso em 30 ago. 2025.

Estados Ilhas do Pacífico (P-SIDS), bem como pela Nova Zelândia e Austrália. Ao seu turno, Bangladesh destacou que os mecanismos financeiros também devem considerar as peculiaridades dos países vulneráveis às mudanças climáticas e as Filipinas destacou necessidades especiais dos arquipélagos.

Entre os temas de maior debate, podem ser citados: contribuições voluntárias; acesso direto a recursos; período e planejamento orçamentário; contribuições e atrasos; fiscalização e auditoria; comitê de finanças e fundo especial e relação com o GEF.

Com relação às contribuições voluntárias, o Grupo Europeu defendeu modalidades de contribuição que permitam a participação direta de Organizações Regionais de Integração, aumentando a base de recursos disponíveis. A Rússia alertou que isso poderia gerar ingerência externa ou dependência excessiva de grandes doadores, comprometendo a autonomia do Acordo, bem como alertou para o risco de contribuições voluntárias estarem sujeitas a cenários políticos. O CLAM enfatizou normas claras de prestação de contas, especialmente para doadores privados, a fim de evitar conflitos de interesse. Para o CLAM, transparência e “*accountability*” são princípios norteadores. Um *trust fund* voluntário foi criado, para contribuir no processo de participação de países em desenvolvimento, porém os países desenvolvidos foram reticentes em aceitar maiores obrigações financeiras. Entretanto, a União Europeia ofereceu 40 milhões de euros para ajudar no processo de ratificação para os países em desenvolvimento⁸.

Quanto ao acesso direto, o Grupo Africano defendeu o acesso direto aos fundos. Procedimentos simplificados de acesso e aprovação foram defendidos pelo grupo e também por observadores como High Seas Alliance. Com relação ao período e planejamento orçamentário, Canadá, Reino Unido e o Grupo Europeu se opuseram a um ciclo orçamentário anual diante das complexidades, todavia, reforçaram que as auditorias devem ser anuais. Japão e CLAM se manifestaram por ciclos de dois anos, o que mais tarde recebeu suporte do Comunidade do Caribe (CARICOM)⁹, AOSIS e

Turquia. Acerca do planejamento, o Grupo Europeu defendeu que se adotasse um orçamento administrativo e um programático, sendo que o programático deve informar resultados, objetivos e metas. Austrália e União Europeia defenderam o sistema de salvaguardas, para prevenir o uso excessivo de propostas orçamentárias suplementares, trazendo para discussão o que tem ocorrido na ISA.

No que tange às contribuições e aos atrasos, AOSIS sugeriu medidas rigorosas, como suspensão do direito a voto de Estados inadimplentes, visando proteger a previsibilidade orçamentária. O Grupo Europeu apoiou consequências para o não pagamento, mas com prazo máximo inferior a seis anos e se opôs ao uso da reserva de capital de giro para cobrir inadimplências. A Nova Zelândia pediu cautela e mais debate antes de adotar punições formais, enquanto o CLAM destacou que medidas deveriam ser aplicadas de forma não discriminatória, considerando realidades econômicas diversas.

Com relação à fiscalização e à auditoria, o Reino Unido e o Canadá defenderam mecanismos robustos baseados na UNFCCC, visando transparência e confiança. Filipinas sugeriram modelo da ISA. O CARICOM apoiou auditoria da ONU, mas alertou para ajustes necessários à realidade de um novo secretariado do BBNJ.

No que concerne ao Comitê de Finanças, o CLAM sugeriu que regras reflitam funções específicas do Comitê, aplicando regras da COP *mutatis mutandis*. CARICOM pediu alinhamento com outros órgãos subsidiários, incluindo frequência de eleições, limites de mandato e sistema escalonado de renovação. Quanto à interação com outros órgãos subsidiários, AOSIS defendeu vínculos com o Comitê de Acesso e Repartição de Benefícios (ABS), o de Compliance e o de Capacitação e Transferência de Tecnologia Marinha (CBTMT), propondo programas conjuntos para SIDS. Quanto à composição do Comitê de Finanças, AOSIS, P-SIDS e CARICOM defenderam um corpo limitado, com assentos para SIDS. O CLAM apoiou composição restrita baseada em especialistas, enquanto a UE preferiu modelo da UNFCCC, evitando prolongar debates sobre elegibilidade. O P-SIDS destacou que membros devem ter experiência prática em gestão de fundos, captação de recursos e transparência, incluindo profissionais de áreas além do direito. Quanto ao mandato, Grupo Europeu e P-SIDS defenderam mandatos de dois anos.

⁸ CREMERS, Klaudija; ROCHETTE, Julien; COCCORESE, Elisa; KACHELRIESS, Daniel; PAYNE, Cymie R. The first substantive BBNJ Agreement Preparatory Committee: preparing the ground for future implementation. IDDRI; High Seas Alliance; Rutgers University; IUCN-WCEL-Ocean Law, 2025. p.5.

⁹ São 16 membros e 06 membros associados. Member States and Associate Members – CARICOM. Acesso em: 30 ago. 2025.

Na PrepCom I, diversas delegações concordaram em utilizar o GEF para apoiar órgãos subsidiários e a implementação do Acordo. O Grupo Europeu sugeriu alinhar ciclos orçamentários com reposição do GEF. O CLAM enfatizou acesso simplificado para países em desenvolvimento. O Grupo Africano propôs direcionar recursos a capacitação e transferência de tecnologia. Algumas delegações alertaram para o risco de dependência excessiva do GEF e nesse sentido parece ter sido alcançado o consenso de que o GEF deve ser complementar, coexistindo com fundos próprios e contribuições inovadoras no âmbito do próprio Acordo.

Durante a PrepCom II, houve avanço na redação de um Draft relacionado aos Arranjos com o GEF para dar efeito às disposições pertinentes sobre o financiamento do Acordo. O documento foi preparado pelos Co-Presidentes¹⁰. Houve, ainda, avanço no tema da cooperação institucional de modo geral.

1.4 Cooperação institucional

A DOALOS tem servido como Secretariado enquanto não se decide sobre como será o funcionamento do Secretariado do BBNJ. Pode-se considerar que a PrepCom I teve muitas sugestões diferentes e inovadoras de seus delegados, porém foi amplamente baseada nos instrumentos, frameworks e órgãos (IFBs) já existentes. Assim, a cooperação tem sido mais do sentido de analisar IFBs para ver se podem servir de modelo para o regime em vias de construção. Merecem especial destaque as questões do CHM e do financiamento, posto que o CHM será um mecanismo adicional e inovador sobre o compartilhamento de dados.

A cooperação com diversas organizações, como a Organização Marítima Internacional (OMI); Organização para Agricultura e Alimentação (FAO); a Autoridade Internacional dos Fundos Marinhos (ISBA); e as Organizações Regionais de Ordenamento Pesqueiro (RFMOs da sigla em inglês) já havia sido debatida e teve boa recepção dos Estados signatários em 2023. Em 2025 durante as duas PrepComs observou-se maior aproximação dessas organizações tanto pelas manifestações orais quanto escritas. Durante a PrepCom II aprofundou-se a análise de arranjos que poderiam inspirar os órgãos que serão criados no âmbito do Acordo, bem com os arranjos que poderiam formalizar as

cooperações entre o Secretariado BBNJ e os IFBs. Os secretariados de convenções foram bastante citados e demandados sobretudo da Convenção sobre Diversidade Biológica (CDB), da Convenção de Minamata, da Convenção do Clima (UNFCCC) entre outras. Cada um dos arranjos tem pontos fortes e limites, com potencialidades de reduzir a fragmentação na governança marinha¹¹.

Há aspectos sensíveis nos arranjos de cooperação, pois cada organização também se manifestou no sentido de defender o seu mandato. Por exemplo, houve diversas manifestações da ISA e de RFMOs durante a PrepCom II reafirmando as suas competências. Com relação ao posicionamento dos Estados, é possível que Rússia e China tenham restrições à colaboração com outros IFBs em razão da alta tensão geopolítica neste momento, em regiões como o Mar do Sul da China e o oceano glacial Ártico.

Durante as negociações houve sessões específicas para comentar o documento preparado pelo Secretariado intitulado: “Arranjos para reforçar a cooperação com os instrumentos e marcos jurídicos pertinentes, bem como com os organismos globais, regionais, sub-regionais e setoriais relevantes (IFBs do inglês)”¹². Esse documento será certamente objeto de mais debate em 2026 durante a PrepCom III.

1.5 Mecanismos de reporting

Para a PrepCom II foi circulado o documento “Requisitos de apresentação de relatórios nos termos do Acordo BBNJ”¹³. Trata-se de um documento bastante informativo que reúne os dispositivos do Acordo que preveem obrigações relacionadas a apresentação de relatórios tanto para o Secretariado, para a Conferência das Partes, quanto para e pelos órgãos subsidiários. Como haverá a criação de um Comitê específico de Implementação e Cumprimento, o tema da implementação do Acordo e dos mecanismos de acompanhamento do cumprimento das obrigações já está sendo objeto de proposições a fim de identificar quando e padronizar como as obrigações serão avaliadas.

¹¹ Ver: LAUSEN, Johan Nikolaj. Fragmentation revisited: a critical analysis of the effects of introducing the BBNJ Agreement into the ocean governance landscape. *Nordic Journal of International Law*, v. 94, p. 184-210, 2025.

¹² A/AC.296/2025/16.

¹³ A/AC.296/2025/17.

¹⁰ A/AC.296/2025/14.

Diante desses avanços na fase das Comissões preparatórias, é relevante pontuar alguns elementos relacionados aos desafios para a próxima PrepCom e para a iminente entrada em vigor do tratado.

2 Desafios para a continuidade da PrepCom e entrada em vigor do acordo

Os objetivos das PrepComs I e II estão sendo cumpridos e as negociações parecem avançar de modo construtivo. Os dois grandes desafios, que foram pautados na PrepCom I e II, foram o desenho institucional (design) e as negociações relativas ao financiamento. Tanto os Co-Chairs quanto a DOALOS conseguiram preparar um material bastante rico com informações relevantes sobre os aspectos institucionais e procedimentais de outras organizações internacionais a fim de subsidiar as negociações. Um dos principais desafios para 2026 consiste em manter o espírito cooperativo e de fortalecimento do multilateralismo, mas ao mesmo tempo avançando para a necessária tomada de decisão no que concerne ao desenho institucional e ao financiamento.

Para 2026, os desafios estão conectados a temas mais sensíveis como o financiamento. Os interesses do Chile e de Bruxelas de sediarem o Secretariado com uma organização autônoma com personalidade jurídica impõem um objetivo de obtenção de mais recurso financeiro, dificuldade essa que está presente em todos os foros multilaterais. A articulação das obrigações e das competências dos órgãos que serão criados com a entrada em vigor do Acordo com outras organizações também será um desafio.

A PrepCom III ocorrerá entre os dias 23 de março e 2 de abril de 2026. Nas suas alegações finais durante a PrepCom II, a Co-Chair Felson observou que a iminente entrada em vigor do BBNJ é um “desenvolvimento bem-vindo, mas nos coloca sob pressão de tempo”. Ela também destacou a necessidade de manter o diálogo aberto, o foco nas questões-chave para consolidar o Acordo, e o oferecimento de apoio contínuo, inclusive no trabalho entre as sessões. Já o Co-Chair McCarthy, em suas alegações finais, agradeceu a todos os delegados pela flexibilidade e enfatizou que, muito embora algumas questões tenham progredido mais rapidamente do que outras, considera que a PrepCom II foi bem-su-

cedida, oferecendo um plano de trabalho preciso para o período entre sessões.

O maior desafio agora é manter todas as delegações a bordo, para a implementação do Acordo BBNJ nas melhores condições, com o objetivo maior da conservação e do uso sustentável da biodiversidade marinha além da jurisdição nacional. É relevante que o CLAM continue unido e mantenha sua participação ativa com propostas orais e escritas. Para que o Brasil possa participar da futura COP 1 do Acordo BBNJ como Parte é preciso ratificar o Acordo. A sociedade civil aguarda ansiosamente esse momento.

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**I. TENSÕES FUNDACIONAIS NO DIREITO
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**The two courses to the
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The two courses to the recognition of the rights of nature in Latin America*

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María Valeria Berros**

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Abstract

Last years' constitutional, legal and jurisprudential experiences point to two paths into the recognition of Rights of Nature in Latin America. This work collects the key features of this process which is over a decade old from an interdisciplinary perspective between anthropology and law to analyse both legal and case law on rights of nature. First, the path pursued by Ecuador's Constitution and Bolivian legislation is developed which recognise the rights of nature; in consequence, national, provincial and local law bills were issued across the countries of the region. Second, some cases that recognise rights to certain ecosystems using arguments that revisit the law in an ecocentric way are dealt with. Our thesis holds that this expanding process of rights implies of environmental justice since it brings back knowledge and practices absent in this field; it establishes new figures such as river guardians and it stops the North-South knowledge and legal tools unidirectional production adding worlds where the institution is not exclusively human.

Keywords: legal science; constitution; environmental political jurisprudence; environmental protection; rights of nature.

Resumo

As experiências constitucionais, legais e jurisprudenciais dos últimos anos apontam para dois caminhos de reconhecimento dos Direitos da Natureza na América Latina. O presente trabalho reúne as principais características desse processo, já com mais de uma década, a partir de uma perspectiva interdisciplinar entre a antropologia e o direito, com o objetivo de analisar tanto o arcabouço normativo quanto a jurisprudência relativa aos direitos da natureza. Em primeiro lugar, examina-se o percurso adotado pela Constituição do Equador e pela legislação boliviana, que reconhecem explicitamente os direitos da natureza; em consequência, projetos e iniciativas legislativas de âmbito nacional, provincial e local foram apresentados em diversos países da região. Em segundo lugar, são analisados alguns casos que reconhecem direitos a determinados ecossistemas, com base em argumentos que revisitam o direito a partir de uma abordagem ecocêntrica. Sustenta-se, como tese central, que esse processo expansivo de reconhecimento de direitos implica uma reconfiguração da justiça ambiental, na medida em que reintegra saberes

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e práticas até então ausentes desse campo; institui novas figuras, como os guardiões dos rios; e interrompe a produção unidirecional de conhecimentos e instrumentos jurídicos no eixo Norte-Sul, incorporando mundos nos quais a institucionalidade não é exclusivamente humana.

Palavras-chave: ciência jurídica; constituição; jurisprudência político-ambiental; proteção ambiental; direitos da natureza.

1 Introduction

Until recently, our constitutions, laws and judgments relegated forests, rivers, mountains, animals and plants to the world of things that can be exploited or must be protected as just another part of the environment. Recent years have been characterised, on the contrary, by an irruption of non-human beings into the legal field that runs parallel to the growing activisms and socio-political struggles in the West that seek to transform our modes of identification and ways of relating to our environment.

In the legal field, a series of new regulations and judicial decisions are organising the discussion around the legal status of nature: can it be transformed from an object to a subject; in what way; with what limits; how to rethink the concept of justice and its functioning in the face of this expansion of rights; and how can the concept of justice and its functioning be rethought in the face of this expansion of rights?

In the framework of these debates, Latin America plays a central role: in our continent, the recognition of the rights of nature has been going on for more than a decade. The first undisputed milestone in this direction was the process initiated with the Constitution of the Republic of Ecuador in 2008, which established the rights of *Pachamama*¹ after an interesting assembly experience in which the members of the constituent assembly debated with representatives of indigenous peoples and environmental organisations. For almost a year, between November 2007 and October 2008, this heterogeneous group of actors discussed and rewrote the constitutional pact. Inspired by this innovative ex-

perience, the Plurinational State of Bolivia also incorporated this extension of rights shortly after its 2009 constitutional reform in two national laws of 2010 and 2012, which are the ones that give substance to Mother Earth as a bearer of rights. The first law enshrines a set of rights and the second defines the fundamental guidelines and principles for moving towards *Vivir Bien* as an *alternative horizon to capitalism*. The recognition of the rights of nature is linked to certain shifts in the Western conception of nature as indefinitely sacrificial. However, these modes of identification with our environment embodied in the rights of nature, and which present a battle to the more traditional naturalism², do not necessarily involve a change in the traditional model of development.

In recent years, an alternative path to enshrine nature as a subject of law has been developing in Latin America that does not involve constitutional reform or the approval of national laws. We are referring to judicial decisions that declare elements of nature as a legal subject, even when their current norms do not contain express recognitions to that effect. The first emblematic case of this alternative path was that of the Atrato River in Colombia, in 2016. Shortly afterwards, different courts in that country declared other rivers, the Colombian Amazon, páramos and protected natural areas to be subject to the law. There is also a line of jurisprudence that enriches this second path by outlining an ecocentric approach to conflict resolution, although without recognising nature or any of its components as a legal subject. This is the case of Argentina, whose Supreme Court of Justice incorporates an ecocentric or ecosystemic perspective in rulings involving rivers, wetlands and glaciers, in addition to the application of the *in dubio pro natura* principle in some of these decisions. This principle introduces a strong criterion for decision-making by both courts and administrative bodies: when there are doubts in a given dispute, the solution most favourable to nature should be adopted.

This paper thus traces the course of two complementary paths towards the recognition of the rights of nature in Latin America over the last 17 years. The first path refers to the incorporation of the rights of nature in Ecuador's Magna Carta and in Bolivian legislation,

¹ Quotations in italics throughout the article are from infrequently used foreign locutions or textual expressions found in constitutions, laws, lawsuits, judgments or interviews.

² For naturalist ontology, nature exists as an autonomous domain and humans are part of differentiated collectivities that exclude all non-humans. DESCOLA, Philippe. *Más allá de naturaleza y cultura*. Buenos Aires: Amorrortu, 2012.

which has been widely disseminated. The second path is made up of legal transformations linked to the judicial sphere, which have been woven into a web of actions that are not so visible. Although the expansion of ecocentric arguments does not imply the abandonment of the anthropocentric logic underpinning most of the region's constitutions or judicial decisions on environmental matters, we are facing an emerging paradigm shift.

Whether in its strong or *light* version, the consecration of nature as a subject of rights implies a significant transformation of contemporary environmental law in three dimensions: access to justice, the functioning of judicial processes and institutional designs. Can only natural or legal persons bring their claims to court when ecosystems are at risk³; how to rethink the legal interests affected and the evidence produced in court cases; what types of knowledge are incorporated in the files as a result of this type of consecration; what types of knowledge are incorporated in the files?

If the enshrinement of the rights of nature entails profound transformations in the field of law, the same does not necessarily occur in the socio-political field: the production model and environmental policies in Latin America are largely unchanged. By their very existence, the rights of nature do not necessarily lead us to scenarios of greater social and ecological justice in our continent. Governments in the region continue to develop extractivist policies that depredate territories, even in those countries that have forged these processes of expanding rights. We will therefore review some of the potentialities, contradictions and limits of this enshrinement of the rights of nature in our continent.

³ Demogue had already foreshadowed, at the beginning of the 20th century, the possibility of using the concept of subject of rights for animals. DEMOGUE, Rene. *Notions fondamentales de droit privé: essai critique*. Paris: Librairie Nouvelle de Droit et Jurisprudence, 1911.; BERROS, María Valeria; HAIDAR, Victoria; GALANZINO, Marianela. La mirada jurídica sobre los animales: un análisis de su estatuto en el derecho privado argentino. *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, v. 48, p. 79-101, 2016.; In a classic text on the subject, Stone asked whether trees could have procedural legitimacy, that is, whether they could directly claim their rights before the courts. STONE, Christopher. Should Trees Have Standing? Toward Legal Rights for Natural Objects. *Southern California Law Review*, v. 45, p. 450-501, 1972.

Table 1 - Recognition of the rights of nature in Latin America

	Recognition of the rights of nature in Latin America	
Road 1: legislation	Constitutions	Ecuador: 2008 Constitution.
	National laws	Bolivia: Law 71/2021 and Law 300/2012. Costa Rica: Biodiversity Law 7788/1998.
	Provincial and local laws	Argentina: City of Santa Fe (2018). Brazil: cities of Bonito (2017), Paudalho (2018), Florianópolis (2019), Sero (2022), Alagoa Nova (2023), Alto Paraguai (2023), José de Freitas (2023), Cáceres (2023). Colombia: Department of Nariño (2019). Mexico: State of Guerrero (2014), Mexico City (2017), State of Colima (2019), Mexico State (2024).
Road 2: judicial decisions in countries with not explicit legislation	Case law recognising rights to ecosystems	Colombia: Atrato river (2016), Páramo de Pisba, Amazonia (2018), Otún, Pance, Quindío, Magdalena, Cauca, Coello, Combeima, Cocora, La Plata rivers (2019), Lago Tota, Complejo los Páramos las Hermosas, Los Nevados, Isla Salamanca (2020), Fortalecillas River (2021)
	Related judicial decisions	Argentina: Atuel River (2017), wetlands in Puerto General Belgrano (2019), Parana Delta (2020), Yungas (2021), Calilegua National Park (2025).

Source: Own elaboration.

2 A first path: constitutional or legal recognition of the rights of nature

2.1 The constitutional re-foundation of Ecuador and Bolivia

The first decade of this century was characterised by the electoral triumph of a series of so-called progressive governments in Latin America. After a neoliberal period that left deep traces in Latin American societies, other political experiences began to emerge and, in some of them, new constitutional pacts were developed. This is the case of both Ecuador and Bolivia, which in their respective preambles refer to the re-foundational nature of the new constitutions. In the first case, the construction of a new form of citizen coexistence in diversity and harmony with nature is expressed. For its part, the Bolivian text refers to the collective construction of a new state that leaves behind the colonial, republican and neoliberal state.

The 2008 Ecuadorian preamble alludes to the decision to *build a form of citizen coexistence, in diversity and harmony with nature, in order to achieve good living*. In 2009, Bolivia's constitutional preamble enunciates the *historic challenge of collectively building the Unitary Social State of Plurinational Community Law* and affirms that the strength of Pachamama will allow *Bolivia* to be *re-founded*.

As a philosophical underpinning, both the Ecuadorian and Bolivian constitutions take up the indigenous notions of Good Living, which designate the harmonious life between humans and nature. The Andean cosmivision of living well is not centred on the individual but “...on the complexity and immanence of Mother Earth and the cosmos, considered as living matrices and integrated by animistic forces”⁴. The goal is to achieve *sumak kawsay* (good living) as proposed in the Ecuadorian constitutional text; or *suma qamaña* (living well), *ñandereko* (harmonious life), *teko kavi* (good life) in the case of Bolivia.

Buen Vivir or Vivir Bien proposes not only the revision of classical concepts such as development and progress, but also institutional restructuring and inno-

ventions in public policies⁵. The assumption is that there could be no Buen Vivir without a protected and conserved nature⁶. Jurists, academics and political leaders of the Latin American left at the time shared the hope that this proclamation of Buen Vivir would strengthen a “decolonisation of thought”, or a “liberating and tolerant project”⁷.

It is an eclectic concept that is used by various actors for different purposes. The vastness of the subject would merit a separate paper: the different meanings of Buen Vivir; the close link between this concept and those of plurinationality, autonomy and community; the alliances between local and international NGOs in the promotion of new rights and demands; the socio-political implications of legal innovations in the unique context of plurinational states; the contradictions between the spirit of Buen Vivir and the extractivist goals of Bolivia and Ecuador.

As Svampa reflects, the re-legitimisation of a community matrix is not alien to the extractivist paradigm or to neoliberal globalisation; the strong identity content of Buen Vivir may well be deactivated in practice by the expansion of this model of development. The expansion of the frontiers of law may coincide, although it may sound contradictory, with the expropriation of territories and environmental depredation⁸.

The case of Yasuní ITT in the Ecuadorian Amazon or the progressive authorisation of the use of transgenic seeds that has been going on in Bolivia for more than a decade are paradigmatic examples. In 2007, Ecuador had planned to leave a significant volume of oil untapped, contributing to the protection of the global climate and the biological diversity of the rainforest and the territories of indigenous peoples. In return, the international community would contribute financially to the development of renewable energy sources, the maintenance and restoration of ecosystems, and the promotion of social development and sustainable

⁵ SILVA, Thiago dos Santos da. Cosmovisão indígena e a relação ética com o ambiente: Pacha Mama, Bem Viver e o ecocentrismo. *Revista de Direito Internacional*, v. 3, n. 3, p. 393-409, 2024.

⁶ GUDYNAS, Eduardo. *Derechos de la naturaleza: ética biocéntrica y políticas ambientales*. Buenos Aires: Tinta limón, 2015.

⁷ ACOSTA, Alberto. El buen vivir, una utopía por (re)construir. *CIP-Ecosocial: Boletín ECOS*, v. 11, p. 1-19, abr./jun. 2010.

⁸ SVAMPA, Maristella. Modelos de desarrollo, cuestión ambiental y giro eco-territorial. In: ALIMONDA, Héctor. *La naturaleza colonizada: ecología política y minería en América Latina*. Buenos Aires: CLACSO-CICCUS, 2011.

⁴ SCHAVELZON, Salvador. *Plurinacionalidad y Vivir Bien/Buen Vivir: dos conceptos leídos desde Bolivia y Ecuador post-constituyentes*. Buenos Aires: Abya Yala/CLACSO, 2015.

employment. In 2013, Ecuador decided to resume oil exploitation in Yasuní, one of the most biodiverse territories on the planet, generating conflicts with different collectives due to the environmental costs incurred along with the loss of ancestral territories. For its part, the introduction of genetically modified seeds has led to a major transformation of ecosystems and the living conditions of the people who inhabit them, causing serious conflicts at the territorial level⁹.

Despite the expectations generated by the region's progressive governments, the truth is that the redistributive social policies of that period were developed simultaneously with the deepening of the extractivist model¹⁰. It is within the framework of this complex political scenario that the rights of nature were enshrined.

2.2 The content of the surveys

Let us now return to the most significant aspects of the constitutional reform undertaken by Ecuador. In its seventh chapter, the Ecuadorian Magna Carta states that “*Nature or Pacha Mama, where life is reproduced and realised, has the right to full respect for its existence and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes*”¹¹. It also determines that any person, community, people or nationality can demand compliance with these rights from the public authorities, which implies a broad legitimacy to assert these constitutionally recognised rights. Article 72 of the constitution is also innovative in that it establishes a right to restoration beyond the claim for compensation that may correspond to communities and individuals for damage caused to natural systems. In addition, in cases of serious or permanent environmental impacts, the state must establish adequate mechanisms to achieve restoration and eliminate or mitigate harmful environmental consequences.

The enshrinement of the rights of Pachamama in a Magna Carta seeks to distance itself from the rhetoric

of dominion over nature characteristic of the modern Western paradigm. At least declaratively, nature is now considered less external to the human experience.

In the case of Bolivia, the incorporation of Living Well as cross-cutting content at the constitutional level (2009) is followed by the enactment of the Law on the Rights of Mother Earth (2010) and the Framework Law on Mother Earth and Integral Development for Living Well (2012).

The 2010 law refers to Mother Earth as a *dynamic living system made up of the indivisible community of all life systems and living beings, interrelated, interdependent and complementary, sharing a common destiny*, recognising a series of rights and principles. Among the rights it incorporates are: to life, to the diversity of life, to water, to clean air, to balance, to restoration and to live free of pollution.

The principles accepted in this law focus on establishing a certain harmony between human activities and life cycles and processes based on the *diversity of feelings, values, knowledge, knowledge, practices, skills, transcendences, transformations, sciences, technologies and norms of all the cultures of the world that seek to live in harmony with nature*. They also assume the need to ensure the regeneration of Mother Earth and her systems, which cannot be commodified. These latter principles call into question the dominant attempts, especially at the level of international conventions, to solve global environmental problems through economic mechanisms. One example is the carbon credits embodied in the 1997 Kyoto Protocol as a market-based instrument to address climate change.

The Framework Law on Mother Earth and Integral Development for Living Well (2012) adds new principles to those already discussed in the 2010 law. These include the obligation to restore long-damaged livelihood systems; and a social and climate justice argument that seeks to institute differentiated responsibilities between those countries that generate the conditions of climate change and those that suffer most severely from its consequences. The law also proposes the plural participation of both the state and the Bolivian people in the defence of the recognised rights of nature through *consensual and democratic procedures*. To this it adds the promotion of solidarity between human beings, which should be promoted by the state, prioritising those with the lowest economic income and the highest level of

⁹ SCHMIDT, Mariana *et al.* Resistencias a los agrotóxicos y conflictos en torno al modelo extractivo centrado en los agronegocios: un estudio en las provincias de Santa Fe, Santiago del Estero y Salta. In: FOLGUERA, Guillermo. *Diálogos sobre el modelo agroindustrial argentino: miradas plurales de un pensar colectivo*. Buenos Aires: Eudeba, 2022.

¹⁰ SVAMPA, Maristella; VIALE, Enrique. *El colapso ecológico ya llegó: una brújula para salir del maldesarrollo*. Buenos Aires: Siglo XXI, 2020.

¹¹ ECUADOR. *Ecuadorian Magna Carta*. art. 71.

dissatisfaction with their fundamental rights¹². On the other hand, the law alludes to the relationship between the plurinationality of the state and the diversity of recognised knowledge: *The Plurinational State of Bolivia assumes the complementarity between traditional knowledge and the sciences*¹³. This diversity of content prefigures the tensions that would arise in these countries between the new constitutional commitments to protect nature and the aim of generating redistributive policies without changing the dominant extractivist model, within the framework of selective progressivism¹⁴.

While Bolivia's national plans recognise the intrinsic value of nature, they also conceive of biodiversity as a 'comparative advantage', in line with more economic ideas about biological and genetic resources. This is not a minor point, as Latin America is one of the richest regions in terms of biodiversity, and there is a constant dispute between its protection and its instrumentalisation.

2.3 Ad hoc institutional designs

One of the great challenges posed by these normative recognitions at the national level is how to make these rights effective in two major areas: access to justice and institutional designs.

In Ecuador, Article 71 of the new Constitution establishes that any person, community, people or nationality can demand the fulfilment of the rights of nature. For their part, the Bolivian laws of 2010 and 2012 grant legal status to Mother Earth as a collective subject of public interest and consider that both Mother Earth and its components, which includes human beings, are the holders of these rights. This opens up a broad possibility for claims for the rights of nature, as any human being could bring a case of infringement of the rights of nature before the courts.

¹² See art. 4 in ESTADO PLURINACIONAL DE BOLIVIA. *Ley 300 Marco de la Madre Tierra y Desarrollo Integral para el Vivir Bien*. 2012.

¹³ See art. 4 inc. 17 in ESTADO PLURINACIONAL DE BOLIVIA. *Ley 300 Marco de la Madre Tierra y Desarrollo Integral para el Vivir Bien*. 2012.

¹⁴ Selective progressivism is an expression coined by the Argentine environmental journalist Darío Aranda, which is later taken up by Svampa and Viale to describe the cycle of Latin American populist governments (2000-2015) that minimise the preservation of common goods and the care of territories in pursuit of a productivist vision of development that reduces poverty and social exclusion through state redistribution of resources.

On the other hand, the type of institutions that are to implement the content of these enshrinements is a major challenge. In the case of Ecuador, a National Plan for Good Living and a Secretariat for Good Living were created in 2013. A detailed analysis of the content and functioning of both reveals contradictions between developmentalist policies and the protection of nature.

In Bolivia, the 2012 Law generated some national institutions such as the Plurinational Council for Living Well in Harmony and Balance with Mother Earth, the Institutional Framework on Climate Change and the Plurinational Authority of Mother Earth, although only the latter has had significant weight.

These avenues of access to justice and *ad hoc* institutions for the rights of nature are also a pragmatic response to the criticisms made by local and foreign jurists. From the point of view of its detractors, nature should not be invested with rights corresponding to humans because it is not a subject with agency: it cannot manifest its own will or be represented. Faced with these objections rooted in individualistic liberal logic, which continue to reappear in legal debates, the constituent members of the Convention and the legislators outlined the strategies already mentioned.

In addition, several jurists assert that nature should not be considered a subject of law because legal systems only allow rights to be granted to natural and legal persons: civil associations, companies, states. The response of the governments of Ecuador and Bolivia consisted of granting nature specific rights, just as they would be granted to the human inhabitants of a country. If Bolivian (human) citizens have the right to health, education or housing, Pachamama has the right to life, to water, to clean air, to balance, to restoration and to live free of contamination.

2.4 Impacts and spillovers

Inspired by the constitutional and legal reforms carried out by Ecuador and Bolivia, other Latin American countries enacted local regulations granting rights to nature. In 2017, the Municipality of Bonito in Brazil included this enshrinement in its organic charter, as did the Municipality of Paudalho in 2018, the Municipality of Florianópolis in 2019, the Municipality of Serro in 2022, the Municipalities of Alagoa Nova, Alto Paraguai, José de Freitas and Cáceres in 2023. In Argentina, the

Municipality of the City of Santa Fe passed an ordinance in 2018 banning the use of glyphosate and recognising the rights of nature¹⁵. In Colombia, the town of Nariño consecrated nature as a subject of rights in 2019. In Mexico, the Political Constitution of the Free and Sovereign State of Guerrero initiated this extension of rights in 2014, followed by the Magna Carta of Mexico City in 2017 and Mexico State in 2024.

These innovations are also emerging in other continents: in Asia - especially in India - through a series of court rulings; and in Oceania, through the passing of laws and the enshrinement of agreements with indigenous communities in Australia and New Zealand¹⁶.

On the other hand, the constitutional reform in Ecuador and the Bolivian laws had repercussions on international discussions that define agendas and priorities on environmental problems. Let us look at a couple of examples contemporary to the enactment of these laws. In Tiquipaya, a city in central Bolivia, 35,000 people gathered in 2010 to participate in the World People's Conference on Climate Change and the Defence of Life and approved a Declaration of the Rights of Mother Earth. This declaration inspired proposals for international declarations to achieve global recognition of the rights of nature¹⁷.

Two years later, pressure from the governments of Ecuador and Bolivia succeeded in including a mention of Mother Earth and the recognition of the rights of nature in the final document of the United Nations Conference on Sustainable Development in Rio de Janeiro - known as Rio+20 - although this allusion was overshadowed by the simultaneous *promotion of sustainable development*:

We recognise that planet Earth and its ecosystems are our home and that 'Mother Earth' is a common expression in many countries and regions, and note that some countries recognise the rights of nature in the context of *promoting sustainable development*. We are convinced that, in order to achieve a fair balance between the economic, social and environmental

needs of present and future generations, it is necessary to promote *harmony with nature*¹⁸.

Despite its ambiguous nature, the inclusion of the issue of the rights of nature in this meeting reflects the new visibility of the topic at the international level and the influence of some Latin American countries in introducing this discussion beyond their borders, subverting the dominant logic of the circulation of ideas and concepts of environmental law. Traditionally, the tools, concepts and principles of environmental law are formulated on the basis of debates at certain international meetings or in national laws sanctioned by some central countries. In these cases, the contribution not only comes from the South, but also strains the prevailing homogeneity of international environmental law¹⁹.

Although some states, such as Bolivia, Ecuador, Costa Rica and Paraguay, had sought to introduce the legal status of nature with greater emphasis in the final document, only the ambiguous allusion in the aforementioned paragraph was successful. As we have already commented, this UN document simultaneously highlights and devalues the rights of nature by reframing them in terms of promoting sustainable development. Let us also recall that both Bolivia and Ecuador discuss the concept of sustainable development, as well as that of the green economy, which was the conceptual emblem of this 2012 conference. *Harmony with nature* certainly does not have to mean the same thing in the framework of Buen Vivir or as a simple abstract enunciation in the promotion of sustainable development, aligned with the *status quo*.

A document from the Bolivian Platform on Climate Change, which objected to the final document of the Rio+20 meeting, makes this clear:

That document [*The Future We Want*] mentions the indigenous people and Mother Earth, but as a spiritual, folkloric question, as a make-up. (...) they do not take into account our proposals for structural change (...) they say that they have included our needs, but (...) the real intention (...) is to continue

¹⁵ Argentina has had a national bill for the recognition of the rights of nature since 2015, presented by the then senator Fernando «Pino» Solanas, which was never dealt with. A new bill was presented in 2022.

¹⁶ O'DONNELL, Erin; JONES, Julia Talbot. Creating legal rights for rivers: lessons from Australia, New Zealand, and India. *Ecology and Society*, v. 23, n. 1, p. 1-10, 2018.

¹⁷ International organisations working towards this goal include the Pachamama Alliance and the Global Alliance for the Rights of Nature (GARN).

¹⁸ UNITED NATIONS. *The Future We Want*. Rio de Janeiro: United Nations Conference on Sustainable Development, 2012. Grifo nosso.

¹⁹ HAIDAR, Victoria; BERROS, María Valeria. Entre el *sumak kawsay* y la "vida en armonía con la naturaleza": disputas en la circulación y traducción de perspectivas respecto de la regulación de la cuestión ecológica en el espacio global. *Revista Theomai*, v. 32, p. 128-150, 2015.

with the plundering of our resources and our territories²⁰.

A year later, at an international meeting organised by the United Nations Environment Programme in Nairobi, the government of Evo Morales succeeded in incorporating an alternative approach to the green economy: *living in harmony with nature*²¹. While the government in question postulated the need to universally recognise the rights of Mother Earth in different international forums, there were tensions and criticisms caused by projects that violated the rights of nature in Bolivian territory²².

The promising starting point provided by the recognition of the rights of nature must therefore be contrasted with its concrete implementation in the territories. The mere enactment of a law or constitution does not change the living conditions of the group of beings it claims to protect. The way in which extensions of rights are implemented at the territorial level is often unpredictable and contradictory: there are multiple difficulties and obstructions to the implementation of rights recognised by legal or constitutional means²³.

To add to the complexity of the issue, a significant part of Latin American socio-environmental conflicts are judicialised, and the interpretation of judges on this type of extension of rights becomes central. To what extent do the courts in these countries distance themselves from the still dominant -that is, anthropocentric- logic for the resolution of environmental conflicts? If we look at the case of Ecuador - the country with the

largest number of rulings and several of the most emblematic cases - we will notice an oscillation between the use of the rights of nature and more traditional legal tools to settle environmental claims.

Let's look at the case of an environmental conflict that took place in 2011. Residents of the town of Vilcabamba brought a legal action for the alteration of the natural course of the river of the same name caused by the construction of a road. The judgment ruled in favour of the neighbours, articulating both traditional legal tools and those introduced by the constitutional reform. First, the ruling determined that the construction work could not continue and that the damage should be repaired because the road company failed to comply with the environmental impact assessment procedure required by the applicable legislation.²⁴ Furthermore, the final decision took up the constitutional recognition of the rights of nature, expressed in terms of the river's right to flow through its natural course. In this case, the combination of the two bodies of law was virtuous: the logics involved were not mutually exclusive but complementary.

These novel normative sanctions, institutional design or judicial approaches distance themselves from hegemonic conceptions of nature in terms of domination or exploitation. In tune with the ideologies of various socio-environmental movements, these Western devices claim what has been part of the daily praxis of other societies since time immemorial: the interconnectedness of the living world²⁵. An interconnectedness that is made more palpable - for the inhabitants of our countries - by the dramatic consequences of climate change, the mass extinction of species and the expe-

²⁰ BOLIVIAN PLATFORM AGAINST CLIMATE CHANGE. *The future the capitalists want*. 2012.

²¹ PACHECO, Diego. Enfoque «Vivir Bien» is internationally recognised. *ALAI América Latina en Movimiento*, 2013. Available at: <https://www.alainet.org/en/articulo/74630>. Access on: 17 feb. 2022.

²² This contradiction will be reactivated in 2021, as Eduardo Gudynas points out in: GUDYNAS, Eduardo. Buscando a la Pachamama en Bolivia: otra vez la divergencia del mandato local y la excusa global. *Observatorio Plurinacional de Aguas*, 08 jun. 2021. Available at: <https://oplas.org/sitio/2021/06/08/eduardo-gudynas-buscando-a-la-pachamama-en-bolivia-otra-vez-la-divergencia-del-mandato-local-y-la-excusa-global/>. Access on: 17 feb. 2022.

²³ The legalisation of abortion in Argentina in December 2020 provides an excellent example of the latter. Since the law was passed, lawyers, citizens and associations have filed legal actions in several provinces of the country in order to obtain a declaration of unconstitutionality of the national law, which have obtained favourable results in some courts. On the other hand, and even if the appeal of this type of sentences is successful, access to legal abortion does not mean the same for any woman in Argentina due to the very unequal access to the health system and to information, among other reasons.

²⁴ BERROS, María Valeria. Defending Rivers: Vilcabamba in the South of Ecuador. *RCC Perspectives: Transformations in Environment and Society*, LMU, v. 6, p. 37-44, 2017.

²⁵ In various indigenous groups of the Amazon, beings live in a social continuum capable of managing resources in such a way that humans, animals, plants, atmospheric phenomena and owners or masters of species and spaces can develop an environment of joint habitability. DESCOLA, Philippe. *Más allá de naturaleza y cultura*. Buenos Aires: Amorrortu, 2012.; CARMAN, María; BERROS, María Valeria; MEDRANO, Celeste. La irrupción política, ontológica y jurídica de los no-humanos en los mundos antropocénicos. *Quid* 16, n. 14, p. 1-14, 2020.; These processes are not exclusive to indigenous worlds: peasant, agro-ecological, fishing and fair communities think of themselves with an «inclusive we». FURLAN, Violeta; JIMÉNEZ-ESCOBAR, Néstor David; ZAMUDIO, Fernando; MEDRANO, Celeste. Ethnobiological equivocation and other misunderstandings in the interpretation of natures. *Studies in History and Philosophy of Science*, v. 84, p. 1-9, 2020.

rience of a pandemic at the edge or inside our own bodies. The spread of the Covid coronavirus19 has indeed made citizens more aware of the interdependence of all beings than ecocentric laws and constitutions.

3 A Second Path to the Recognition of the Rights of Nature: Court Decisions

3.1 The case of the Atrato River in Colombia

The regulatory innovations mentioned in the first part of this article - the constitutional or legal recognition of the rights of nature - have shaken a certain consensus in the Latin American legal field, mainly with regard to who can be rights-holders. Although disagreements between jurists remain the order of the day, more and more judges are echoing these new ideas and incorporating them into their rulings, even when there is no explicit recognition of nature as a subject of law in their legal systems. This makes it possible to think of a second path that begins with judges who reinterpret existing norms from an ecocentric perspective.

The emblematic case to illustrate this second path is the ruling of the Colombian Constitutional Court that enshrined the Atrato River as a subject of law in 2016. This decision opened the door to other court rulings declaring animals, rivers, natural areas and even the Amazon as subjects of rights.

The Atrato river basin represents 60% of the area of the department of Chocó and is located in one of the most biodiverse areas on the planet. It is home to almost 500,000 people, mostly Afro-descendants and mestizos. Extractive activities, many of them illegal, such as deforestation and gold mining, are carried out in the basin. The intensification of extractive activities since the 1990s has not only caused irreparable damage to the ecosystem but also to people's health, as evidenced by the alarming level of mercury in the blood of the local population. The natural course of the river was altered; the creatures that live there and the people who rely on the river for their survival were also harmed. The inhabitants continued to feed on lead-contaminated fish and agricultural products. The result: disease, poisoning and death. This was compounded by the state's neglect

of an area that is difficult to access and is only crossed by two dirt tracks in very poor condition.

Illegal mining activities have changed the course of rivers and affected water sources with the dumping of fats, oils and heavy metals. The contamination of the basins, marshes, wetlands and tributaries of the Atrato River threatens the survival of the population, the fish and the development of agriculture.

After years of deepening grief of all kinds, the Centro de Estudios para la Justicia Social Tierra Digna - representing a group of community councils in Chocó - filed a lawsuit in January 2015. This first lawsuit was rejected in court on formal grounds. However, this type of frustration can be the kick-start to reach higher instances. And so it happened with this claim: shortly afterwards, the Constitutional Court declared itself competent to decide.

The representative councils of the Chocó communities then filed a new legal action directed against different governmental institutions, including the Presidency of the Nation and a number of ministries. The request was clear: to stop the intensive and large-scale use of illegal mining and forestry operations that affected both the rights of the communities and the balance of the ecosystems.

One of the intervening judges, Jorge Iván Palacio Palacio, had been familiar with the problems of this region of Colombia for many years before this judicial presentation. The arrival of this legal action at the Court was a privileged opportunity to intervene in the region's problems:

I dreamed of coming to this Constitutional Court to try to advocate for animals. Since I was a child, I found the slaughter of pigs very cruel. They were lucky to have me on the Court! Interview with former magistrate Palacio Palacio, 2021.²⁶

The dossier was nourished by reports from scientific institutions, NGOs and international organisations that contributed elements on issues of interest to the Court and whose imprint was reflected in the 2016 ruling. However, it was the judicial inspection carried out in the territory that caused the Constitutional Court to - in the words of the judge - *turn the case around*, granting *reason to these communities*. The palpable effects of the polluting substances appeared brutally before the judge's eyes:

²⁶ Interview with former magistrate Palacio Palacio. 2021.

... we noted the problem of mercury and cyanide. I was impressed by the state of health of the children, of the elderly, the suffering, the degradation caused by the ingestion of mercury and cyanide in the fish, in the food, because the fish is also contaminated and suffers the consequences of this cyanide. Interview with former magistrate Palacio Palacio, 2021.²⁷

The testimonies of the affected persons were collected in evidence notebooks that were incorporated into the case file. These testimonies, together with the images of the judicial inspection, as well as the scientific studies and other documents submitted to the proceedings, demonstrated the humanitarian and environmental tragedy of the Atrato River, to which *the Court could not be oblivious*.

The highly harmful substances dumped in the river were responsible both for illnesses, intoxications and deaths of the elderly and minors, and for the danger of extinction of plant and animal species. The judgement exposed both axes: the humanitarian crisis suffered by the inhabitants and the progressive destruction of one of the richest areas in the world in terms of biological diversity, where 90% of the territory is a special area of conservation.

Colombia is considered a megabiodiverse country, as its invaluable natural wealth on the planet merits special protection under universal co-responsibility. Many of the species and ecosystems present in Colombia are exclusive, i.e. endemic, so if they disappear from the territory they will disappear from the Earth. Flora and fauna can disappear, paradoxically, faster than the capacity to know them.

In its ruling, the Court adopted various measures to address the violation of fundamental human rights such as the right to life, health, drinking water, culture, territory and food security. Firstly, it ordered the government to carry out three action plans with the aim of decontaminating the river basin, recovering the ecosystems and avoiding further damage to the region's environment; neutralising and eradicating illegal mining; and recovering traditional forms of subsistence and food. It also ordered toxicological and epidemiological studies and the development of environmental indicators. Finally, it designed a structure for the control and monitoring of the sentence and ordered the Attorney General's Office, the Ombudsman's Office and the Comptroller

General's Office to supervise compliance with the sentence. It also convened a Panel of Experts and ordered the creation of an Inter-Institutional Commission for Chocó, among other oversight measures. This ruling is similar to other Latin American rulings that ordered actions and established a control and monitoring scheme in a highly polluted basin, such as the famous case on the Matanza-Riachuelo basin in Argentina.

However, this ruling gains international visibility for recognising the Atrato River as an entity subject to rights.

Despite the fact that Colombia does not have a law or a constitution that explicitly declares nature as a subject of rights, the ruling effectively makes up for this absence. The decisive actor in the conquest of progressive extensions of rights in Colombia has not been the legislative or executive power, but - as Palacio Palacio emphasises during the interview - the judiciary: *Judges are the ones who defend nature with innovative sentences. The judiciary has been the standard bearer on these issues*.

The recognition of the Atrato River as a subject of law is the result of an ecocentric interpretation of the current Colombian legal system. In the words of the judge in the case, this tutela leaves *anthropocentrism aside and focuses on ecocentrism*²⁸. It is about *thinking of the human species as one more species within the species*.

The main order is not to continue polluting the river, because you see petrol stains (...) The cow, the vegetables, the bulls (...) have their own cosmology. And that is why they are subjects (...) Each species has a role in this world, on this planet. Interview with former magistrate Palacio Palacio, 2021.²⁹

The ruling also makes explicit its ecocentric approach by stating that the land does not belong to humans but that, on the contrary, *"(...) it is man who belongs to the*

²⁷ Interview with former magistrate Palacio Palacio. 2021.

²⁸ In the words of the former magistrate, constructing this judgment from an ecocentric perspective is the result of *one's worldview: how one conceives of nature, how one conceives of man's relationship with the environment. And from reading Martha Nussbaum, Peter Singer, Arthur Schopenhauer, Bertrand Russell. All this literature enriches and shapes (...) the day I became a judge (...) these teachings of (...) these great masters and what one has experienced, because theory and practice mix*. Interview with former judge Palacio Palacio, 2021. Palacio Palacio had already demonstrated an innovative spirit in cases related to gender issues. Indeed, the former magistrate played an important role in legal actions related to abortion, equal marriage and adoption for same-sex couples; issues that advanced in Colombia not through legislation but through judicial decisions.

²⁹ Interview with former magistrate Palacio Palacio. 2021.

land, like any other species'³⁰. The ruling ordered the national government to protect and legally represent the rights of the river, through the institution designated by the president, in conjunction with the ethnic communities that inhabit the Atrato river basin in Chocó. At the same time, in order to ensure the recovery of the river, the Court ordered that these legal representatives be supported by an advisory team made up of the Humboldt Foundation and the World Wildlife Fund Colombia.

In this way, the river is both a subject of rights and an entity that needs to be endowed with representation through the figure of its guardians. Both aspects become a reference in the regional legal field: other judges are inspired by this ruling to recognise various Colombian ecosystems as subjects of rights.

Another aspect of the judgement that had transcendence in the legal field is the conception of biocultural rights. Based on a diagnosis of the precariousness to which various beings - human and non-human - are thrown, the judgement enunciates "an alternative vision of the collective rights of ethnic communities in relation to their environment", which it calls biocultural rights. This is the first Colombian judgement to develop this concept. According to the ruling, these are not "new rights for ethnic communities", but "a special category that unifies their rights to natural resources and culture, understanding them as integrated and interrelated".

... the so-called *biocultural rights* refer to the rights of ethnic communities **to administer and exercise autonomous guardianship** over their territories - in accordance with their own laws and customs - and the natural resources that make up their habitat, where their culture, traditions and *way of life* are developed on the basis of the special relationship they have with the environment and biodiversity³¹.

Like other rulings declaring animals or other non-human entities to be subjects of rights, the Atrato River ruling sparked controversy in the judicial field³².

³⁰ CORTE CONSTITUCIONAL DE COLOMBIA. *Centro de Estudios para la Justicia Social Tierra Digna and others v. Presidencia de la República and others*. 2016.

³¹ CORTE CONSTITUCIONAL DE COLOMBIA. *Centro de Estudios para la Justicia Social Tierra Digna and others v. Presidencia de la República and others*. 2016. Italics and highlights are from the original text.

³² The greatest resistance to these groundbreaking rulings recognising rights to non-human subjects comes from specialists in private law, a branch of law that studies relationships between subjects and between subjects and things. The same happened in Argentina with the rulings declaring the orangutan Sandra a non-human person.

Despite the ongoing debates, the truth is that this ruling constitutes a watershed in environmental jurisprudence: five years later, dozens of rivers were declared subjects of rights and several also have a guardian³³. In addition to rivers, a significant number of animals, natural areas, moorlands and even the Colombian Amazon were declared subjects of rights based on decisions of different courts in the country.

Another of the repercussions of the Atrato River ruling is that, shortly afterwards, a presidential decree banned the manufacture, import and export of mercury-added products.³⁴ Although there is no strict control over the application of this decree, the intervening judge considers it an auspicious initiative: "*At least it made visible not only in Chocó, but in all of Colombia a problem that is general, and of Latin America as a whole: the problem of mining*"³⁵.

The judgement points out the importance of ensuring the reproduction of life for all beings, including human inhabitants: all these sufferings have an entity, are related and must be remedied.

3.2 Deforestation in the Colombian Amazon

The Colombian Amazon court case is of particular interest as it is the first case of climate litigation to take place in Latin America. Climate litigation claims the fulfilment of states' commitments on greenhouse gas emissions and has been developed especially in Europe, the United States, Canada, New Zealand and Australia³⁶.

³³ The judgments can be downloaded at: UNITED NATIONS. Harmony With Nature. *Rights of nature law and policy*. Available at: <http://www.harmonywithnatureun.org/rightsOfNature/>. Access on: 17 dec. 2023.

³⁴ COLOMBIA. Presidential Decree n° 419, de 2021. Por el cual se da cumplimiento a los compromisos adquiridos por Colombia relacionados con el Anexo A - Parte I del Convenio de Minamata sobre el Mercurio y se adoptan otras disposiciones. *Diario Oficial*, n° 51.653, 22 abr. 2021.

³⁵ Interview with former magistrate Jorge Palacio Palacio. 2021.

³⁶ The United Nations, through a series of reports, has been tracking climate litigation cases around the world. See: UNITED NATIONS ENVIRONMENT PROGRAMME; COLUMBIA LAW SCHOOL. Sabin Center for Climate Change Law. *Global Climate Litigation Report: 2020 Status Review*. Nairobi: UNEP, 2020. Available at: <https://www.unep.org/es/resources/informe/informe-mundial-sobre-litigios-climaticos-revision-global-2020>. Access on: 17 dec. 2023.; CAVEDON-CAPDEVILLE, Fernanda de Salles *et al*. An ecocentric perspective on climate litigation: lessons from Latin America. *Journal of Human Rights Practice*, v. 16, n. 1, p. 89-106, 2024.

This first case of climate litigation on our continent addresses a conflict over deforestation in the Amazon, the intensification of which is alarming. In 2016, Colombia lost 178,597 hectares of forest, a 44% increase in the level of deforestation compared to the previous year. A large part of these destroyed hectares are part of the Amazon, which is continually at risk from land grabbing, illegal crops, pressure from agribusiness, infrastructure construction and illegal timber extraction. The group of people filing the lawsuit is made up of children and adolescents from the affected communities in the different provinces of the Colombian Amazon - with the support of the NGO Dejusticia - who will reach adulthood between 2041 and 2070 and old age from 2071, in line with life expectancy in the country. If urgent measures are not taken, the temperature will rise by between 1.6 and 2.14 degrees Celsius, seriously affecting their quality of life in the future.

The lawsuit was filed against the Presidency of the Republic, several national ministries, the Special Administrative Unit of National Natural Parks and the Governors of Amazonía, Caquetá, Guainía, Guaviare, Putumayo and Vaupés, with the aim of requesting compliance with the commitments made on climate change and, in particular, the curbing of deforestation.

The court ruling provides for a series of orders linked to the protection of people's human rights, the protection of future generations and the safeguarding of the region's biodiversity. The first order is to draw up a short-, medium- and long-term action plan to counteract the rate of deforestation. Likewise, an "Intergenerational Pact for the Life of the Colombian Amazon" is ordered to be signed, with the participation not only of state entities but also of the plaintiffs, the affected communities, scientific and research organisations in environmental matters, and the interested population in general. The defendant municipalities are also requested to update and implement their land-use plans. Finally, several corporations in the region must present an action plan to counteract the deforestation problems reported in the case.

The recognition of the Colombian Amazon as a subject of rights takes up several arguments of the Constitutional Court in the Atrato River case.

(...) a new legal approach called biocultural rights has been developing, whose central premise is the relationship of profound unity and interdependence between nature and the human species, and which

has as a consequence a new socio-legal understanding in which nature and its environment must be taken seriously and with full rights. That is, as subjects of rights.

Sentence STC4360/2018. Civil Cassation Chamber of the Supreme Court of Colombia, 05.4.2018, p. 40-41.³⁷

Like the Atrato River ruling, the call for a pact that considers the future of the Amazon is a departure from the anthropocentric paradigm. It defends the intrinsic value of the non-human: species have the right to develop their own life processes and ecosystems have the right to persist, regardless of their usefulness to humans.

3.3 Other related judicial decisions

In addition to this proliferation of rulings declaring certain ecosystems as subjects, there is also a set of judicial decisions that contribute to the Latin American ecocentric turn, although without reaching such explicit formulations. This is the role played by the Supreme Court of Justice of Argentina: although the ecocentric allusions in its rulings are tenuous, they are nonetheless significant as the highest judicial authority in one of the largest countries in the region³⁸.

In the *dégradé* of cases that we have covered throughout the article, we will now review this discrete link, which we can characterise as a recognition of rights of nature in a weak sense.

The Court's first judicial decision that includes ecocentric arguments rules on a conflict between two Argentine provinces over the use of the Atruel River. The province of La Pampa has a historic claim against the province of Mendoza for overexploitation of the watercourse upstream, causing damage and shortages downstream. The claim filed by La Pampa reached the Supreme Court of Justice of the Nation in 2014 and was resolved in 2017 from an ecocentric perspective:

The legal regulation of water has been based on an anthropocentric model, which has been purely dominion-based, taking into account the private utility that a person can obtain from it, or else in terms of the public utility identified with the State (...). The legal paradigm

³⁷ SUPREME COURT OF COLOMBIA. *Sentence STC4360/2018*. Civil Cassation Chamber. 05 apr. 2018. p. 40-41.

³⁸ One of the rulings of the Argentine Supreme Court that had international repercussions was the one on the contamination of the Matanza Riachuelo basin in 2008.

that orders the regulation of water is eco-centric, or systemic, and does not only take into account private or state interests, but those of the system itself, as established in the general environmental law.³⁹

Although the Atuel River is not declared a subject of law, the existence of ecosystem interests is affirmed, contrasting them with those held by States or private individuals. This ecocentric perspective is consolidated in later rulings, as in the case we will see below.

In a conflict generated by the construction of a private neighbourhood on a wetland in the town of Puerto General Belgrano in the province of Entre Ríos⁴⁰, the Court incorporated the principle of *in dubio pro natura* as a criterion for decision-making:

(...) in cases of doubt, all proceedings before courts, administrative bodies and other decision-makers shall be resolved in a manner conducive to the protection and conservation of the environment, giving preference to the least harmful alternatives. Actions shall not be taken when their potential adverse effects are disproportionate or excessive in relation to the benefits derived from them.

This principle is inspired by contributions from criminal and constitutional law with the *in dubio pro imputado* principle, followed by developments in labour law with the *in dubio pro operario* principle and, later, the *in dubio pro consumidor* principle. In the first case, when there are doubts about the authorship of a person accused of a crime, one must be in favour of his innocence. In the case of labour and consumer law, we find entire bodies of law that have a protective nature: the weaker party to the employment contract or the consumer relationship must be protected. In the case of the principle applied here by the Court, the environment will be protected as a priority in those conflicts that have different resolution alternatives.

Although it is not an explicit recognition of the rights of nature, these innovations involve an initial shift from the status of nature as an object to that of a subject. Gradually, the legal work of Argentina's highest judicial authority abandons an orthodox logic in environmental matters: it ceases to speak - to use Bourdieu's

beautiful expression⁴¹ - "in the language of conformity with the past". The rulings in question distance themselves from anthropocentrism and are in tune with a certain zeitgeist in which ecological concerns occupy a growing place.

4 Conclusions

Throughout this paper we have seen the main milestones of the two paths to the recognition of the rights of nature in Latin America. These innovations were predominantly driven by governments of the progressive cycle - in the case of the constitutional re-foundation of Ecuador and Bolivia -; to a lesser extent, by NGOs and, to an even lesser extent, by local populations.

The first path of recognition of the rights of nature, represented by the advances in the constitutions and legislation of Ecuador and Bolivia, has had an impact on laws, court rulings or agreements between governments and communities in different parts of the world, as well as on debates at various international meetings on climate change and other environmental issues.

The "contagion effect" was also present in Latin America. Suffice it to mention the first bill on the rights of nature presented in Argentina, which has not yet been debated; the proliferation of sentences that veer towards ecocentrism; and the impact on the imaginaries of environmental, peasant-indigenous and ecofeminist movements that increasingly echo this idea and incorporate it into their discourses, mobilisations and demands.

Both the recognition of the rights of nature and Buen Vivir in the Ecuadorian and Bolivian charters and norms speak of respecting, protecting and restoring ecosystems and the life of all natural beings, including humans. However, some public policies implemented *subsequent to* these sanctions contradict the central spirit of these legal creations. In the name of a nation's Good Living, extractivist policies can be implemented in peasant or indigenous territories without the consent of these communities, violating their right to self-determination.

³⁹ CORTE SUPREMA DE JUSTICIA DE LA NACIÓN ARGENTINA. *Provincia de La Pampa v Provincia de Mendoza s/ uso de aguas*, 243/2014. 2017.

⁴⁰ CORTE SUPREMA DE JUSTICIA DE LA NACIÓN ARGENTINA. *Majul, Julio Jesús v. Municipalidad de Pueblo General Belgrano*, 714/2016/RH1. 2019.

⁴¹ BOURDIEU, Pierre. Elementos para una sociología del campo jurídico. In: BOURDIEU, Pierre; TEUBNER, Gunther. *La fuerza del derecho*. Bogotá: Siglo del Hombre Editores, 2000. p. 153-220.

It is not idle to recall that the extension of rights to Pachamama and other non-human beings is taking place in one of the most socially unequal territories on the planet, which also breaks sad records in terms of biodiversity loss and violence against environmental defenders confronted with various types of extractivism.

The second path, represented by judicial transformations, is also far from reaching its ceiling. On the one hand, there is a growing legitimacy of these ecocentric arguments in the courts, even in the framework of legal regimes that do not have this type of rights extension, such as Colombia and Argentina. On the other hand, there is a proliferation of claims that make use of these arguments, several of which have yet to be resolved.⁴²

Although the *mainstream* of Latin American constitutions, laws and judicial rulings on environmental matters responds to an anthropocentric logic, rulings with an ecocentric content are multiplying. Let us quote the judge in the Atrato River case: *With respect to how we consider nature, change is inexorable. I am exaggerated in my optimism. It is a force that comes from below, from the strength of the people.*⁴³

And why is this change, in the judge's words, inexorable? We know that the recognition of rights of nature is part of a variation of rights-holders throughout Western history. Various struggles involving subordinated, invisibilised or oppressed groups such as slaves, women, people with disabilities and children, prompted the enshrinement of rights as a way of circumventing these injustices.

In contrast to these precedents, the granting of rights to nature challenges the modern conception of justice, which is exclusively concerned with the interests of human beings, and also redefines notions usually mobilised in this sphere. If the concept of person, for example, had been reserved for human beings, the declaration of a great ape as a non-human person involves no less a transformation of the anthropocentric starting point of justice in the West. Who are, nowadays, the people entitled to claim justice? Let us recall that in Argentina, a protectionist NGO has filed habeas cor-

pus on behalf of an orangutan and a chimpanzee to interrupt their captivity in zoos, conceived as a *prison for non-human prisoners*; and Greenpeace filed, on behalf of the yagareté species, a legal action before the Supreme Court of Justice of the same country claiming the protection of its habitat⁴⁴. Another example of this inexorable change in justice is the consolidation of the field of ecological justice. Unlike environmental justice, which deals with the protection of the environment based on human needs, ecological justice focuses on the extension of rights to non-human beings.

On the other hand, the recognition of rights to rivers, mountains, moors and other beings is part of an ontological transformation still underway in our Western societies. This growing emergence of the non-human takes shape not only in legal innovations in Latin America and other regions with respect to nature, Buen Vivir and animals, but also in vegan conversions and environmental activism of various kinds, and in the presence of *earth-beings*⁴⁵ during political negotiations in different Latin American socio-environmental conflicts involving peasant and indigenous societies. Through different forms of resistance - militant, academic, legal, domestic - the hitherto dominant mode of relating to the environment is challenged.

The successive catastrophes - fires, droughts, floods - caused by climate change; the continuous depredation of territories in the context of the environmental blindness⁴⁶ of neoliberal and progressive states; the assassi-

⁴⁴ Although the case is still pending, the Supreme Court of Justice of the Nation declared itself competent on 2 November 2023. GREENPEACE sobre el fallo de la Corte: "Es un avance importante para defender a los últimos 20 yagaretés del Gran Chaco". Greenpeace, 02 nov. 2023. Available at: <https://www.greenpeace.org/argentina/story/problemas/bosques/greenpeace-sobre-el-fallo-de-la-corte-es-un-avance-importante-para-defender-a-los-ultimos-20-yagaretes-del-gran-chaco/>. Access on: 16 dec. 2023.

⁴⁵ De la Cadena calls earth-beings «the presence in politics of those non-human actors that the dominant disciplines assigned to the sphere of nature (where they should be known by science) or to the metaphysical and symbolic fields of knowledge». LA CADENA, Marisol de. Cosmopolítica indígena en los Andes: reflexiones conceptuales más allá de la "política". *Tabula Rasa*, v. 3, p. 273-311, 2020.

⁴⁶ «In this political-ideological framework dominated by the productivist vision and so refractory to the principles of the environmental paradigm, the current dynamic of dispossession becomes a blind spot that cannot be conceptualised. As a consequence, socio-environmental issues are considered a secondary concern (or are simply sacrificed) in view of the serious problems of poverty and exclusion in Latin American societies». SVAMPA, Maristella; VIALÉ, Enrique. *Maldesarrollo: la Argentina del extractivismo y el despojo*. Buenos Aires: Siglo XXI, 2014.

⁴² In Argentina, one of the amparos over the burning of the Paraná Delta calls for the Delta to be declared a subject of law and for a guardian to be appointed, in line with Colombian innovations. In the same direction, a recent claim was made in Florianópolis for the protection of Lagoa da Conceição.

⁴³ Interview with former judge Jorge Palacio Palacio in charge of the Atrato River case. 2021.

nation of environmental leaders in the region and, in recent years, the experience of a pandemic at the limits of one's own skin, have only deepened awareness of the planetary crisis and the limits of the dominant mode of production.

The case of Argentina is eloquent: although environmental resistance has been going on for several decades, activism has become more vigorous in recent years. In 2019, a massive mobilisation took place in Mendoza to stop the modification of a law that allowed the use of highly polluting chemicals in mining activities. In Chubut, in 2020, the provincial government sought to regressively modify the 2003 law banning open-pit mining. The local population took to the streets as they did then, 17 years ago, denouncing the collusion between political parties and provincial state powers to promote mining activity. In the midst of the pandemic, the Paraná Delta suffered - and continues to suffer - the consequences of an overwhelming fire generated by multiple causes, mainly anthropogenic. Faced with this, organisations and citizens from different localities along this wetland mobilised creatively, demanding the approval of a wetland protection law. In addition to this, there is the emergence of collectives such as Río Feminista, an articulation of women and organisations living along the Paraná Delta; the struggles of different groups against toxic agro-chemical spraying in the central north of the country, or against the expansion of territories destined for open-pit mining projects in different parts of the Andes mountain range.

The rights of nature form part of the repertoires of struggle of diverse socio-environmental, peasant-indigenous or feminist activisms in Latin America, even if they do not necessarily fight through the courts or pursue legal reform. Many of these struggles promote other ways of doing and practising politics, incorporating the legal and political representation of beings who, until recently, were conceived of as unrepresentative. In this sense, the enactment of the rights of nature - and especially their implementation - poses enormous challenges for our societies.

First, the rights of nature, like Buen Vivir, refer us to a historical moment in which a particular political philosophy became legible and audible in disparate spheres, stimulating novel debates on other forms of coexistence in Latin America and other regions⁴⁷. In this sense,

⁴⁷ BRIONES, Claudia. Políticas contemporáneas de convivialidad.

one of the greatest challenges is to achieve an ontological decentring on the part of jurists, civil servants or other experts responsible for enacting laws, modifying the constitution in the framework of an assembly or settling legal agreements with local populations. In this regard, let us look at an emblematic case of the enshrinement of the rights of nature at the global level: the case of the Whanganui River in New Zealand. Disputes over this river between Maori communities and the New Zealand government date back 140 years. While the state regarded and regulated the river as a waterway and a natural resource, the communities saw it as a living entity with a shared history. After years of negotiation, an agreement was reached that considers the river as a subject of law. The Whanganui River is now legally recognised as a living person: it is an indivisible and living whole, a physical and spiritual entity stretching from the mountain to the sea. The testimony of Minister of State Christopher Francis Finlayson gives an account of the difficulties involved in the dialogue and negotiation with local communities that led to the signing of the Whanganui River Treaty:

(...) the Whanganui River people say 'I am the river and the river is me'. The first time I heard it, it sounded like something out of James Cameron's Avatar. But the more you look, the more you realise that indigenous people have a completely different view of nature than European New Zealanders⁴⁸.

In effect, Maori communities passed on the voice of the *land-beings* and made that relationship between the river and the people part of the agreement. The introduction to the text of the agreement synthesises the pervasive reciprocity between Maori, land, waterways and ancestors in the above-mentioned phrase: *I am the River and the River is me*. If the river disappears, so do they. These are powerful beings - the sky, the mountains, the rivers - who act as guardians of humans and on whom humans depend, not the other way around⁴⁹.

In: MECILA (ed.). *Convivialidad-desigualdad: explorando los nexos entre lo que nos une y lo que nos separa*. Buenos Aires: CLACSO, 2022. p. 315-378.

⁴⁸ Interview by Hal Crimmel and Isaac Goeckertiz as part of the making of the documentary *The rights of nature. A global movement. THE RIGHTS of nature: a global movement [documentary]*. Isaac Goeckertiz; Hal Crimmel; María Valeria Berros. United States: IG Films, 2018. 1 video (52 min 41 s). Available at: <https://www.youtube.com/watch?v=RupkZM8dV14>. Access on: 17 dec. 2023.

⁴⁹ SALMOND, Anne. Tears of Rangi: water, power and people in New Zealand. *Journal of Ethnographic Theory*, v. 4, n. 3, p. 285-309, 2014.

This multiplicity is inscribed in the government-community agreement, albeit more in terms of juxtaposition than a deep interrogation of differences: the agreement is written in English and interspersed with Maori words without translation.

The effort of ontological decentring of jurists is thus expressed in a double gesture: abandoning the conviction that our society - and our justice - can serve as a standard to qualify all forms of society; and trying to understand how another human group attributes certain characteristics to entities, spaces, artefacts or animals in order to “make the world” with them⁵⁰.

This government-community agreement is inspiring for rethinking the rights of nature in the framework of an interlocution that interrogates our dominant naturalist ontology and allows us to assume the limitations of the legal concepts and tools in use. Like the appropriation of Andean categories of Buen Vivir in Ecuador’s constitution and Bolivia’s national laws, the Whanganui River agreement testifies to the complexities of dialogue between governments and communities. Even with its flaws, the agreement accounts for compositions of the world comprised of both humans and non-humans, as agents with their properties and modes of action⁵¹.

Like Buen Vivir, the rights of nature seek to tell other stories and draw other maps of what matters⁵². In each of these situated contexts, the rights of nature propose cohabitations between humans and non-humans in ways that do not necessarily seek to generalise to the whole and are made comprehensible from ways of knowing that are also not enabled for the whole⁵³. Some of these cohabitations might not be adequately processed, for example, on the basis of this legal tool. In the last section we will return to these blind zones of Pachamama’s rights: the spaces of dissent that they enable or hinder, and the need to be articulated with other rights, demands and interests.

In the area of environmental justice, the enshrinement of rights of nature involves a democratisation and *ontological pluralisation*⁵⁴ in three senses.

Firstly, their recognition in constitutions and court rulings takes up knowledge and practices that, in general terms, did not have a significant presence in these spheres. We refer, for example, to the growing legitimacy of victims’ testimonies in environmental cases - such as the case of the Atrato River - or the very compositions of the worlds of indigenous communities, as we saw with the notion of Buen Vivir or the case of the Whanganui River.

Secondly, the salutary fresh airs that these extensions of rights introduce into the legal field are expressed in the creation of new figures and institutions, such as the guardians of rivers and other ecosystems. These figures are not free of tensions and misunderstandings: how close - or far away - are these figures from the aspirations and uses of the world of the local communities in which socio-environmental conflicts are rooted?

Thirdly, the democratisation of environmental justice occurs in a geopolitical sense: the single North-South direction in the production of knowledge and legal tools is interrupted. It is now the South that generates new guiding concepts - the rights of Mother Earth, Buen Vivir - which the North has to take up either in international debates seeking to promote a declaration of the rights of nature, in proposals for the recognition of ecosystem rights - as is happening in the United States - or through the extension of rights to rivers and lakes in Australia, Canada, Colombia and Peru. As Schavelzon summarises, the legal innovations of Ecuador and

⁵⁰ DESCOLA, Philippe. *La composición de los mundos*. Buenos Aires: Capital Intelectual, 2016.

⁵¹ DESCOLA, Philippe. *La composición de los mundos*. Buenos Aires: Capital Intelectual, 2016.

⁵² BRIONES, Claudia. Políticas contemporáneas de convivialidad. In: MECILA (ed.). *Convivialidad-desigualdad: explorando los nexos entre lo que nos une y lo que nos separa*. Buenos Aires: CLACSO, 2022. p. 315-378.

⁵³ BRIONES, Claudia. Políticas contemporáneas de convivialidad. In: MECILA (ed.). *Convivialidad-desigualdad: explorando los nexos entre lo que nos une y lo que nos separa*. Buenos Aires: CLACSO, 2022. p. 315-378.

⁵⁴ The concept of ontological pluralisation is taken up by Marisol de la Cadena. Her proposal consists of transforming the concept of politics, conceived as power disputes within a singular world, for another concept that includes the possibility of adverse relations between worlds. LA CADENA, Marisol de. *Cosmopolítica indígena en los Andes: reflexiones conceptuales más allá de la “política”*. *Tabula Rasa*, v. 3, p. 273-311, 2020. In line with Stengers’ cosmopolitical proposal and Blaser’s conceptual elaborations, ontological pluralisation starts from the idea of a world that is multiple, recognising the interconnection between these worlds without making them commensurable. STENGERS, Isabelle. *The Cosmopolitical Proposal*. *Pleiade*, 14, 2014.; BLASER, Mario. *Is another Cosmopolitics possible?* *Cultural Anthropology*, v. 31, n. 4, 2016. Paraphrasing Descola, this exercise of democratisation and ontological pluralisation is linked to the challenge of living together in collectives whose forms are not pre-determined. DESCOLA, Philippe. *La composición de los mundos*. Buenos Aires: Capital Intelectual, 2016.

Bolivia have made it possible to think of worlds where agency is not exclusively human⁵⁵.

The hegemonic North-South directionality in the production of environmental knowledge is, however, still present in the legal innovations of animal law. Unlike the rights of nature, the argumentation of Latin American protectionists and judges in the most prominent cases in which an animal is declared a subject of rights tends to take up an animalist literature from the Anglo-Saxon world that extends the benefit of moral consideration - previously reserved only for humans - to certain animals⁵⁶.

With few exceptions - such as the holding of public hearings in the Sandra orangutan court case - Latin American animal law rulings declaring great apes to be subjects of rights lack the polyphonic quality of a ruling that is the product of a sustained collective struggle, such as that of the Chocó communities that mobilised to recover their river. The lawsuits surrounding the Suiça chimpanzee, the Cecilia chimpanzee or other equally emblematic individual animals were brought by some protectionist NGO with little representation in their communities, and resolved by the courts in relative solitude. While these rulings are seen by some experts as revolutionary or responsible for opening a metaphysical rift, we believe that declaring some great apes to be non-human persons represents a moderate ontological rupture.

In effect, these actions operate selectively by ranking animals in a hierarchy and taking care of those animals that are most similar to us. Animal ethics is sensocentric: its focus is not on the totality of living or abiotic organisms, but exclusively on those animals identified as sentient. Vertebrate mammals,” says Singer, one of the most famous authors, “have a complex cerebral cortex and nervous systems almost identical to our own, so their reactions to pain are remarkably similar⁵⁷. Promoters of this *species-free ethic* stress that physical differences between humans and animals should not be the basis for discrimination in the treatment of nonhuman animals, given that we have important similarities in our capacities to feel pain, pleasure and other emotions.

⁵⁵ SCHAVALZON, Salvador. *Plurinacionalidad y Vivir Bien/Buen Vivir: dos conceptos leídos desde Bolivia y Ecuador post-constituyentes*. Buenos Aires: Abya Yala/CLACSO, 2015.

⁵⁶ DESCOLA, Philippe. *Más allá de naturaleza y cultura*. Buenos Aires: Amorrortu, 2012.

⁵⁷ SINGER, Peter. *Liberación animal*. Buenos Aires: Taurus, 2011.

This implies the triumph of an extensionist perspective: we recognise in them - the vertebrate mammals, with special emphasis on the great apes - the same as we recognise in ourselves. By contrast, the rights of nature bring into play a greater political and anthropological imagination and involve a holistic perspective, focusing on the inherent value of all beings.

This does not diminish the relevance of the above-mentioned rulings in recognising, for the first time in the world, some great apes as non-human persons. We simply want to point out the differences with respect to the predominant features of the rights of nature in terms of the democratisation, ontological pluralisation and ecocentrism involved.

The rights of nature and Buen Vivir stand as synthesis-ideas that have the capacity to articulate struggles and translate - when this is desirable or possible - territorial, conservationist, anti-capitalist or anti-patriarchal claims.

How is the complementarity of the rights of nature with human rights, ecofeminisms, demands for plurinationality, indigenous claims for water or territory woven or not woven into practices? Under what circumstances does the struggle for ecological justice include demands for social justice?

In the constituent assembly held in Chile, the Mapuche president of the Constituent Convention, Elisa Loncón, proposed representing all those excluded by the state: indigenous peoples, women, sexual and gender-based dissidents, children and adolescents, people with disabilities, non-human animals and nature⁵⁸. CIMA, a self-organised interdisciplinary network for a new constitution, was also formed, with Buen Vivir as one of its axes; and FIMA, a historic environmental NGO, is also pushing for a new ecological constitution. The text of this first convention was submitted to a referendum and was not approved by Chilean society. At the end of 2023, the content of a new version of the constitution, which does not incorporate the ecological issue from the perspective of the expansion of rights, was adopted.

We have seen throughout this paper that nature is often hegemonically conceived as a fragile other, exter-

⁵⁸ ALFIE, Camila. La revolución de Chile: Elisa Loncón, la lingüista mapuche que encabeza el entierro de la constitución de Pinochet. *Página/12*, 09 jul. 2021.

nal to the human experience, which must be protected. In this respect, let us recall the principle of *in dubio pro natura* of the Argentine Supreme Court of Justice or the figure of the guardians of the Atrato River instituted by the Constitutional Court of Colombia. The Mapuche leader Adolfo Millabur, one of the indigenous assembly members of the Constituent Convention that took place in Chile, distances himself from this dominant vision of care: “when we talk about the relationship with nature, we are not referring to protecting and caring for it. On the contrary, it is nature that takes care of us”⁵⁹.

Although it is beyond the scope of this paper, it is sufficient to mention that the rights of nature are rethought, demanded, performed performatively and sometimes articulated with other emancipatory demands in Latin America, such as the struggles against different forms of extractivism, the new feminist agendas of care, the search for recognition of the plurinationality of states or the search for a socio-ecological transition.

Their postulates admit multiple transversalisations and reinterpretations, in tune with the cognitive liberation that Svampa and Viale point out as a mark of these times. Perhaps the greatest creativity of Buen Vivir and the rights of nature does not come from governments that can, at certain junctures, bureaucratise them or empty them of content, but from the activism that revitalise them.

We are aware that this paper leaves unanswered several questions about the emergence, consolidation and implementation of the rights of nature in Latin America: the conditions of possibility for the emergence of these rights; the role played by socio-environmental and indigenous activism in the region; the limitations of environmental law and its anthropocentric philosophy that these new rights seek to remedy.

One of the misunderstandings that this paper may raise is the assumption that we, the authors, pontificate on the rights of Pachamama as intrinsically desirable or “progressive”. As we have discussed in previous work, the emancipatory character of ecocentric positions is not guaranteed in advance: it is necessary to assess who takes them up, for what purposes, and what are the political effects of such uses, as they can also become a new

argument for reactionary policies. Ecocentric postulates can also be capitalised on by right-wing activists proposing authoritarian or fascist measures⁶⁰.

The transition from anthropocentric to ecocentric does not necessarily aim at more equitable relations. Within the framework of these allegedly innovative paradigms, there may also be a prescription as to what the morally appropriate relationship of human beings with the environment should be.

If constitutions and laws are passed or rulings are made with ecocentric content, we are not necessarily on the way to achieving greater parameters of social and ecological justice. We must observe how the implementation of the rights of nature is put into play in relation to productive or extractive processes in a given region. We also know that not all extractivism generates rejection in the territories: sometimes, local populations tolerate, endorse or participate in processes of this nature⁶¹.

What dialogue - or lack of dialogue - is established between these rights and those issues that mobilise the interest of local populations? What happens when the rights of nature conflict, for example, with the reproductive needs of subaltern groups?

The implementation of rights of nature can sometimes lead to unexpected conflicts: how to integrate the paradigms of social and ecological justice in situated territories, or do rights of nature amount - to use Fraser’s classic formulation - to a mere “cultural recognition” of the environment that does not alter the profound inequalities in the mechanisms of economic redistribution? Fraser warned, decades ago, of the mutual interference that can arise when demands for justice are presented with contradictory objectives⁶².

The contribution of this new legal instrument can only be understood in the framework of ethnographies

⁵⁹ PARA SENTAR las bases de un Estado plurinacional. *Página/12*, 28 mayo 2021. This perspective is similar to the case of the Whanganui River already discussed: the sky, mountains and rivers act as guardians of humans, and not the other way around.

⁶⁰ In his disturbing book, Stefanoni shows different scenarios of political response to the environmental crisis, especially those that are woven from right-wing environmentalism in countries such as Austria, France or the United States. American ethno-nationalists spread, for example, the following slogan: plant trees, save seas, deport refugees. Similar slogans of European right-wing parties coincide in this desire to achieve both environmental and racial purity. STEFANONI, Pablo. *La rebeldía se volvió de derecha*. Buenos Aires: Siglo XXI, 2021.

⁶¹ LAPEGNA, Pablo. *La Argentina transgénica: de la resistencia a la adaptación, una etnografía de las poblaciones campesinas*. Buenos Aires: Siglo XXI, 2019.

⁶² FRASER, Nancy. *Repensando la esfera pública, el reconocimiento y la justicia. Autodeterminación*. 2015.

that accompany the implementation of its implementation in situated territories, critically analysing the specific circumstances in which these ecocentric laws or court rulings come to life.

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DAO Gia Phuc

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From rules of origin to sustainability: evolution of product transparency in international trade*

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DAO Gia Phuc**

Abstract

This study examines the evolution of transparency and due diligence obligations in international trade law under the WTO framework, focusing on how these requirements have broadened beyond traditional rules of origin and product safety standards to encompass sustainability concerns, including environmental protection and human rights in supply chains. It also evaluates the implications of these developments for exporters in the Global South. Through a doctrinal analysis of WTO agreements, case law, and recent regulatory initiatives, the study finds that new due diligence measures, exemplified by the EU Corporate Sustainability Due Diligence Directive (as revised under the EU's Omnibus I simplification initiative), the EU Deforestation Regulation, the EU Carbon Border Adjustment Mechanism, and the U.S. Uyghur Forced Labor Prevention Act, represent the next generation of trade-linked measures with cross-border effects aimed at aligning global commerce with sustainable development goals. The analysis is complemented by consideration of the WTO Agreement on Fisheries Subsidies (in force since 2025) as a rare example of a WTO instrument with explicitly embedded sustainability objectives. However, these measures also impose significant compliance burdens on developing-country exporters, especially smaller producers. The study concludes that while sustainability-driven transparency is a positive trend, its fair and effective implementation requires capacity-building support for producers in developing economies, inclusive international standard-setting, and multilateral cooperation to ensure consistency with WTO principles. Finally, by providing a comprehensive legal analysis of modern supply chain due diligence regimes and their trade-law compatibility, this research offers novel insights into reconciling global trade governance with ethical and environmental imperatives. It highlights pathways to integrate sustainability without disadvantaging developing economies.

Keywords: WTO law; due diligence; non-product-related PPMs; sustainable supply chains; Global South.

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Resumo

Este estudo examina a evolução das obrigações de transparência e de diligência devida no direito do comércio internacional no âmbito da OMC, com foco em como esses requisitos se expandiram para além das tradicionais regras de origem e dos padrões de segurança dos produtos, passando a abranger preocupações relacionadas à sustentabilidade, incluindo a proteção ambiental e os direitos humanos nas cadeias de abastecimento. O trabalho também avalia as implicações desses desenvolvimentos para os exportadores do Sul Global. Por meio de uma análise doutrinária dos acordos da OMC, da jurisprudência e de iniciativas regulatórias recentes, o estudo conclui que as novas medidas de diligência devida — exemplificadas pela Diretiva da União Europeia sobre Diligência Devida em Sustentabilidade Corporativa (na versão revista no âmbito da iniciativa de simplificação Omnibus I), pelo Regulamento da UE sobre Desmatamento, pelo Mecanismo de Ajuste de Carbono na Fronteira da UE e pela Lei dos Estados Unidos para a Prevenção do Trabalho Forçado Uigur — representam a próxima geração de medidas comerciais com efeitos transfronteiriços, destinadas a alinhar o comércio global aos objetivos do desenvolvimento sustentável. A análise é complementada pela consideração do Acordo da OMC sobre Subsídios à Pesca (em vigor desde 2025), como um raro exemplo de instrumento da OMC que incorpora explicitamente objetivos de sustentabilidade. Contudo, essas medidas também impõem encargos significativos de conformidade aos exportadores de países em desenvolvimento, especialmente aos pequenos produtores. O estudo conclui que, embora a transparência orientada pela sustentabilidade represente uma tendência positiva, sua implementação justa e eficaz exige apoio em capacitação para os produtores das economias em desenvolvimento, processos inclusivos de definição de padrões internacionais e cooperação multilateral, a fim de assegurar a compatibilidade com os princípios da OMC. Por fim, ao oferecer uma análise jurídica abrangente dos regimes modernos de diligência devida nas cadeias de abastecimento e de sua compatibilidade com o direito do comércio internacional, esta pesquisa apresenta contribuições originais para a conciliação entre a governança do comércio global e os imperativos éticos e ambientais, apontando caminhos para integrar a sustentabilidade sem prejudicar as economias em desenvolvimento.

Palavras-chave: direito da OMC; diligência devida; PPMs não relacionados ao produto; cadeias de abastecimento sustentáveis; Sul Global.

1 Introduction

Over the last three decades, “transparency” in international trade has evolved from a primarily administrative concept, publishing and applying customs rules, proving origin for tariff purposes, and complying with product safety and labeling standards, into a far more demanding set of obligations that reaches deep into global supply chains. Major importing jurisdictions increasingly require firms not only to disclose where goods come from, but also to demonstrate how they were produced, including whether production involved forced labor, deforestation, excessive carbon emissions, or other sustainability-related harms. These developments are reshaping market access conditions and redistributing compliance costs across value chains, with particularly acute implications for exporters and small producers in the Global South. This article uses “product transparency” as an operational concept to describe legal and regulatory requirements that condition trade on the availability, reliability, and verifiability of information about a product’s origin, characteristics, and, crucially, its supply-chain processes. It treats “due diligence” as the set of mandatory corporate procedures (risk mapping, traceability, verification, remediation, and reporting) through which firms must identify and address adverse impacts in their operations and business relationships. Many contemporary transparency requirements are best understood as non-product-related process and production method (npr-PPM) measures: they differentiate physically identical goods based on production conditions that do not alter the final product. “Sustainability” is used in a tripartite sense encompassing environmental integrity (including climate mitigation), social and human-rights protection, and (where relevant) governance-related integrity in value chains. Finally, many sustainability-linked trade and corporate rules are described as “extraterritorial”; in strict jurisdictional terms, they are typically anchored in territorial hooks (importation and EU-market participation) but generate profound cross-border effects by conditioning market access on upstream conduct abroad.

The core legal problem is how these new, sustainability-driven transparency and due diligence regimes can be reconciled with WTO disciplines that were built around non-discrimination, market access commitments, and a product-focused notion of “likeness.” Specifically, when measures such as forced-labor import bans, deforestation-free requirements, and carbon-based border adjustments shift the regulatory focus from product attributes to production processes, under what conditions can they be structured to comply with GATT and the TBT Agreement? Moreover, how should WTO-consistent design account for capacity asymmetries so that these measures do not operate as de facto exclusionary barriers for developing-country exporters? The article advances two claims. First, WTO law does not categorically prohibit process-based transparency measures; instead, their legality turns on regulatory architecture, origin neutrality, even-handed administration, proportionality, due process, and credible justification where exceptions apply. Second, achieving fairness and effectiveness requires complementing such measures with capacity-building, inclusive standard-setting, and multi-lateral cooperation, so that compliance obligations do not simply shift risk and costs to the weakest actors in supply chains.

Methodologically, the article undertakes a doctrinal analysis of WTO agreements and leading jurisprudence on PPM-related measures, and then situates contemporary due diligence regimes within that legal framework. It proceeds by tracing early transparency obligations (Section 2), clarifying the WTO treatment of npr-PPMs (Section 3), mapping the rise of mandatory due diligence and trade-linked measures with cross-border effects (Section 4), assessing WTO compatibility (Section 5), and evaluating distributional impacts and strategic responses for developing countries (Section 6).

2 Early trade transparency requirements

Historically, transparency in trade law focused on compelling businesses to disclose essential information about their products for regulatory and tariff purposes. One of the earliest legal obligations was the requirement to declare the country of origin of goods, a practice that has been entrenched since the GATT era.

Rules of origin determine a product’s national source, which is crucial for administering tariffs, trade preferences under free trade agreements, and trade remedies.¹ By mandating certificates of origin, governments force firms to be transparent about their supply chains. The WTO’s Agreement on Rules of Origin reinforces this by requiring that origin criteria be applied objectively and published promptly, consistent with GATT’s transparency principles.² These rules aim to prevent traders from evading duties (e.g., anti-dumping measures) through simple transshipment or “origin hopping” via third countries.³ In practice, importers must exercise due diligence to verify that products genuinely qualify as originating in the claimed country, which essentially foreshadows modern supply chain traceability and compliance programs.

Following origin disclosure, the next evolution of transparency requirements came in the form of product standards and labeling obligations designed to protect consumers and public health. The establishment of the WTO Technical Barriers to Trade (TBT) Agreement and Sanitary and Phytosanitary (SPS) Agreement in 1995 cemented countries’ rights to regulate goods for legitimate objectives (such as human, animal, or plant life and health, or prevention of deceptive practices) so long as measures are science-based, non-discriminatory, and not more trade-restrictive than necessary.⁴ These agreements also introduced procedural transparency duties: governments must, for instance, publish draft regulations in advance, notify the WTO of proposed standards, and allow time for comments by other members. Technical regulations often require that products meet specific labeling or certification requirements, thereby making key product information visible to regulators and consumers. For example, food import rules may mandate labels disclosing ingredients or nutritional information, and electrical appliances may require safe-

¹ INAMA, Stefano. *Rules of origin in international trade*. Cambridge: Cambridge University Press, 2022.

² MAVROIDIS, Petros C. *The regulation of international trade: GATT*. Cambridge: MIT Press, 2016. v. 1.

³ LIU, Xuepeng; SHI, Huimin. Anti-dumping duty circumvention through trade rerouting: evidence from chinese exporters. *The World Economy*, v. 42, n. 5, p. 1427–1466, 2019.

⁴ KIM, Minjung. The ‘standard’ in the GATT/WTO TBT agreements: origin, evolution and application. *Journal of World Trade*, v. 52, n. 5, 2018. Available in: <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TRAD\TRAD2018033.pdf>. Access at: Jan. 2, 2026.

ty certification marks, all of which increase transparency into product characteristics and compliance.

A prominent example of a transparency measure in this context is the U.S. Country-of-Origin Labeling (COOL) law for meat products, which requires retail meat packages to indicate the livestock's origin.⁵ While the objective was to inform consumers about where their food comes from (a transparency goal), the implementation of COOL sparked a WTO dispute. Canada and Mexico challenged the measure, arguing it imposed onerous tracking and segregation burdens on foreign livestock compared to domestic livestock. In the U.S.-COOL case, the WTO Appellate Body acknowledged that countries may adopt origin labeling in principle but found that the specific U.S. COOL rules violated TBT obligations: the labels were confusing and did not provide information commensurate with the costly requirements imposed on producers.⁶ In other words, the measure's design failed to genuinely achieve its transparency purpose while discriminating against imported cattle and hogs. As a result, WTO panels and the Appellate Body held the COOL measure inconsistent with trade rules (notably TBT Article 2.1 on non-discrimination). The case ultimately led the U.S. to repeal the mandatory COOL requirements for beef and pork to comply with the WTO rulings.⁷ This outcome illustrates that transparency measures must be carefully crafted under WTO law since regulators have leeway to mandate product information (such as origin, ingredients, quality standards, etc.). However, such measures cannot arbitrarily or unjustifiably discriminate against imports and should genuinely contribute to their stated informational objectives. In sum, WTO law permits requirements for product transparency so long as they meet the fairness and necessity criteria in practice.

Beyond these mandatory regimes, the late 20th century saw the rise of voluntary standards and certifications, a trend that further expanded transparency expecta-

tations in global trade.⁸ Private sustainability standards (such as ISO quality and environmental standards, organic and fair-trade certifications, and eco-labels) emerged mainly in response to consumer and civil society pressure for ethically sourced products.⁹ Although adherence was optional, these schemes created soft transparency norms by encouraging companies to know and disclose various aspects of their supply chains (for example, a fair-trade label signals that a product's ingredients were sourced under particular labor and pricing conditions). According to UN definitions, these Voluntary Sustainability Standards (VSS) are private standards requiring products to meet specific social or environmental criteria, often verified by certifications and labels.¹⁰ Initially, governments treated such matters as part of corporate social responsibility or left them to market forces. However, over time, the influence of voluntary programs began to penetrate legal frameworks. States increasingly incorporate concepts from private standards into public regulations, especially in areas like organic food, timber sourcing, and carbon emissions, by recognizing or even mandating specific certifications.¹¹ This blurring of the line between voluntary and mandatory is evident in modern trade legislation on sustainability due diligence, which draws inspiration from what were once purely voluntary codes. In short, the proliferation of private eco-labels and ethical certifications in the 1990s set the stage for today's wave of mandatory due diligence laws addressing environmental and social conditions in production.¹² What started as voluntary transparency initia-

⁸ KIM, Minjung. The 'standard' in the GATT/WTO TBT agreements: origin, evolution and application. *Journal of World Trade*, v. 52, n. 5, 2018. Available in: <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TRAD\TRAD2018033.pdf>. Access at: Jan. 2, 2026.

⁹ BENNETT, Elizabeth A. The efficacy of voluntary standards, sustainability certifications, and ethical labels. In: MARX, Axel et al. (ed.). *Manual de pesquisa sobre governança global, empresas e direitos humanos*. Cheltenham: Edward Elgar Pub, 2022. Available in: <https://www.elgaronline.com/edcollchap/edcoll/9781788979825/9781788979825.00016.xml>. Access at: Jan. 2, 2026.

¹⁰ UNCTAD. *Voluntary sustainability standards*. Available in: <https://unctad.org/topic/trade-analysis/voluntary-sustainability-standards>. Access at: Jan. 2, 2026.

¹¹ SOLAR, Jimena; IVANOVA, Yovita; OBERLACK, Christoph. Human rights and environmental due diligence regulations for deforestation-free value chains? exploring the implementation of the EU regulation on deforestation-free products in the cocoa and coffee sectors of Peru. *Global Policy*, v. 16, n. 4, Sept. 2025. Available in: <https://onlinelibrary.wiley.com/doi/abs/10.1111/1758-5899.70009>. Access at: Sept. 21, 2025.

¹² BENNETT, Elizabeth A. The efficacy of voluntary stand-

⁵ JURENAS, Remy; GREENE, Joel L. *Country-of-origin labeling for foods and the WTO trade dispute on meat labeling*. 2013. Available in: <https://www.agri-pulse.com/ext/resources/pdfs/c/o/o/1/3/COOL-report-update-CRS-9-2013.pdf>. Access at: Jan. 2, 2026.

⁶ CARLSON, Geoffrey. United States: certain country of origin labelling (Cool) Requirements (US-Cool, Article 22.6 – United States), DS384/DS386. *World Trade Review*, v. 15, n. 3, p. 526–528, 2016.

⁷ JURENAS, Remy; GREENE, Joel L. *Country-of-origin labeling for foods and the WTO trade dispute on meat labeling*. 2013. Available in: <https://www.agri-pulse.com/ext/resources/pdfs/c/o/o/1/3/COOL-report-update-CRS-9-2013.pdf>. Access at: Jan. 2, 2026.

tives has evolved into binding requirements, reflecting a broader shift in trade governance towards aligning commerce with the Sustainable Development Goals.

3 Process-based trade measures and WTO discipline

3.1 Definition and legal status of non-product-related PPMs

In international trade law, process and production methods (PPMs) refer to how products are made. A crucial distinction is drawn between product-related and non-product-related PPMs (npr-PPMs). Product-related PPM requirements affect a product's characteristics or quality (for example, limits on pesticide residues in food), whereas npr-PPMs concern production methods that leave no trace in the final product.¹³ In other words, two goods may be physically identical and "like" in all observable aspects, but an npr-PPM measure would treat them differently based solely on how they were produced, for instance, whether wood was harvested sustainably or whether a garment was made with forced labor. This concept is controversial because it extends trade regulations into the realm of ethical or environmental processes rather than focusing on product traits.

WTO law does not explicitly define or forbid npr-PPM measures, but their legal status has been debated since the GATT era. Traditionally, GATT/WTO rules focus on discrimination between products (e.g., under GATT Articles I and III, like products must be treated equally regardless of origin). Early interpretations held that if two products are identical in composition and use, they should not be treated differently because of an unrelated production method.¹⁴ Many countries feared

that allowing trade distinctions based on how products are made could become a cover for protectionism. Thus, a conventional view emerged that npr-PPM-based trade measures were *prima facie* inconsistent with WTO obligations.¹⁵ However, this was more a policy presumption than a rule codified in WTO agreements. As global awareness grew about issues like environmental protection and human rights, the strict stance on npr-PPMs began to soften, giving way to a more nuanced legal analysis rather than a blanket prohibition.

3.2 Early WTO jurisprudence and the tuna-dolphin cases

The first major tests of npr-PPM measures in trade came before the WTO was established, during the GATT era. The famous "Tuna-Dolphin" disputes in the early 1990s highlighted the clash between environmental concerns and trade rules. In the United States - Restrictions on Imports of Tuna (GATT Panel 1991), the U.S. banned imports of tuna from countries whose fishing practices killed dolphins at a high rate, effectively requiring foreign producers to adopt U.S. dolphin-safe methods.¹⁶ A GATT dispute panel found this import embargo violated GATT rules. Critically, the panel reasoned that one country should not impose its own process standards on another country through trade measures, since GATT's obligations applied to products (tuna fish) and not the manner of their production (fishing techniques).¹⁷ A second panel in U.S. - Tuna (1994) reached similar conclusions.¹⁸ Although these Tuna-Dolphin panel reports were not adopted (and thus never became binding GATT law), they created a lasting impression: namely, that trade measures based on non-product-related PPM differences were per

labeling regime. *World Trade Review*, Cambridge, Mar. 2017. Available in: [/core/journals/world-trade-review/article/risk-and-regulatory-calibration-wto-compliance-review-of-the-us-dolphin-safe-tuna-labeling-regime/9CC6BBDE41C96D9C17EEEAD6E7F6E293](https://www.wto.org/core/journals/world-trade-review/article/risk-and-regulatory-calibration-wto-compliance-review-of-the-us-dolphin-safe-tuna-labeling-regime/9CC6BBDE41C96D9C17EEEAD6E7F6E293). Access at: Apr. 13, 2017.

¹⁵ SIFONIOS, David. *Environmental process and production methods (PPMs) in WTO law*. Berlin: Springer, 2018.

¹⁶ WORLD TRADE ORGANIZATION. United States: restrictions on imports of Tuna. *American Journal of International Law*, Cambridge, Feb. 2017.

¹⁷ CROWLEY, Meredith A.; HOWSE, Robert. Tuna-Dolphin II: a legal and economic analysis of the Appellate Body Report. *World Trade Review*, v. 13, n. 2, p. 321-355, 2014.

¹⁸ WORLD TRADE ORGANIZATION. United States: restrictions on imports of Tuna. *American Journal of International Law*, Cambridge, Feb. 2017.

ards, sustainability certifications, and ethical labels. In: MARX, Axel et al. (ed.). *Manual de pesquisa sobre governança global, empresas e direitos humanos*. Cheltenham: Edward Elgar Pub, 2022. Available in: <https://www.elgaronline.com/edcollchap/edcoll/9781788979825/9781788979825.00016.xml>. Access at: Jan. 2, 2026.

¹³ CHARNOVITZ, Steve. The law of environmental PPMs in the WTO: debunking the myth of illegality. *Yale J. Int'l L.*, v. 27, p. 59, 2002.

¹⁴ COGLIANESE, Cary; SAPIR, André. Risk and regulatory calibration: WTO compliance review of the US dolphin-safe tuna

se impermissible under international trade rules. This early jurisprudence signaled a deep skepticism toward unilateral environmental trade bans, especially when they had an extraterritorial reach.

It is important to note, however, that the GATT text itself did not explicitly ban PPM-based distinctions. The panel decisions were interpretations reflecting the trade context of the time. Many commentators criticized the rigidity of the Tuna-Dolphin outcomes, arguing that an absolute bar on PPM measures was untenable as environmental and ethical issues gained prominence.¹⁹ Nonetheless, throughout the early 1990s, the prevailing view was that a country could not condition market access on foreign producers adopting specific processes unless an explicit exception applied. This set the stage for the WTO era, where the question became: can any npr-PPM measures be justified under the more flexible exception provisions of WTO agreements?

3.3 Evolving approach in appellate body case law

With the establishment of the WTO in 1995 and its stronger dispute settlement system, the question of npr-PPMs returned in new disputes, and the tone of the rulings began to change. The landmark case United States - Import Prohibition of Certain Shrimp and Shrimp Products (U.S. - Shrimp) in 1998 marked a turning point in the acceptance of process-based trade measures. The United States had banned imports of shrimp caught without Turtle Excluder Devices (TEDs) to prevent the incidental killing of endangered sea turtles (an npr-PPM measure aimed at conservation). The WTO Appellate Body acknowledged that protecting global environmental resources (like sea turtles) is a legitimate objective under GATT Article XX.²⁰ In contrast to the earlier tuna cases, the Appellate Body found that the U.S. measure could fall under the Article XX(g) exception for conservation of exhaustible natural resources.

Notably, the Appellate Body stated that conditioning access to a market on the adoption of specific policies (here, fishing methods) is not inherently a WTO violation, provided the conditions are applied fairly. The U.S.

- Shrimp measure initially failed to satisfy the Article XX chapeau (the introductory clause of Article XX) because the way it was applied was deemed arbitrary and unjustifiably discriminatory, for example, the U.S. had not engaged in serious negotiations with some affected countries.²¹ It had given some nations more extended transition periods than others. The Appellate Body faulted this lack of flexibility and international cooperation, not the underlying environmental goal. After the ruling, the United States revised its policy to provide greater flexibility and to pursue agreements with exporting countries. In a compliance proceeding a few years later, a WTO panel confirmed that the adjusted shrimp import policy, now applied in a more even-handed, inclusive manner,²² met the requirements of Article XX, allowing the sea turtle conservation measure to remain in place. The U.S. - Shrimp case demonstrated that npr-PPM measures can be compatible with WTO rules when carefully designed and justified. The decision overturned the notion that there was a flat prohibition on PPM-based trade measures. Instead, it focused on how such measures are implemented. Key lessons were that countries should seek multilateral solutions where possible, avoid arbitrary discrimination, and give exporting countries some latitude or assistance to meet the importing country's standards.

Subsequent WTO disputes reinforced this more permissive approach in principle while continuing to scrutinize the details of each measure. In EC - Seal Products (2014), the European Union banned imports of seal fur and other seal products based on public moral concerns, specifically, objections to the inhumane killing of seals.²³ This was effectively a process-based import ban grounded in animal welfare (an ethical concern unrelated to the product's physical characteristics). The WTO Appellate Body accepted that animal welfare can be a matter of public morals under GATT Article XX(a), one of the general exceptions.²⁴ In that case, the EU measure was found to serve a legitimate moral objective. Portions of the ban were ultimately

¹⁹ SIFONIOS, David. *Environmental process and production methods (PPMs) in WTO law*. Berlin: Springer, 2018.

²⁰ KISHORE, Pallavi. Revisiting the WTO shrimps case in the light of current climate protectionism: a developing country perspective. *Geo. Wash. J. Energy & Envtl. L.*, v. 3, p. 78, 2012.

²¹ WORLD TRADE ORGANIZATION. *United States: Import prohibition of certain shrimp and shrimp products*. 2001.

²² BREE, Axel. Article XX GATT-Quo Vadis-the environmental exception after the shrimp/turtle appellate body report. *Dick. J. Int'l L.*, v. 17, p. 99, 1998.

²³ EUROPEAN COMMUNITIES. *Measures prohibiting the importation and marketing of seal products*. 2014.

²⁴ EUROPEAN COMMUNITIES. *Measures prohibiting the importation and marketing of seal products*. 2014.

upheld under Article XX, although the Appellate Body did examine whether the EU had applied the ban even-handedly.²⁵ EC - Seal Products confirmed that public moral values, even when implemented via PPM-based distinctions, are not off-limits in WTO law, so long as the trade restriction is necessary and not applied in a discriminatory way.

Other disputes and policies have also navigated PPM issues. For example, various eco-labeling schemes and sustainability import requirements have been analyzed under the WTO's Technical Barriers to Trade (TBT) Agreement.²⁶ While not all such measures pass WTO scrutiny, the trend in case law makes clear that WTO panels and the Appellate Body do not treat PPM-based measures as automatically illegal. Instead, they ask whether a legitimate objective justifies the measure and whether it is implemented without unjustifiable discrimination. In moving from past jurisprudence to future sustainability disputes, one constraint is institutional since the WTO Appellate Body has been unable to hear new appeals since December 2019, so controversial measures may ultimately be appealed "into the void" unless parties agree to alternative appeal arrangements (such as Article 25 arbitration under the MPIA).

3.4 Analytical framework under GATT articles III and XX, and the TBT agreement

When evaluating a PPM-based trade measure under WTO law, one must navigate several layers of legal analysis. The key provisions typically include the non-discrimination rules of the GATT (notably Articles I and III), the general exceptions of GATT Article XX, and the disciplines of the TBT Agreement on technical regulations. A logical framework for analysis can be outlined as follows:

Threshold Question: GATT or TBT?

First, determine whether the measure is an internal regulation subject to GATT rules or a technical regulation covered by the TBT Agreement (or both). Many

npr-PPM measures (such as sustainability certification requirements or import bans based on processes) can be considered "technical regulations" because they impose conditions on product access to markets. If a measure sets out product characteristics or related processes and production methods that are mandatory for compliance (for example, a rule that imported wood must be certified as sustainably harvested), it is likely covered by the TBT Agreement. If it is a pure import ban or quota with no element of product standard, it might be addressed directly under GATT provisions.

GATT National Treatment and MFN

If the measure is considered under the GATT, the core obligations to consider are Article III (National Treatment) and Article I (Most-Favored-Nation), as well as the prohibition on import bans in Article XI. Under Article III:4, WTO members must not treat imported products less favorably than "like" domestic products.²⁷ In npr-PPM scenarios, a challenging issue is that products made in different ways (with or without a specific process) are often still considered "like products" if they are physically identical and serve the same end uses. This means that a regulation banning or penalizing a product based on its production method could be deemed to accord less favorable treatment to imports (for example, if foreign products are more affected by the requirement than domestic products). Similarly, if a PPM measure applies only to imports (e.g., an import ban on products that do not meet a process standard) and not to the domestic like product, it clearly violates Article III. Article I:1 would be breached if the measure favors some exporting countries over others, for instance, if exceptions or phased-in compliance are granted only to certain trade partners. Moreover, an outright import prohibition or quota based on a PPM would conflict with Article XI:1, which bans quantitative import restrictions. In practice, most PPM-based measures will be found to violate one of these core provisions, because they differentiate among like products or restrict imports.²⁸

Justification under Article XX (General Exceptions)

²⁵ One issue was an exemption for indigenous communities' seal hunts, which raised questions of arbitrary discrimination between products based on origin. See DU, Ming. *What Is a technical regulation in the TBT agreement?* some reflections on EC-Seal products. 2015.

²⁶ For instance, the U.S. – Tuna II (Mexico) case regarding "dolphin-safe" tuna labels. See CROWLEY, Meredith A.; HOWSE, Robert. Tuna–Dolphin II: a legal and economic analysis of the Appellate Body Report. *World Trade Review*, v. 13, n. 2, p. 321–355, 2014.

²⁷ MAVROIDIS, Petros C. *The regulation of international trade: GATT*. Cambridge: MIT Press, 2016. v. 1.

²⁸ CHARNOVITZ, Steve. The law of environmental PPMs in the WTO: debunking the myth of Illegality. *Yale J. Int'l L.*, v. 27, p. 59, 2002.

Finding a GATT violation is not the end of the story; the measure can still be saved if it satisfies Article XX. This article enumerates legitimate policy goals, such as protecting public morals (XX(a)), human, animal, or plant life or health (XX(b)), and conserving exhaustible natural resources (XX(g)), that can justify a GATT-inconsistent measure. An npr-PPM measure typically invokes one of these exceptions. For example, a ban on goods made with forced labor might invoke “public morals” or “human life and health”; a ban on logging products from illegal deforestation would invoke conservation of natural resources. Under Article XX analysis, two tests are applied:

First, Scope of the Exception. Does the measure genuinely fall within one of the Article XX (a)-(j) categories? This often involves showing that the policy is related to a specified goal. Some sub-paragraphs require a necessity test (e.g., XX(a) and XX(b) ask if the measure is “necessary” to protect morals or health), while XX(g) requires the measure to be “related to” conservation and made effective in conjunction with domestic restrictions. In npr-PPM cases, panels and the Appellate Body assess the connection between the chosen trade measure and the policy goal, including whether there were less trade-restrictive and reasonably available alternatives.

Second, Chapeau (no abuse of exceptions). Even if a measure fits an exception category, it must also satisfy the Article XX chapeau,²⁹ which prohibits applying the measure in a manner that constitutes “arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade.” This is where the design and implementation of an npr-PPM measure face the toughest scrutiny. The authorities will examine whether the measure is applied evenly to different trading partners where the same conditions prevail. Any pattern of discrimination, for instance, if some countries are given exemptions or easier terms without a valid justification, can fail the chapeau test. Likewise, a country must show good faith that the measure should not be a stealth protectionist policy masquerading as a moral or environmental measure. In assessing PPM measures under the chapeau, WTO case law has considered factors such as whether the imposing country made serious attempts to

negotiate a multilateral solution or provided flexibility to other countries.³⁰ As seen in U.S. - Shrimp, a lack of effort to accommodate other nations or sudden coercive implementation can render an otherwise legitimate measure unjustifiable. Conversely, engaging in international cooperation and tailoring the measure to different conditions can demonstrate that any discrimination is not “arbitrary or unjustifiable”.

Assessment under the TBT Agreement

If the npr-PPM measure qualifies as a technical regulation (which is often the case for rules on product labeling or certification of production methods), it must also comply with the WTO TBT Agreement. The TBT Agreement’s key principles parallel GATT, but with a focus on technical requirements. Article 2.1 of TBT requires that technical regulations accord no less favorable treatment to imported products than to like domestic products and accord no less favorable treatment to imports from any one country than to imports from another. This means a PPM-based standard must not be a guise for discrimination. Even if on its face it applies to all products regardless of origin, regulators must ensure it is not applied in a way that disproportionately burdens foreign producers without justification.³¹ For example, in the U.S. - Tuna II dispute, a labeling requirement related to dolphin-safe fishing was found to violate TBT 2.1 because its conditions were stricter for some countries’ tuna fisheries than others, leading to de facto discrimination.³²

Additionally, Article 2.2 of the TBT requires that technical regulations be no more trade-restrictive than necessary to achieve a legitimate objective. An importing country using a PPM measure (say, a sustainability certification) must show that its goal (environmental protection, consumer information, etc.) is legitimate and that no reasonably available alternative measure that is less disruptive to trade can achieve the same objective. If a less trade-restrictive approach (for instance, an international standard or a voluntary scheme) could accomplish the policy goal, a stringent unilateral

²⁹ BREE, Axel. Article XX GATT-Quo Vadis-the environmental exception after the shrimp/turtle appellate body report. *Dick. J. Int’l L.*, v. 17, p. 99, 1998.

³⁰ BENOIT, Charles. Picking tariff winners: non-product related PPMs and DSB interpretations of unconditionally within article I:1 note. *Georgetown Journal of International Law*, v. 42, p. 583-604, 2010.

³¹ DU, Ming. *What is a technical regulation in the TBT agreement?: some reflections on EC-seal products*. 2015.

³² CROWLEY, Meredith A.; HOWSE, Robert. Tuna-Dolphin II: a legal and economic analysis of the Appellate Body Report. *World Trade Review*, v. 13, n. 2, p. 321-355, 2014.

requirement might fail the necessity test. Furthermore, the TBT Agreement encourages the use of relevant international standards (Article 2.4). If an international standard for sustainable production exists (e.g., a widely recognized certification), WTO members are expected to base their measures on it unless it would be ineffective or inappropriate.³³ Aligning PPM measures with international standards or agreements not only supports TBT compliance but also the Article XX chapeau test under GATT, as it evidences a cooperative and non-arbitrary approach.

In sum, the legality of an npr-PPM measure under WTO law is determined by a careful, case-by-case application of these rules. The measure must be crafted to minimize discrimination and trade restrictiveness while effectively pursuing a legitimate policy goal. WTO panels and the Appellate Body (when it was operational) have made clear that they will not second-guess the importance of objectives such as environmental protection or human rights but will examine whether a trade measure is a proportionate and fair way to achieve those objectives.

3.5 The WTO agreement on fisheries subsidies and sustainability objectives

Beyond dispute settlement and Article XX-type justifications, the WTO's negotiated rulebook itself has begun to incorporate sustainability objectives more explicitly. The Agreement on Fisheries Subsidies, adopted at the WTO's Twelfth Ministerial Conference (MC12) and entering into force on 15 September 2025, disciplines subsidies that contribute to illegal, unreported and unregulated (IUU) fishing and to fishing on overfished stocks, while also providing for special and differential treatment elements. Although often described as the "first phase" of fisheries subsidies disciplines, it is widely regarded as the first new multilateral WTO agreement that places environmental sustainability at its core. Its entry into force is significant for the present inquiry since it underscores that sustainability is not merely an external policy value imported into trade law through exceptions or interpretive techniques, but can be em-

bedded directly in WTO primary rules, potentially offering a multilateral reference point when assessing the legitimacy and design of unilateral sustainability-linked market access measures.

4 The rise of mandatory due diligence and trade-linked measures with cross-border effects

In recent years, a new wave of trade-related regulations has emerged, compelling businesses to police their supply chains for human rights and environmental abuses. These measures mark a shift from voluntary corporate social responsibility to mandatory legal obligations with global reach.³⁴ Major economies such as the United States and the European Union are increasingly leveraging their market power to enforce supply chain due diligence, transparency requirements, and process and production method (PPM) standards beyond their borders.³⁵ Measures such as the EUDR and CBAM are sometimes labelled "extraterritorial." In strict jurisdictional terms, however, they are usually anchored in territorial hooks, importation into the EU (EUDR, CBAM) or participation in the EU market (CSDDD), and they regulate actors within the regulating jurisdiction. Their practical salience lies in the cross-border effects they generate: to maintain market access, firms must trace and alter upstream processes occurring in third countries. Accordingly, this article foregrounds "cross-border effects" when describing the regulatory projection generated by international trade, while using "extraterritorial effects" only in the broader, effects-based sense (and without hyphenation) where helpful.

³³ KIM, Minjung. The 'standard' in the GATT/WTO TBT agreements: origin, evolution and application. *Journal of World Trade*, v. 52, n. 5, 2018. Available in: <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TRAD\TRAD2018033.pdf>. Access at: Jan. 2, 2026.

³⁴ LEAL-ARCAS, Rafael; ALSAUD, Madhawi. New trends in international economic and environmental law and governance. *J. Animal & Env't L.*, v. 15, p. 1, 2023.

³⁵ DENNY, Danielle Mendes Thame. Human rights and market access section II: dossier especial: business and human rights. *Brazilian Journal of International Law*, v. 15, n. 2, p. 203–221, 2018.

4.1 Mandatory human rights due diligence measures

4.1.1 Uyghur Forced Labor Prevention Act (UFLPA)

A prominent example from the United States is the UFLPA, enacted in 2021 in response to allegations of forced labor in China’s Xinjiang Uyghur Autonomous Region (XUAR).³⁶ The UFLPA’s legal objective is to prevent goods made with forced labor, particularly by persecuted Uyghur minorities, from entering U.S. commerce. Its core provision establishes a rebuttable presumption that any goods mined, produced, or manufactured in Xinjiang (or involving entities linked to Xinjiang’s labor transfer programs) are tainted by forced labor, and thus barred from import into the U.S..³⁷ This presumption is expansive that it applies not only to final products from Xinjiang, but also to goods made in other regions or countries if they contain inputs from Xinjiang or from listed entities known for forced labor. An importer may rebut the presumption only by demonstrating, with clear evidence, that the supply chain is free of forced labor and that it has complied with rigorous due diligence requirements.³⁸ The UFLPA is therefore mandatory and effectively extraterritorial in effect: while it operates at the U.S. border, it forces foreign producers worldwide to eliminate Xinjiang inputs or risk losing access to the U.S. market. The trade impact has been significant since in its first year of enforcement, U.S. Customs detained thousands of shipments (over 5,500 by late 2023) valued at nearly \$2 billion under the UFLPA.³⁹ Industries from apparel to solar panels have had to restructure sourcing, and companies must

³⁶ CRANE, Andrew *et al.* Governance gaps in eradicating forced labor: from global to domestic supply chains. *Regulation & Governance*, v. 13, n. 1, p. 86–106, 2019.

³⁷ HUSISIAN, Gregory; TURLAIS, John E. *What every multinational company needs to know about... the Uyghur Forced Labor Prevention Act (part I)*. Available in: <https://www.foley.com/insights/publications/2024/01/multinational-company-uyghur-forced-labor-prevention-act-i/>. Access at: Jan. 2, 2026.

³⁸ HUSISIAN, Gregory; TURLAIS, John E. *What every multinational company needs to know about... the Uyghur Forced Labor Prevention Act (part I)*. Available in: <https://www.foley.com/insights/publications/2024/01/multinational-company-uyghur-forced-labor-prevention-act-i/>. Access at: Jan. 2, 2026.

³⁹ HUSISIAN, Gregory; TURLAIS, John E. *What every multinational company needs to know about... the Uyghur Forced Labor Prevention Act (part I)*. Available in: <https://www.foley.com/insights/publications/2024/01/multinational-company-uyghur-forced-labor-prevention-act-i/>. Access at: Jan. 2, 2026.

map and document their entire supply chains to satisfy U.S. authorities that no forced labor is present. The Act exemplifies how human rights concerns (forced labor as a modern form of slavery) are now directly translated into trade bans, raising tensions with offender countries (China has decried the measure) but advancing a public morals objective in trade.⁴⁰

4.1.2 Conflict minerals regulations

Another early foray into mandatory human-rights due diligence is the regulation of “conflict minerals,” aimed at severing the link between global supply chains and armed violence. Both the U.S. and EU have instituted measures targeting the trade in four high-risk minerals, tin, tantalum, tungsten, and gold (known as 3TG), which have fueled conflict and human rights abuses in parts of Africa. The U.S. addressed this through Section 1502 of the 2010 Dodd-Frank Act, which requires companies listed on U.S. stock exchanges to investigate and annually report whether their 3TG minerals originate in the conflict-ridden Democratic Republic of Congo or adjoining countries.⁴¹ The EU Conflict Minerals Regulation (Regulation (EU) 2017/821), which came into full effect in January 2021, goes further by imposing an outright due diligence obligation. Its objective is to “help stem the trade” in 3TG that finances armed groups or involves forced labor.⁴² The regulation requires EU importers of these minerals to follow the OECD’s responsible sourcing standards and to import only from responsible, conflict-free sources.⁴³ It applies to raw minerals and metals above certain volume thresholds, covering importers across the EU. Like the UFLPA, this law is mandatory and generates extraterritorial (cross-border) compliance effects as European companies (and, by extension, their overseas suppliers and smelters) must audit and manage their supply chains

⁴⁰ CRANE, Andrew *et al.* Governance gaps in eradicating forced labor: from global to domestic supply chains. *Regulation & Governance*, v. 13, n. 1, p. 86–106, 2019.

⁴¹ IRELAND, Emma. Are US corporations being Dodd-Frank: disclosure law as an instrument of social reform. *Penn Undergraduate LJ*, v. 4, p. 5, 2016.

⁴² MACCHI, Chiara. A glass half full: critical assessment of EU Regulation 2017/821 on conflict minerals. *Journal of Human Rights Practice*, v. 13, n. 2, p. 270–290, 2022.

⁴³ YOUNG, Steven B. Responsible sourcing of metals: certification approaches for conflict minerals and conflict-free metals. *The International Journal of Life Cycle Assessment*, v. 23, n. 7, p. 1429–1447, 2018.

in conflict-affected areas worldwide to remain in compliance.⁴⁴ The trade consequences include increased diligence costs and supply chain tracing efforts across industries (electronics, automotive, jewelry), as well as some sourcing rerouting toward certified “conflict-free” smelters. By leveraging the EU’s market power, the regulation seeks to pressure mining operations in unstable regions to reform and level the playing field for ethical sourcing.⁴⁵ The effectiveness of this approach depends on broad adoption, EU lawmakers acknowledged that global impact requires other major markets to implement similar rules. Indeed, the EU regulation was partly inspired by U.S. Dodd-Frank requirements, and the EU model now serves as a template for due diligence legislation elsewhere.

4.1.3 EU Corporate Sustainability Due Diligence Directive (CSDDD)

The EU has moved toward a comprehensive due diligence framework with the 2024 Corporate Sustainability Due Diligence Directive.⁴⁶ This directive represents a new apex of mandatory human rights and environmental due diligence, expanding beyond single-issue laws. The CSDDD’s legal objective is broad, it aims to ensure large companies operating in the EU proactively identify and address adverse human rights and environmental impacts throughout their operations and value chains. In July 2024, the directive formally entered into force, requiring all EU Member States to enact national laws compelling in-scope companies, including certain non-EU companies with substantial EU turnover, to conduct due diligence on their global supply chains. However, the EU’s subsequent “Omnibus I” simplification package has revised the CSDDD by (i) limiting its application to companies with more than 5,000 employees and €1.5 billion net turnover (including non-EU companies meeting the same EU-turnover threshold) and (ii) postponing national transposition to 26 July 2028 and the application of due diligence obligations

to 26 July 2029.⁴⁷ The main content of the CSDDD obliges companies to integrate a due diligence process aimed at preventing or mitigating human rights abuses (e.g., child labor, unsafe working conditions) and environmental harm (e.g., pollution, ecosystem degradation) in their own activities, in their subsidiaries, and in their business relationships across the supply chain. In its original form, the directive also envisaged climate transition plans aligned with the Paris Agreement; however, the Omnibus I simplification package removed this mandatory transition-plan requirement.⁴⁸ The scope is ambitious in regulatory ambition, but, after Omnibus I, significantly narrowed in personal scope: the due diligence obligation is now targeted at only the largest EU and non-EU companies (>5,000 employees and €1.5 billion net turnover).⁴⁹ This means, for example, that a significant U.S. or Asian multinational with extensive sales in Europe could be directly subject to European due diligence duties, illustrating the cross-border effects of EU market regulation. Non-compliant companies may face sanctions and turnover-based penalties under Member State laws once the directive is implemented; under the Omnibus I compromise, fines may reach up to 3% of net worldwide turnover, while the EU-level harmonisation of civil liability is reduced, leaving enforcement and liability design largely to national law.

The CSDDD thus exemplifies the trend of making corporate accountability for human rights and sustainability a matter of binding law rather than voluntary codes, even as the EU recalibrates the instrument’s scope and timing in the name of competitiveness.⁵⁰ U.S. lawmakers and businesses have voiced concern that the CSDDD imposes onerous extraterritorial mandates on American businesses and could negatively affect U.S. firms’ operations.⁵¹ Tensions of this kind highlight how

⁴⁴ MACCHI, Chiara. A glass half full: critical assessment of EU Regulation 2017/821 on conflict minerals. *Journal of Human Rights Practice*, v. 13, n. 2, p. 270–290, 2022.

⁴⁵ EU is one of the world’s largest importers of 3TG. MACCHI, Chiara. A glass half full: critical assessment of EU Regulation 2017/821 on conflict minerals. *Journal of Human Rights Practice*, v. 13, n. 2, p. 270–290, 2022.

⁴⁶ VENTURA, Livia. Corporate sustainability due diligence and the new boundaries of the firms in the European Union. *European Business Law Review*, v. 34, n. 2, 2023.

⁴⁷ BAUMÜLLER, Josef. Corporate sustainability due diligence directive. *Der Wirtschaftstrenbänder*: WT Fachjournal für Wirtschaftsprüfer und Steuerberater, v. 76, n. 4, p. 284–288, 2024.

⁴⁸ VENTURA, Livia. Corporate sustainability due diligence and the new boundaries of the firms in the European Union. *European Business Law Review*, v. 34, n. 2, 2023.

⁴⁹ BAUMÜLLER, Josef. Corporate sustainability due diligence directive. *Der Wirtschaftstrenbänder*: WT Fachjournal für Wirtschaftsprüfer und Steuerberater, v. 76, n. 4, p. 284–288, 2024.

⁵⁰ AL-EMADI, Talal Abdulla *et al.* The EU corporate sustainability due diligence directive: implications and the Qatari case study. *The Journal of World Energy Law & Business*, v. 18, n. 4, p. jwaf022, 2025.

⁵¹ CLIFFORD CHANCE. *The EU’s corporate sustainability due diligence directive: impact on US companies*. 2004. Available in: <https://www.cliffordchance.com/content/cliffordchance/insights/resources/blogs/business-and-human-rights-insights/2024/10/the->

mandatory due diligence regimes, while aiming to “level the playing field” ethically, may spark regulatory conflicts.⁵² Nonetheless, the CSDDD is poised to become a benchmark, prompting other jurisdictions to consider similar comprehensive due diligence legislation and solidifying the concept that respect for human rights and the environment is a prerequisite for market access.

4.2 Environmental transparency and PPM measures

In parallel with human rights due diligence, governments are adopting environmental transparency and PPM measures that tie market entry to the sustainability of production processes. These initiatives focus on issues such as deforestation, climate change, and other environmental impacts, and require proof that imported goods were produced in an environmentally responsible manner. Such measures enforce modern PPM standards, regulating how a product is made (e.g., with low carbon emissions or without forest destruction), rather than focusing solely on the product’s physical characteristics. This represents a notable development in trade governance, since historically, product regulations have rarely been scrutinized for foreign production methods.

4.2.1 EU Deforestation Regulation (EUDR)

In 2023, the European Union adopted a landmark regulation to curb global deforestation driven by commodity demand. The EUDR aims to ensure that key products sold in or exported from the EU are “deforestation-free,” i.e., not produced on land that was deforested or degraded after a cutoff date of December 31, 2020.⁵³ The legal objective is to disconnect European consumption from forest loss and incentivize sustainable land-use practices abroad, thereby protecting biodiversity and reducing greenhouse gas emissions from

deforestation. Under the EUDR, companies placing covered commodities on the EU market (or exporting them from the EU) must conduct due diligence to verify that the goods meet three conditions: (1) they are deforestation-free (post-2020 land clearings are disqualifying); (2) they were produced in compliance with all laws of the country of origin (e.g. land rights, forestry regulations); and (3) they are accompanied by a corporate due diligence statement attesting to compliance. The scope of products is significant as it includes cattle (beef and leather), cocoa, coffee, oil palm (palm oil), rubber, soy, and wood, as well as derived products like chocolate, furniture, and beef products.⁵⁴ These commodities are among the leading drivers of tropical deforestation linked to international trade, and the EU itself is a major consumer of them.⁵⁵

By mandating geolocation information of the farmland where the goods were produced, and strict supply chain tracing, the EUDR imposes a heavy compliance burden. It is a mandatory scheme, non-compliant products cannot be placed on the EU market, and it generates pronounced cross-border compliance effects: farmers in Brazil, oil-palm growers in Indonesia, and cocoa cooperatives in West Africa must effectively adhere to EU-defined sustainability criteria if they wish to access the EU’s lucrative market. The trade consequences could be far-reaching. Producer countries have raised concerns at the WTO that the EUDR might act as a barrier to trade under the guise of environmental goals.⁵⁶ The EU Parliament initially set an aggressive timeline for compliance, but implementation has been further delayed to 30 December 2026 for operators and traders that are not micro and small enterprises, and to 30 June 2027 for micro and small enterprises. The same legislative package introduced targeted simplifications (including removing certain printed products from scope and streamlining aspects of due diligence), and it requires the European Commission to review the regime

eu-corporate-sustainability-due-diligence-directive-impact-on-us-companies.html. Access at: Jan. 2, 2026.

⁵² TÜRKE, Mariana Aparecida Vilmondes. Business and human rights in Brazil: exploring human rights due diligence and operational-level grievance mechanisms in the case of Kinross Paracatu gold mine. *Revista de Direito Internacional*, v. 15, n. 2, p. 221–241, 2018.

⁵³ KÖTHKE, Margret; LIPPE, Melvin; ELSASSER, Peter. Comparing the former EUTR and upcoming EUDR: some implications for private sector and authorities. *Forest Policy and Economics*, v. 157, p. 103079, 2023.

⁵⁴ KÖTHKE, Margret; LIPPE, Melvin; ELSASSER, Peter. Comparing the former EUTR and upcoming EUDR: some implications for private sector and authorities. *Forest Policy and Economics*, v. 157, p. 103079, 2023.

⁵⁵ LI, Bo et al. *What is the EU Deforestation Regulation? 7 Key Questions, Answered*. 2025. Available in: <https://www.wri.org/insights/explain-eu-deforestation-regulation>. Access at: Jan. 2, 2026.

⁵⁶ Some, like Indonesia and Brazil, worry about sovereignty over land-use decisions and the feasibility of smallholders complying (given the administrative costs of mapping and monitoring plots). See RUMBLE, Olivia; GILDER, Andrew. *WTO Review of EU Trade Policies highlights significant unease about CBAM*.

by 30 April 2026,⁵⁷ partly to give businesses and trading partners more time to adjust.

Nevertheless, the direction is clear: companies trading in these commodities are now compelled to institute robust traceability and auditing systems. In the long run, the EUDR may spur other markets to adopt similar “zero-deforestation” import standards, amplifying its impact. On the other hand, if misaligned trade policies (such as free trade agreements that boost imports of risky commodities) undercut the regulation’s goals, it could face challenges in effectively halting deforestation.⁵⁸

4.2.2 EU carbon border adjustment mechanism (CBAM)

Perhaps the most debated environmental PPM measure is the EU’s Carbon Border Adjustment Mechanism, introduced as part of the European Green Deal’s effort to combat climate change. CBAM’s core objective is to prevent “carbon leakage,” the shift of carbon-intensive production to countries with laxer emission constraints, and to ensure importers pay a carbon price equivalent to that faced by EU manufacturers.⁵⁹ In effect, it extends the EU’s domestic carbon pricing (the Emissions Trading System - ETS) to imports, leveling the playing field on carbon costs. Legally, CBAM was adopted in 2023 (Regulation (EU) 2023/956) and operated a transitional reporting phase from October 2023 through 2025. As part of the EU’s Omnibus-driven simplification, Regulation (EU) 2025/2083 introduced a de minimis exemption (50 tonnes per year) and streamlined elements of authorisation and reporting for smaller importers. CBAM requires importers of certain carbon-intensive goods to report the embedded greenhouse gas emissions of those products and, in the definitive phase, to purchase and surrender “CBAM certificates” priced at the EU ETS rate.⁶⁰ The scope initially

covers a set of high-emission industries: iron and steel, cement, aluminum, fertilizers, electricity, and hydrogen, representing a substantial share of European industrial CO₂ emissions. The transitional reporting phase ran through 2025; for imports from 2026, CBAM enters its definitive phase, with annual declarations and certificate surrender beginning with the first compliance cycle for 2026 imports, and the effective carbon-cost signal expected to strengthen as free ETS allowances are phased out. The CBAM is mandatory, non-compliant imports (without emissions data or unpaid certificates) will be denied entry or penalized, and it has pronounced cross-border effects. It pressures foreign producers to reduce their carbon footprint or else bear an added cost when selling into the EU. Countries with their own carbon pricing can avoid the charge (credits are given for any carbon taxes already paid at origin), effectively nudging other governments to implement climate policies to stay competitive. The trade implications of CBAM are complex and already being felt. Exporters from developing countries fear that CBAM will erode their competitiveness in EU markets, as many rely on emissions-intensive sectors and lack resources to decarbonize quickly.⁶¹ CBAM has already attracted WTO litigation: in May 2025 Russia requested consultations challenging the EU’s CBAM and linked elements of the EU emissions trading architecture. Any dispute settlement trajectory will unfold against the backdrop of the Appellate Body’s paralysis, which can make final, appeal-level resolution uncertain unless parties agree to alternative appeal mechanisms. The EU counters that the measure is non-protectionist and essential for climate action, likely seeking shelter under WTO exceptions for environmental protection.

Beyond geopolitics, CBAM imposes significant compliance work. Companies must implement systems to calculate and verify the carbon content of their products across complex supply chains, a novel requirement for many. Logistics providers and customs

⁵⁷ LI, Bo *et al.* *What is the EU Deforestation Regulation? 7 Key Questions, Answered*. 2025. Available in: <https://www.wri.org/insights/explain-eu-deforestation-regulation>. Access at: Jan. 2, 2026.

⁵⁸ ECOVADIS. Trade vs. trees: is the EU’s deforestation regulation being undercut by its own trade policy? *In: ECOVADIS. Blog EcoVadis*, Sept. 2025. Available in: <https://ecovadis.com/blog/trade-vs-trees-is-the-eus-deforestation-regulation-being-undercut-by-its-own-trade-policy/>. Access at: Jan. 2, 2026.

⁵⁹ GRUBB, Michael *et al.* Carbon leakage, consumption, and trade. *Annual Review of Environment and Resources*, v. 47, n. 1, p. 753–795, 2022.

⁶⁰ RUMBLE, Olivia; GILDER, Andrew. *WTO review of EU trade policies highlights significant unease about CBAM*. Available in: <https://africanclimatewire.org/2023/06/wto-review-of-eu-trade-policies-highlights-significant-unease-about-cbam/>. Access at: Jan. 2, 2026.

africanclimatewire.org/2023/06/wto-review-of-eu-trade-policies-highlights-significant-unease-about-cbam/. Access at: Jan. 2, 2026.

⁶¹ Indeed, WTO members have expressed unease: China’s ambassador warned that CBAM would unfairly penalise developing countries, and Russia argued it could disrupt global trade flows and competition. RUMBLE, Olivia; GILDER, Andrew. *WTO review of EU trade policies highlights significant unease about CBAM*. Available in: <https://africanclimatewire.org/2023/06/wto-review-of-eu-trade-policies-highlights-significant-unease-about-cbam/>. Access at: Jan. 2, 2026.

brokers are also drawn in as they may act as declarants for foreign firms as CBAM phases in, its design and administration will be closely watched. If successful, it could pave the way for similar carbon border measures elsewhere, potentially leading to a patchwork of carbon tariffs globally.⁶² Such a trend might encourage international convergence on carbon pricing, but it also risks fragmenting trade if regimes differ.

4.3 The expanding scope of regulatory models with cross-border effects

Together, the above measures illustrate a remarkable expansion of trade-linked regulatory models with cross-border effects in international trade. A defining feature of these new measures is that they are mandatory, companies do not have the option to opt out without foregoing market access, and they project the regulating country's standards beyond its borders. By tying compliance to entry into large markets (such as the EU or the U.S.), these laws effectively extend regulatory influence outward (through market-access conditionality), influencing business conduct in foreign jurisdictions. This raises fundamental questions about sovereignty and the reach of domestic law; for instance, the EU's due diligence and environmental rules, by design, affect producers in Asia, Africa, or the Americas who may have never set foot in Europe but who supply European companies or export to European customers. Notably, these initiatives shift the burden of monitoring and enforcement from governments to companies. Importing firms and multinational enterprises are now tasked with carrying out the policing functions: they must trace their supply chains for banned labor or illegal timber, audit their suppliers' practices, collect emissions data, and so forth.⁶³ In essence, compliance costs and responsibilities are being decentralized to the private sector. This approach harnesses corporate resources and incentives to achieve public policy goals (such as human rights and sustainability), but it also imposes heavy logistical and financial burdens on businesses, especially

those with complex global supply chains. Smaller exporters in developing countries may find it particularly challenging to meet the detailed documentation and traceability demands, potentially impacting their access to markets. Thus, while these measures aim to level the playing field by internalizing social and environmental costs, they can also reshape supply chain structures, sometimes favoring larger, more sophisticated firms that can absorb compliance costs.

The scope of issues addressed by such sustainability-linked, trade-based measures with cross-border effects is steadily broadening. What began with niche areas (conflict minerals, specific forced-labor hotspots) has evolved into sweeping frameworks covering climate change, general human rights due diligence, and deforestation across entire sectors. This trend is likely to continue.⁶⁴ Each new measure reinforces the precedent that trade can be used to promote non-trade values. Internationally, this raises the question of how to reconcile these unilateral or regional measures with multilateral trade rules. Many of these measures will be tested against World Trade Organization obligations, and their legality may hinge on general exceptions for the protection of morals or the environment.

5 Legal assessment of supply chain regulations under WTO rules

5.1 Legal characterization of due diligence measures under WTO Law

Modern supply-chain due diligence and transparency measures, such as the U.S. Uyghur Forced Labor Prevention Act (UFLPA), the EU Deforestation Regulation (EUDR), the EU Corporate Sustainability Due

⁶² Already the UK, Canada, and others have explored the concept. OGER, Antoine. What's missing in CBAM and the EU's net zero strategy. *White paper*. Available in: <https://www.hinrichfoundation.com/research/wp/sustainable/gaps-in-cbam-and-the-eu-net-zero-strategy>. Access at: Jan. 2, 2026.

⁶³ VENTURA, Livia. Corporate sustainability due diligence and the new boundaries of the firms in the European Union. *European Business Law Review*, v. 34, n. 2, 2023.

⁶⁴ Other jurisdictions are considering similar laws: for example, national due diligence laws in countries like Germany and France already impose human rights duties on companies' global supply chains, and new proposals (such as a possible UK due diligence law or Canada's recent forced labor import ban initiatives) are on the horizon. The extra-territorial regulatory model is also expanding through new EU initiatives, from proposed bans on products made with forced labor (analogous to the UFLPA) to sector-specific regulations such as the EU Battery Regulation, which mandates responsible sourcing of battery raw materials. AL-EMADI, Talal Abdulla et al. The EU corporate sustainability due diligence directive: implications and the Qatari case study. *The Journal of World Energy Law & Business*, v. 18, n. 4, p. jwaf022, 2025.

Diligence Directive (CSDDD), and the EU Carbon Border Adjustment Mechanism (CBAM), represent a new class of trade-related regulations. Legally characterizing these measures under World Trade Organization (WTO) rules is the necessary first step in assessing their compatibility.⁶⁵

From a WTO law perspective, these measures can be characterized as either border measures (import restrictions) or internal regulations, depending on their design. An outright ban on importing products produced under certain conditions (e.g., under forced labor or illegal logging) constitutes a quantitative restriction on trade. This would normally violate GATT 1994 Article XI, which prohibits import bans or quotas.⁶⁶ On the other hand, some measures are structured as internal regulations applied to both domestic and imported products (for instance, a law that prohibits the sale of any product, whether domestic or imported, produced using prohibited methods). Such an internal measure would fall under GATT Article III disciplines (National Treatment for internal regulations). In practice, the distinction can be blurred, many due diligence laws require importers to demonstrate compliance (via certificates, due diligence statements, etc.) as a condition for their goods to enter or be sold in the market. Whether one calls this a border measure or an internal measure, it is clearly trade-affecting and subject to WTO scrutiny.

Another way to characterize these measures is to ask whether they qualify as “technical regulations” under the WTO’s Technical Barriers to Trade (TBT) Agreement. The TBT Agreement defines a technical regulation as a document that lays down product characteristics or related processes and production methods, the compliance with which is mandatory. Many due diligence measures involve mandatory procedures or standards that products must meet (e.g., traceability documentation, sustainability certifications). For instance, the EUDR requires covered commodities like coffee, palm oil, or timber to be accompanied by information proving they are deforestation-free; this could be viewed as a de fac-

to technical requirement for those products.⁶⁷ Similarly, CBAM obliges importers to purchase carbon emission certificates corresponding to the product’s embedded emissions, effectively imposing a technical and financial requirement tied to the product’s production method. If these rules are deemed “technical regulations,” the disciplines of the TBT Agreement (on non-discrimination, necessity, and use of international standards) would apply in addition to GATT rules. If a measure is not a technical regulation (for example, UFLPA’s import ban might be seen as a customs measure outside TBT’s scope), then it is assessed solely under GATT and possibly other WTO agreements.

5.2 Non-discrimination principles: GATT Articles I and III

At the heart of WTO law are the non-discrimination obligations, chiefly the Most-Favored-Nation (MFN) treatment in GATT Article I and National Treatment in GATT Article III. Due diligence regulations must respect these principles or risk legal challenge. A supply-chain measure that targets specific countries or regions on its face will prima facie violate MFN. For example, the UFLPA (as enacted by the United States) is explicitly focused on goods linked to the Xinjiang region of China. Even though the goal, eliminating forced labor, is universally relevant, singling out one region’s products means other WTO members’ products are treated more favorably, breaching MFN. A less overt scenario is the EU’s deforestation regulation, which is origin-neutral in its basic requirement (all covered products must be deforestation-free) but includes a system of country risk benchmarking. Suppose the EU classifies countries as “high risk”: exports from those countries face stricter due diligence scrutiny or additional compliance steps than those from “low risk” countries.⁶⁸ This kind of differentiation by origin, even if grounded in environmental data, amounts to unequal treatment under Article I. The WTO allows classifying countries by risk per se, but such an approach must be justified

⁶⁵ ANDRADE, Mariana Clara de. Path to judicial activism? the use of “relevant rules of International Law” by the WTO Appellate Body section II: artigos sobre outros temas. *Brazilian Journal of International Law*, v. 15, n. 3, p. 307–323, 2018.

⁶⁶ CONDON, Madison; IGNACIUK, Ada. Border carbon adjustment and international trade: a literature review. *OECD Trade and Environment Working Papers*, Paris, Oct. 2013. Available in: <http://search.proquest.com/docview/1459385799/abstract/7F92941000534C6BPQ/1>. Access at: Feb. 8, 2017.

⁶⁷ KÖTHKE, Margret; LIPPE, Melvin; ELSASSER, Peter. Comparing the former EUTR and upcoming EUDR: some implications for private sector and authorities. *Forest Policy and Economics*, v. 157, p. 103079, 2023.

⁶⁸ MARÍN DURÁN, Gracia; SCOTT, Joanne. Regulating trade in forest-risk commodities: two cheers for the European Union. *Journal of Environmental Law*, v. 34, n. 2, p. 245–267, 2022.

to avoid being disguised discrimination.⁶⁹ In designing due diligence rules, policymakers have sought to avoid explicit origin-based discrimination; uniform, global standards are preferable. Indeed, one can argue that a measure is applied to all imports equally (and thus MFN-consistent) if it holds every exporting country to the same benchmark (e.g., zero tolerance for forced labor or illegal deforestation). However, even a uniform standard can have disparate impacts: producers in some countries will be more heavily affected due to prevailing local issues. WTO law distinguishes between *de jure* discrimination (in the letter of the law) and *de facto* discrimination (in effect). Many sustainability measures, though origin-neutral on paper, may be found discriminatory in effect if they disproportionately exclude or burden imports from certain members without adequate justification.⁷⁰

GATT Article III, on National Treatment, requires that imported products be treated no less favorably than “like” domestic products with respect to internal taxes and regulations. In the context of due diligence measures, a crucial question is whether the regulation also applies to domestic producers. If a country bans imports of goods made with child or forced labor but has no such restrictions on domestic goods (hypothetically produced under similar unethical conditions), that would be a blatant Article III violation. WTO members typically ensure consistency by pairing import restrictions with parallel domestic measures: for instance, forced labor is generally illegal in domestic production as well, and the EU’s deforestation law applies equally to timber, beef, soy, and other commodities produced within the EU.⁷¹ Formal equivalence, however, is not the end of the inquiry. WTO tribunals first consider whether imported and domestic products are “like products.”⁷² Here, the thorny issue is that WTO jurisprudence has traditionally defined likeness based on physical characteristics, end uses, and consumer preferences, rather than the way a good is produced.

⁶⁹ BOHANES, Jan. Risk regulation in WTO law: a procedure-based approach to the precautionary principle. *Colum. J. Transnat’l L.*, v. 40, p. 323, 2001.

⁷⁰ MAVROIDIS, Petros C. *The regulation of international trade: GATT*. Cambridge: MIT Press, 2016. v. 1.

⁷¹ KÖTHKE, Margret; LIPPE, Melvin; ELSASSER, Peter. Comparing the former EUTR and upcoming EUDR: some implications for private sector and authorities. *Forest Policy and Economics*, v. 157, p. 103079, 2023.

⁷² WORLD TRADE ORGANIZATION. *Japan: taxes on alcoholic beverages*. 1998.

A ton of aluminum produced with renewable energy is physically identical to a ton of aluminum produced with coal-fired electricity; a cotton shirt sewn in a factory with fair labor practices is identical in appearance and function to one sewn by forced labor. WTO law has generally treated such products as “like products.” This means a regulation that treats them differently is discriminating between like products.⁷³ Thus, process-based distinctions inherently risk violating Article III, unless the difference in process translates into a product distinction recognized by consumers (there is scope to argue that consumer perception of a product’s ethical origin could affect its likeness, but this remains an unsettled and controversial area).

5.3 Exceptions under GATT article XX

WTO law does not operate in an absolutist fashion, GATT Article XX provides a set of general exceptions that allow members to maintain measures which would otherwise violate GATT obligations, provided certain conditions are met. In the context of supply-chain due diligence measures, several Article XX grounds are potentially relevant. Article XX(a) allows measures “necessary to protect public morals.” A nation could invoke public morals to justify bans or restrictions on goods made with egregious human rights abuses, such as forced labor or child labor. Indeed, the EC - Seal Products (2014) precedent shows that WTO adjudicators accepted animal welfare concerns as falling within public morals. Protecting human dignity and preventing complicity in forced labor could certainly be construed as a moral imperative for many societies.⁷⁴ The UFL-PA, for instance, would likely be defended under Article XX(a) as a measure necessary to protect public morals (reflecting the moral abhorrence of forced labor).

Article XX(b) covers measures “necessary to protect human, animal or plant life or health.” This exception could be invoked for regulations intended to protect health or safety. For example, if a measure addresses a health risk in products (though our examples are more

⁷³ For example, a carbon-intensive steel billet vs. a low-carbon billet facing different border fees under a CBAM, or a “conflict-free” mineral vs. a conflict-tainted mineral where only the latter is banned. DROEGE, Susanne; FISCHER, Carolyn. Pricing carbon at the border: key questions for the EU. *ifo DICE Report*, v. 18, n. 01, p. 30-34, 2020.

⁷⁴ DU, Ming. What is a technical regulation in the TBT agreement? some reflections on EC-Seal products. 2015.

about ethics and environment than direct health risks), one might argue that severe environmental harm abroad can threaten human life (climate change, for instance, endangers human life and health globally). A creative argument is to justify climate measures, such as carbon restrictions, under XX(b) because unchecked climate change poses grave risks to human and planetary health.⁷⁵ However, climate and environmental protection more naturally align with Article XX(g), which permits measures “relating to the conservation of exhaustible natural resources” if paired with domestic restrictions. Forests, biodiversity, clean air, and a stable climate have been recognized in past WTO cases as “exhaustible natural resources” within the meaning of XX(g). The EUDR’s objective of halting deforestation could come under XX(g) as a conservation measure. The same provision could justify aspects of the EU’s CBAM, since it aims to conserve the global atmospheric resource by curbing carbon emissions leakage. Article XX(g) has two key tests: the measure must be “relating to” conservation (a substantial connection between the measure and the goal, less strict than “necessary”), and it must be made effective in conjunction with equivalent domestic restrictions. The latter condition means the regulating country should also constrain its own domestic activities related to the resource. The EU would point out that its domestic producers are subject to emissions caps (hence CBAM equalizes the treatment), and that it has laws against domestic deforestation, etc., thereby satisfying the even-handedness requirement of XX(g).

Applying these principles to due diligence measures, regulators need to ensure that, if they invoke Article XX, their measure is “necessary” or “relating to” the chosen policy goal and that no reasonable alternative is available that is less trade-restrictive. Under XX(a) and XX(b), “necessary” involves a weighing and balancing test.⁷⁶ A WTO panel would consider the importance of the objective (e.g., combating forced labor is a very weighty objective), the effectiveness of the measure in achieving that objective, and the measure’s impact on trade. If an alternative measure can achieve the same level of protection with less trade disruption, for instance, a cooperative international agreement or a less

blanket form of restriction, the challenged measure might be found not necessary.

Whether a measure is justified under XX(a), (b), or (g), the most demanding aspect of Article XX is the chapeau (the introductory clause of Article XX). The chapeau requires that the measure not be applied in a manner that constitutes “arbitrary or unjustifiable discrimination” between countries where the same conditions prevail, nor a “disguised restriction on international trade.” This is essentially a test of good faith and even-handed application. A measure that formally falls under a listed exception can still be deemed WTO-inconsistent if, in its application, it unfairly discriminates between trading partners or serves as a veiled form of protectionism. WTO case law has developed important guidance here. In *U.S. - Shrimp/Turtle* (1998), the Appellate Body acknowledged the legitimacy of the U.S. law to protect sea turtles (an exhaustible natural resource), but initially found that the way the U.S. applied its ban was unjustifiably discriminatory.⁷⁷ The U.S. had not adequately engaged other countries or considered their different conditions, it imposed a rigid requirement (use of turtle-excluder devices in shrimp fishing) without serious efforts at negotiation or technical assistance, and it allowed no flexibility in recognizing other countries’ equivalent conservation programs. The Appellate Body said that WTO members cannot simply require other countries to adopt the same regulatory standards wholesale, ignoring differences in circumstances, because that would constitute arbitrary discrimination. The lesson from that case (and the subsequent compliance proceeding where the U.S. adjusted its implementation) is that a unilateral measure addressing a global concern should be implemented with a degree of flexibility and international cooperation. Providing affected trading partners with opportunities for dialogue, phase-in periods, or assistance, and avoiding creating exceptions that favor some countries over others without a valid reason, are important factors in withstanding chapeau scrutiny.

Crucially, under the chapeau, even a well-intentioned measure must not result in unfair discrimination. Consider the public morals case of *EC - Seal Products*: the EU’s ban on seal fur had exceptions for indigenous communities and for small-scale hunts, which the WTO

⁷⁵ KISHORE, Pallavi. Revisiting the WTO shrimps case in the light of current climate protectionism: a developing country perspective. *Geo. Wash. J. Energy & Envtl. L.*, v. 3, p. 78, 2012.

⁷⁶ BREE, Axel. Article XX GATT-Quo Vadis-the environmental exception after the shrimp/turtle appellate body report. *Dick. J. Int’l L.*, v. 17, p. 99, 1998.

⁷⁷ KISHORE, Pallavi. Revisiting the WTO shrimps case in the light of current climate protectionism: a developing country perspective. *Geo. Wash. J. Energy & Envtl. L.*, v. 3, p. 78, 2012

found led to arbitrary discrimination because the way those exceptions were designed favored certain countries' exports (e.g., Canada versus Greenland) without adequate justification. By analogy, a forced labor import bans that targets only one region (while similar labor abuses elsewhere are overlooked) could be seen as unjustifiably discriminatory. Similarly, if the EU's deforestation law fails to account for developing countries' efforts or penalizes small producers without providing support, it might be criticized as arbitrary. "Disguised restriction on trade" is another chapeau concept, meaning a protectionist measure that hides behind a moral/environmental pretext. To avoid this accusation, regulators must ensure consistency and transparency in their application of the rules. For instance, if CBAM were designed mainly to shield EU industry and had little to do with genuinely pricing carbon (say, if the import fees exceeded the costs borne by domestic producers), it would look like a trade restriction in disguise. In contrast, if it truly mirrors the domestic carbon price and is adjusted as such, it stands a better chance of being seen as bona fide environmental policy.

5.4 Technical regulations and the TBT agreement

Many supply-chain transparency measures can be viewed through the lens of the Agreement on Technical Barriers to Trade (TBT), which deals with product regulations and standards. The TBT Agreement is relevant because it contains its own set of obligations that complement GATT rules. If a due diligence measure is considered a technical regulation, two key provisions come into play: TBT Article 2.1, which is a non-discrimination rule similar to GATT Article III (it requires that imported products be accorded treatment no less favorable than like products of national origin and like products from other countries), and TBT Article 2.2, which requires that technical regulations not create unnecessary obstacles to trade, in other words, they should be no more trade-restrictive than necessary to fulfill a legitimate objective.

It is worth noting that, unlike GATT, the TBT Agreement does not have an explicit general exceptions clause. This means that if a measure is found to violate TBT (for instance, failing the Article 2.2 necessity test), a member cannot directly invoke GATT Article XX to excuse that breach. In WTO practice, a measure chal-

lenged as a technical regulation is usually assessed under TBT first; if it complies with TBT, it is likely to comply with GATT, and if it fails TBT, there may be no saving it under GATT exceptions.⁷⁸ Therefore, WTO-consistent design requires meeting the TBT's built-in balance: pursue the legitimate objective in a way that minimally impedes trade. Transparency provisions of the TBT Agreement (such as notification of new regulations to the WTO, allowing foreign stakeholders to comment, etc.) also apply and have been used by countries like Indonesia, Malaysia, and Brazil to raise concerns about EU measures like the EUDR. These discussions aim to ensure that due diligence rules are not formulated in a manner that is unnecessarily trade-disruptive.

5.5 Interaction with bilateral and regional trade agreements

WTO rules serve as the baseline for global trade, but many countries also address supply-chain issues through bilateral and regional trade agreements (FTAs). These agreements can both influence and be influenced by unilateral due diligence measures. In recent years, it has become common for FTAs to include chapters or provisions on labor and environmental standards, often referred to as "Trade and Sustainable Development" (TSD) chapters.⁷⁹ These typically commit the parties to uphold certain labor rights (such as the elimination of forced and child labor, freedom of association, etc.) and environmental agreements, and not to weaken their standards for the sake of trade. That said, there are instances in which trade agreements directly address the measures at issue. A notable example is the U.S.-Mexico-Canada Agreement (USMCA) (2020), which, for the first time among FTAs, explicitly commits each party to prohibit the importation of goods produced by forced or compulsory labor.⁸⁰ This commitment essentially multilateralizes the UFLPA principle across North America. In fact, following the USMCA, Canada and Mexico have been updating their laws to implement import bans on goods produced with forced labor,

⁷⁸ MAVROIDIS, Petros C. *The regulation of international trade: GATT*. Cambridge: MIT Press, 2016. v. 1.

⁷⁹ BARAI, Munim Kumar; LE, Thi Ai Lam; NGUYEN, Nga Hong. Vietnam: achievements and challenges for emerging as a FTA hub. *Transnational Corporations Review*, v. 9, n. 2, p. 51-65, 2017.

⁸⁰ EVANS, David. The United States-Mexico-Canada agreement: how NAFTA 2.0 represents a New Era in North American trade. *DePaul L. Rev.*, v. 71, p. 831, 2021.

harmonizing with the U.S. approach. This shows that a regional trade agreement can serve as a platform for mutually recognizing and enforcing due diligence goals, thereby reducing the likelihood of trade friction among the parties over those measures. When all parties in an FTA agree to a certain standard (such as banning goods produced with illegal deforestation or high emissions), it alleviates concerns of discrimination because they share the same rulebook.⁸¹

Another aspect of FTA interaction is exceptions clauses in FTAs. Most FTAs incorporate language akin to GATT Article XX to ensure that parties can enact policies for health, environment, or morals without breaching the FTA. Thus, even if a measure raised an issue under an FTA's obligations, the general exceptions (usually copied from GATT XX and GATS XIV) would likely apply. For instance, if an EU FTA partner objected to the EUDR under the FTA, the EU could invoke the FTA's environmental exception (if included) just as it would Article XX in the WTO context. However, FTAs sometimes go further by encouraging cooperation on the very issues that due diligence laws address. The EU's agreements often establish committees or dialogues on forestry, sustainable agriculture, or labor rights, where the parties discuss how to achieve the goals together rather than via unilateral import bans. There is also an emerging idea of using trade agreements to form "clubs" of countries with high standards, e.g., a climate club where members agree on carbon pricing and therefore might trade among themselves with fewer adjustments.⁸² If such cooperative regimes flourish, unilateral measures like CBAM might include exemptions for countries with equivalent climate policies. While that raises its own MFN questions, it illustrates how bilateral/regional arrangements could mitigate tensions: by negotiating mutual recognition of standards, data-sharing in supply chain traceability, or providing aid through FTA mechanisms to help implement new rules.

⁸¹ LEAL-ARCAS, Rafael *et al.* The World Trade Organization and carbon market clubs. *Georgetown Journal of International Law*, v. 52, 2021.

⁸² NORDHAUS, William. Climate clubs: overcoming free-riding in international climate policy. *American Economic Review*, v. 105, n. 4, p. 1339–70, 2015.

6 Impacts on developing countries

For developing countries in the Global South, the rise of mandatory due diligence and transparency requirements in international trade is a double-edged sword. On the one hand, these nations recognize the importance of tackling issues such as deforestation, forced labor, and climate change to ensure sustainable development. On the other hand, they are apprehensive about the practical challenges and potential trade barriers that such due diligence measures may create for their exporters.

Compliance Burdens and Capacity Asymmetries

A primary concern is the compliance burden that stringent due diligence standards place on exporters in developing countries, especially smaller producers. Meeting the complex requirements of Western markets often demands new systems for supply chain traceability, detailed record-keeping, and costly certification or auditing processes.⁸³ Large multinational suppliers may manage these obligations, but many smallholder farmers and small exporters in the Global South struggle to keep up.⁸⁴ These tasks demand technical expertise and infrastructure (such as digital databases, satellite monitoring, or third-party audits) that many developing-country producers lack. This capacity asymmetry means the burden of compliance falls hardest on those least equipped to handle it. Without significant capacity-building support, more negligible suppliers' risk being unable to meet the new standards and, as a result, losing access to lucrative EU and U.S. markets. In effect, well-intentioned regulations could squeeze out disadvantaged producers, cutting them off from global value chains if they cannot afford new documentation systems.

⁸³ ALMEIDA, Thiago Ferreira. Environmental protection or domestic protectionism? the EU deforestation-free regulation and its shift from exporter to importer of foreign capital. In: WESSEL, Ramses A. *et al* (org.). *EU external relations law and sustainability: the eu, third states and international organizations*. The Hague: T.M.C. Asser Press, 2024. p. 167–201. DOI: https://doi.org/10.1007/978-94-6265-655-0_8. Available in: https://link.springer.com/chapter/10.1007/978-94-6265-655-0_8. Access at: Sept. 21, 2025.

⁸⁴ For example, under the EUDR, a coffee cooperative or cocoa farmer may now need to provide precise geolocation coordinates and land-use documents to prove their crop was not grown on recently deforested land. Likewise, under the UFLPA, importers must effectively prove a negative, that their products have no inputs made with forced labor, which requires rigorous mapping and vetting of far-flung supply chains.

ms or hire compliance staff.⁸⁵ Addressing this imbalance through financial aid, technology transfer, or training will be crucial to prevent sustainability standards from unintentionally becoming trade barriers for poorer nations. Recent EU “Omnibus” simplifications and delays, such as the narrowing and postponement of the CSDDD, the CBAM de minimis exemption for small importers, and the delayed application of the EUDR, may soften immediate timelines for some firms, but they do not remove the core structural challenge since exporters must still build traceability, data, and verification capacity to remain competitive in high-standard markets.

Cross-Border Effects and Sovereignty Concerns

A related legal and political issue is the cross-border effects (often described as “extraterritorial”) of these due diligence measures and the concerns they raise about national sovereignty. Many of the new regulations effectively project the importing country’s social and environmental standards onto production processes overseas. From the perspective of developing countries, this can be seen as an infringement on their regulatory sovereignty, their right to set and enforce their own laws within their territory.⁸⁶ This situation raises the specter of “green unilateralism” or even “green protectionism.”⁸⁷ Under the banner of laudable objectives (human rights, environmental protection), these measures could, intentionally or unintentionally, serve

as non-tariff barriers to exports. Genuinely addressing issues like illegal deforestation or forced labor should be done through international agreements or cooperative efforts, not by one-sided import bans.⁸⁸ Proponents of the new laws counter that global challenges (such as climate change or modern slavery) necessitate global responsibility, and if multilateral solutions are slow to emerge, individual jurisdictions are justified in taking action to uphold fundamental values.

Conditions for Fair Implementation

From the perspective of developing countries, ensuring that due diligence regulations truly promote sustainable development (rather than becoming new forms of protectionism) requires fair and inclusive implementation. Support is crucial since developed countries and the international community should assist poorer nations in building the capacity to meet the new standards. This might include financial aid, technical assistance, and technology transfer, for example, funding the development of traceability systems for small farmers, or training programs to help local firms obtain necessary certifications. Such capacity-building can level the playing field, so that compliance is not solely a burden but an achievable goal for producers across different development levels. Underpinning these ideas is the principle of “common but differentiated responsibilities”, borrowed from international environmental law.⁸⁹ This principle suggests that while all countries share a common goal in tackling global problems, the responsibilities and efforts should be differentiated by each country’s capabilities and historical contributions to the problem. Applied to trade due diligence, it means that developed nations should not simply demand equal compliance from a small farmer in Africa as from a large company in Europe without assisting.

⁸⁵ Developing country officials and business groups have voiced concerns that compliance costs, whether for retrofitting factories to lower carbon emissions under CBAM or for hiring experts to navigate human rights due diligence checklists, might crowd out small players. RUMBLE, Olivia; GILDER, Andrew. *WTO review of EU trade policies highlights significant unease about CBAM*. Available in: <https://africanclimatewire.org/2023/06/wto-review-of-eu-trade-policies-highlights-significant-unease-about-cbam/>. Access at: Jan. 2, 2026.

⁸⁶ For example, if the EU prohibits imports of timber or beef produced through any forest clearing, this could penalize producers for permissible actions (and even legally licensed) under the producer country’s own laws. Similarly, the CBAM will apply a carbon price on certain imported goods, essentially requiring foreign manufacturers to account for emissions in line with EU climate policy, even if their home country has no such carbon pricing.

⁸⁷ ALMEIDA, Thiago Ferreira. Environmental protection or domestic protectionism? the EU deforestation-free regulation and its shift from exporter to importer of foreign capital. In: WESSEL, Ramses A. *et al* (org.). *EU external relations law and sustainability: the eu, third states and international organizations*. The Hague: T.M.C. Asser Press, 2024. p. 167–201. DOI: https://doi.org/10.1007/978-94-6265-655-0_8. Available in: https://link.springer.com/chapter/10.1007/978-94-6265-655-0_8. Access at: Sept. 21, 2025.

⁸⁸ MISHCHENKO, I. The changing role of non-preferential origin of goods in world trade: the case of the EU. *Evropský politický a právní diskurz*, v. 11, n. 2, p. 40–50, 2024.

⁸⁹ BESLEY, Timothy; CORD, Louise. Overview ectives. *Washington: World Bank Publications*, 2007. Available in: http://books.google.com/books?hl=en&lr=&id=Dms-vwlZYXkC&oi=fnd&pg=PR5&dq=%22volume+is+a+product+of+the+staff+of+the%22+%22legal+status+of+any+territory+or+the+endorsement+or%22+%22Center+Inc.,+222+Rosewood+Drive,+Danvers,+MA%22+%22&ots=Xm3rKUQZsH&sig=dOst6tDZ4BjmJ0MMt8ob9_1PsYQ. Access at: Feb. 9, 2017.

Developing countries are not merely passive subjects of these new trade rules; they are also formulating strategic responses to mitigate risks and seize opportunities. At the domestic level, many governments in the Global South are using external pressure as momentum for internal reforms.⁹⁰ For instance, a country facing an EU ban on unsustainably sourced wood might strengthen its own forest governance and enforcement of logging regulations, both to maintain access to the EU market and to achieve better environmental outcomes at home. Likewise, concerns about labor-related import restrictions have prompted some nations to update labor laws or invest in eradicating forced labor and child labor domestically. These reforms can improve the country's international image, align with the United Nations Sustainable Development Goals, and help exporters meet foreign requirements. In the long run, such upgrades in regulatory standards can make developing economies more resilient and their exports more competitive, especially as global demand shifts toward ethically-made and low-carbon products.

Another approach is regional coordination among developing countries. Neighbors and trade partners in the Global South can share information and pool resources to handle new compliance demands.⁹¹ By speaking with a unified voice, regional groups can negotiate more effectively with the EU or the U.S., possibly securing better terms, such as more extended transition periods or mutual recognition agreements.⁹² Engagement at the World Trade Organization (WTO) is another pillar of the strategic response. The WTO provides a multilateral forum where countries can discuss and, if necessary, dispute the trade implications of these new measures. In some cases, legal challenges may be pursued; for instance, Indonesia has brought a WTO dispute against EU restrictions linked to sustainability

criteria for palm oil biofuels, arguing that they constitute unjustified discrimination.⁹³ Such cases will test how WTO rules balance trade liberalization with environmental and social objectives.

7 Conclusion

The expansion of transparency obligations from origin documentation and product standards to sustainability-based due diligence marks a structural shift in how trade governance operates. Contemporary regimes increasingly require proof not only that a product is safe and properly classified, but also that it is “clean” in process terms, free of forced labor, disconnected from deforestation, and (in some sectors) priced for its embedded carbon. This shift elevates npr-PPMs from a long-contested doctrinal issue to a routine feature of market access, with compliance burdens that travel upstream to suppliers worldwide. From a WTO law perspective, the analysis supports three conclusions. First, sustainability-driven transparency measures often create prima facie tensions with core disciplines, particularly when like products are treated differently based on production conditions, when documentation requirements produce de facto origin-based disadvantages, or when border restrictions function as quantitative limits in practice. Second, WTO rules nonetheless leave meaningful regulatory space: measures aimed at public morals, conservation, or protection of life and health can be defensible when they are carefully designed, demonstrate a genuine contribution to the stated objective, and are administered in an even-handed manner that avoids arbitrary or unjustifiable discrimination. Third, because many due diligence regimes operate through mandatory information, traceability, and certification requirements, the TBT Agreement's non-discrimination and “not more trade-restrictive than necessary” disciplines become central, placing a premium on calibrated design, risk-based proportionality, procedural fairness, and consideration of less trade-restrictive alternatives. The broader institutional context is also shifting when the entry into force of the WTO Agreement on Fisheries Subsidies in 2025 shows that sustainability can be

⁹⁰ NGUYEN, Nguyen Trinh Thanh. The reform of vietnamese economic institutions under the impact of free trade agreements a case study of the EU and Vietnam free trade agreement. *Közgazdaság: Review of Economic Theory and Policy*, v. 13, n. 3, p. 191–203, 2018.

⁹¹ For example, members of ASEAN or the African Union might collaborate to develop standard guidelines for due diligence that meet international benchmarks and suit local circumstances.

⁹² LONG, Tom. Small States, great power? gaining influence through intrinsic, derivative, and collective power. *International Studies Review*, v. 19, n. 2, p. 185–205, 2017.

⁹³ KINSENG, Rilus A. *et al.* Unraveling disputes between Indonesia and the European Union on Indonesian palm oil: from environmental issues to national dignity. *Sustainability: Science, Practice and Policy*, v. 19, n. 1, p. 2152626, 2023.

written into WTO primary rules, potentially providing a multilateral reference point for calibrating unilateral sustainability-linked measures. At the same time, the continuing Appellate Body impasse limits the system's capacity to deliver appeal-level coherence in high-stakes disputes, increasing legal uncertainty around contested measures such as CBAM.

Equally important are the distributional implications. For many developing-country exporters, especially SMEs and smallholders, the costs of traceability, verification, and reporting can function as a practical barrier to entry, encouraging supplier consolidation and potential trade diversion into lower-standard markets. The article, therefore, argues that legitimacy and effectiveness depend not only on formal WTO-consistency, but also on equity-oriented implementation: phased timelines, technical assistance, interoperable data systems, recognition of equivalent compliance pathways, and genuinely inclusive standard-setting. In this sense, the pathway to reconciling trade with ethical and environmental imperatives is not unilateral escalation alone, but a cooperative framework in which sustainability objectives are pursued without structurally disadvantaging developing economies.

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Reconceptualizing freedom of fishing in the high seas under ecological justice frameworks*

Reconceptualizando a liberdade de pesca no alto-mar à luz dos marcos de justiça ecológica

Irawati**

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Abstract

The freedom of fishing on the high seas, codified in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), was established when fishing technology was rudimentary and relatively uniform. However, contemporary technological advances have fundamentally altered this freedom, creating inequities between nations with advanced capabilities and those without, while threatening marine sustainability. This research analyzes the adequacy of UNCLOS and Regional Fisheries Management Organizations (RFMOs) in addressing equity and sustainability, and proposes reconceptualization through ecological justice principles. Using normative legal research methodology with doctrinal analysis of UNCLOS, RFMO conventions, and ecological justice literature, this study reveals that current frameworks inadequately address intergenerational equity (obligations to future generations), intragenerational equity (fair distribution among present populations), and ecocentric values (intrinsic worth of marine ecosystems). The research contributes to limited scholarship on international fisheries law by demonstrating freedom of fishing's incompatibility with ecological justice and proposing normative commitments for reform grounded in governance rather than unlimited exploitation.

Keywords: the freedom of fishing; high seas; Regional Fisheries Management Organizations (RFMOs); United Nations Convention on the Law of the Sea (UNCLOS); ecological justice.

Resumo

A liberdade de pesca no alto-mar, codificada na Convenção das Nações Unidas sobre o Direito do Mar (CNUDM) de 1982, foi estabelecida em um contexto em que as tecnologias de pesca eram rudimentares e relativamente homogêneas. Contudo, os avanços tecnológicos contemporâneos alteraram fundamentalmente essa liberdade, criando assimetrias entre Estados dotados de capacidades avançadas e aqueles que delas carecem, ao mesmo tempo em que comprometem a sustentabilidade marinha. A presente

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pesquisa analisa a adequação da CNUDM e das Organizações Regionais de Ordenação das Pescas (ORGP) no enfrentamento das exigências de equidade e sustentabilidade, propondo uma reconceitualização à luz dos princípios da justiça ecológica. Utilizando uma metodologia de pesquisa jurídica de caráter normativo, com análise doutrinária da CNUDM, das convenções das ORGP e da literatura sobre justiça ecológica, o estudo demonstra que os marcos atuais são insuficientes para contemplar a equidade intergeracional (obrigações para com as gerações futuras), a equidade intrageracional (distribuição equitativa entre as populações presentes) e os valores ecocêntricos (valor intrínseco dos ecossistemas marinhos). A pesquisa contribui para um campo ainda limitado da doutrina em direito internacional das pescas ao evidenciar a incompatibilidade da liberdade de pesca com os princípios da justiça ecológica, e ao propor compromissos normativos de reforma ancorados em uma lógica de governança, em detrimento de uma exploração ilimitada.

Palavras-chave: liberdade de pesca; alto-mar; Organizações Regionais de Ordenação das Pescas (ORGP); Convenção das Nações Unidas sobre o Direito do Mar (CNUDM); justiça ecológica.

1 Introduction

In the ocean, which covers more than 70% of the earth's area, there are many fish resources, which have long been a very important food source for mankind. The potential for fish is very important, especially in the high seas, because it contains many types of fish that have very high economic value. The high seas are also that are open to all countries, so all countries have an interest.

Freedom of fishing was originated from the dispute between Grotius' *mare liberum* – the high seas open to all nations – and Selden's *mare clausum* – the closed sea. Grotius argued that the high seas are free to all, just like in Roman times where the sea is a common property so that all nations have the right to use it for sailing and fishing without any interference from any party.¹ He put forward two legal concepts about the sea: first, the

sea cannot be controlled by a country by occupation, and second, that fisheries resources cannot be used up (inexhaustible).² The concept of Grotius is put forward by Donald R Rothwell and Tim Stevens as follows:³ "For some reasons the sea is common to all, because it is so limitless that it cannot become a possession of anyone, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries."⁴

This legal concept from Grotius is based on the idea that the sea is a common property and all activities in the sea cannot be prohibited for both sailing and fishing. The crux of Grotius' argument is that things which cannot be reduced to possession or are in an unlimited supply and thus sufficient for general use are in common.⁴ In other words, anything that can be used without harming others is considered a common property, and therefore can be used freely by anyone. At the Middle Ages, the right to fish was implemented liberally did not create problems because Fishing technology capabilities are not as modern as they are now and the capabilities of countries are still relatively the same.⁵

The freedom of fishing on the high seas recognized as a right that applies to all countries, both coastal and landlocked states.⁶ This principle has been accepted since the Middle Ages, until today as freedom protected by international law set in 1982 United Nations Convention on the Law of the Sea (UNCLOS).⁷ However, due to the increasing population and the development of fishing technology nowadays, freedom of fishing as regulated in 1982 UNCLOS does not provide a sense of justice for

² ORREGO VICUÑA, Francisco. *The changing international law of high seas fisheries*. Cambridge: Cambridge University Press, 1999.

³ ROTHWELL, Donald R.; STEPHENS, Tim. *The international law of the sea*. Bloomsbury Publishing, 2010.

⁴ YOUNG, Michaela. Then and now: reappraising freedom of the seas in modern law of the sea. *Ocean Development & International Law*, v. 47, n. 2, p. 165-185, 2016.

⁵ YOUNG, Michaela. Then and now: reappraising freedom of the seas in modern law of the sea. *Ocean Development & International Law*, v. 47, n. 2, p. 165-185, 2016.

⁶ TAHINDRO, André. Conservation and management of transboundary fish stocks: comments in light of the adoption of the 1995 agreement for the conservation and management of straddling fish stocks and highly migratory fish stocks. *Ocean Development & International Law*, v. 28, n. 1, p. 1-58, 1997.

⁷ YOUNG, Michaela. Then and now: reappraising freedom of the seas in modern law of the sea. *Ocean Development & International Law*, v. 47, n. 2, p. 165-185, 2016.

¹ BROWN, E. D. *International law of the sea: introductory manual / The international law of the sea: documents, cases and tables*. Dartmouth Pub Co, 1994.

the international community and does not even guarantee the sustainability to fish on the high seas.⁸

This liberal approach created few problems historically because fishing technology was primitive and relatively uniform across nations.⁹ Whereas contemporary conditions differ fundamentally. Modern industrial fishing employs satellite navigation, fish-finding sonar, large-scale nets, factory trawlers, and vessels operating continuously for months.¹⁰ The Food and Agriculture Organization (FAO) reports that 35.4% of global fish stocks are overfished, with 57.3% fished at maximum sustainable levels.¹¹ Despite 35 Regional Fisheries Management Organizations (RFMOs) established to manage fisheries,¹² overexploitation persists.

Greenpeace's report notes that in the span of 30 years, stocks of Pacific bluefin tuna have collapsed by more than 90 percent.¹³ Furthermore, overfishing at the international level is increasingly widespread.¹⁴ This happens because of the increasing world population supported by the technological capabilities of long-distance fishing countries which enable them to catch any type of fish. The practice of overfishing causes the depletion of fish resources and creates injustice for all states. As to this, it is necessary to have arrangements aimed at maintaining the sustainability of fish resources and promoting justice for all countries.

In the last decade, the competition in the use of living resources in the high seas between developed countries, such as Japan, Korea, America, was increasingly out of control. It raised concerns about the availa-

bility of fish resources, especially straddling fish stocks and highly migratory fish species. For this reason, countries, especially distance fishing countries, proposed a regional fish management organization (RFMO), and currently 35 RFMOs have been formed. RFMOs have a very important role in the management and conservation of living resources in the high seas. They have the authority to conserve, set fish quota, and supervise fishing practices in the high seas. RFMOs as a forum for cooperation, but also as a tool to implement the provisions of the 1982 UNCLOS. However, they cannot implement the provisions of UNCLOS and other resolutions properly, regulate the use of living resources in the high seas, and guarantee the sustainability of natural resources. Even though RFMOs have been formed, over exploitation of fisheries still exists and even expands.¹⁵ This is caused by various reasons, such as the difficulty of law enforcement against countries, especially developed countries that have modern fishing technology. Besides, over exploitation of living resources in the high seas occurs due to lack of management in determining resources management living in the high seas.

In the last decade, there is a criticism on freedom of fishing from several international legal experts, such as Freitas, who stated that freedom to fishing on the high seas could cause injustice.¹⁶ What can be understood from Freitas' criticism is that the principle of freedom of fishing is liberal so that states are free to compete to get the maximum benefits in the high seas which in turn creates injustice. As stated by Donald R Rothwell, currently the management of fish resources in the high seas is a problem in the field of international maritime law which is still a challenge for the international community which is increasingly important to receive attention.¹⁷ The technological capabilities of countries are increasingly disparate between developed and developing countries which finally create injustice.¹⁸

⁸ KIM, Hyung Jung. The return to a mare clausum through regional fisheries management organization? *Ocean Development & International Law*, v. 44, n. 3, 205-218, [n.d.].

⁹ TANAKA, Yoshifumi. *The international law of the sea*. Cambridge: Cambridge University Press, 2019.

¹⁰ FOOD AND AGRICULTURE ORGANIZATION (FAO). *The state of world fisheries and aquaculture: towards blue transformation*. Rome: FAO, 2022.

¹¹ FOOD AND AGRICULTURE ORGANIZATION (FAO). *The state of world fisheries and aquaculture: towards blue transformation*. Rome: FAO, 2022.

¹² FOOD AND AGRICULTURE ORGANIZATION (FAO). *Regional Fisheries Bodies*: FAO fisheries and aquaculture department database. [n.d.]. Available at: <http://www.fao.org/fishery/rfb/em>.

¹³ FONSEGRIVES, Romain. *'Huge' overfishing problem shows need to ratify ocean treaty*: Greenpeace. [n.d.]. Available at: <https://phys.org/news/2023-09-huge-overfishing-problem-ratify-ocean.html>.

¹⁴ SONG, Yann-Huei. The efforts of ICCAT to combat IUU fishing: the roles of Japan and Taiwan in conserving and managing tuna resources. *The International Journal of Marine and Coastal Law*, v. 24, n. 1, p. 101-139, 2009. DOI 10.1163/157180808X353993.

¹⁵ HENRIKSEN, Tore; HOEL, Alf Håkon. Determining allocation: from paper to practice in the distribution of fishing rights between countries. *Ocean Development & International Law*, n. 42, n. 1-2, p. 66-93, 2011.

¹⁶ VIEIRA, Monica Brito. Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's debate on dominion over the seas. *Journal of the History of Ideas*, v. 64, n. 3, p. 361, July 2003. DOI 10.2307/3654231.

¹⁷ ROTHWELL, Donald R.; STEPHENS, Tim. *The international law of the sea*. Bloomsbury Publishing, 2010.

¹⁸ IRAWATI. Model kebijakan pemerintah dalam pengaturan pemanfaatan sumber daya hayati oleh negara asing di wilayah pengelolaan perikanan Indonesia. *Jurnal Hukum Ins Quia Iustum*, v. 20, n. 1,

Based on this background, I argue that the freedom of fishing on the high seas needs to establish a new perspective addressing the development of the international community to be more equitable. I study the freedom of fishing on the high seas from the principles of ecological justice so it can be used as material to find appropriate legal concepts in the management of living resources on the high seas.

2 Literature review and methodology

International fisheries law scholarship has examined UNCLOS frameworks, RFMO effectiveness, and compliance mechanisms.¹⁹ However, most literature adopts technical or managerial approaches without fundamentally questioning freedom of fishing's philosophical foundations.²⁰ Ecological justice theory, developed by scholars like Baxter²¹, Dobson²², and Hilderling²³, emphasizes ecocentrism (recognizing nature's intrinsic value), intergenerational equity, and intragenerational justice. Yet few research have systematically applied ecological justice frameworks to critique freedom of fishing.

This research employs normative legal research using doctrinal analysis. Primary sources include UNCLOS (1982), the UN Fish Stocks Agreement (1995), and RFMO conventions. Secondary sources comprise scholarly literature on international fisheries law and ecological justice theory. The study conducts historical analysis of freedom of fishing's evolution, critical evaluation against ecological justice criteria (intergenerational equity, intragenerational equity, ecocentrism), and normative reconstruction proposing reform principles. The ecological justice framework draws from Western environmental philosophy (Baxter, Dobson, Hilderling, Tremmel), selected for emphasizing ecocentrism, inter-

generational obligations, and applicability to natural resource management.

This Western framework is appropriate for critiquing UNCLOS (itself Western-origin) while acknowledging the need for incorporating diverse cultural perspectives in future research. Data sources include legal texts, FAO reports on fish stocks, and environmental philosophy literature. The research focuses on normative dimensions rather than empirical assessment of fishing practices. These selected approaches share a Western philosophical tradition and have been criticized for potentially neglecting indigenous and non-Western perspectives on human-nature relationships. This limitation is acknowledged; however, given that UNCLOS and the international fisheries law regime are themselves products of predominantly Western legal traditions, engaging with Western ecological justice theory provides appropriate critical leverage for evaluating and reforming these frameworks. Future research should incorporate diverse cultural and philosophical perspectives on marine resource governance.

3 Results and discussions

3.1 The principles of justice in natural resources management

The principle of ecological justice is part of environmental ethics. Etymologically, ethics is the same as the notion of morality which discusses and examines the issue of right and wrong. In this sense, ethics is a critical reflection to determine the right attitude and act as a human being. In today's development, ethics must also be applied to the environment as humans.²⁴ Three theories of environmental ethics include anthropocentrism, biocentrism, and eco-centrism. The current theory of environmental ethics is eco-centrism environmental ethics theory. Ecocentrism extends ethical applicability not only to living things but also to inanimate objects. According to this theory, life is created from the existence of living things and non-living things together in

p. 72-74, 2016.

¹⁹ CHURCHILL, R. R.; LOWE, A. V. *The law of the sea*. Manchester: Manchester University Press, 1999.

²⁰ RAYFUSE, Rosemary. *Non-flag state enforcement in high seas fisheries*. Brill Nijhoff, 2004.

²¹ BAXTER, Brian. *A theory of ecological justice*. London: Routledge, 2004. DOI 10.4324/9780203458495.

²² DOBSON, Andrew. Ecological citizenship and global justice: two paths converging? In: WULFHORST, J. D.; HAUGESTAD, Anne K. (ed.). *Future as fairness ecological justice and global citizenship*. Rodopi, 2004.

²³ HILDERLING, Antoinette. *International law, sustainable development and water management*. Eburon Uitgeverij BV, 2004.

²⁴ MÜLLER, Markus M.; CLAYTON, Susan. Introduction to 'environmental justice'. *Social Justice Research*, v. 26, n. 3, p. 227-230, 2013.

a community. Thus, in an environment all things have their respective values and have equal relations.²⁵

Ecocentrism environmental ethics theory is developed in ecological justice.²⁶ According to Briant Baxter, the environmental ethics theory of eco-centrism is developed in ecological justice, which views all elements in nature as having intrinsic value.²⁷ Thus, the relationship between all living things and non-living things must be equal and promote equal justice.²⁸ Therefore, we argue that assessing justice in the management of fish resources in the high seas cannot be separated from the context of ecological justice.

Ecological justice involves two important aspects: fair distribution of environmental benefits, and environmental justice. Gleeson stated that the relationship between humans in an environment in the context of ecological justice is based on two basic ideas, namely: “the justice of the distribution of environments among peoples, and the justice of the relations between humans and the rest of the natural world”.²⁹ Erika S Jermé and Sarah Wakefield argue that environmental justice is a framework to answer how the distribution of the environment and natural resources should be like and ensure that all parties have the right to live healthy.³⁰ Furthermore, Schlosberg stated that ecological justice is the application of the concept of justice to ecological aspects. Furthermore, he stated that ecological justice involves four aspects, namely distributive justice, participation, recognition, and the ability and function of individuals and communities in managing their environment.³¹

Ecological justice offers normative criteria for assessing environmental governance by emphasizing ethical responsibilities toward nature and society. One of its

central principles is ecocentrism, which recognizes that nature has intrinsic value independent of human use.³² Within this perspective, marine ecosystems and species are regarded as possessing moral standing in their own right rather than being treated merely as exploitable resources. Consequently, fishing activities must be limited by respect for ecosystem integrity and the welfare of marine life. Another key principle is intergenerational justice, which requires present generations to ensure that future generations inherit oceans capable of sustaining diverse marine species and viable fisheries.³³ This obligation entails preserving fish stocks, maintaining ecosystem productivity, preventing irreversible environmental harm, and considering the cumulative long-term effects of exploitation. Ecological justice also incorporates intragenerational justice, emphasizing the fair distribution of resources and opportunities among current populations.³⁴ This includes equitable allocation of fishing rights, inclusive governance that involves diverse stakeholders, and recognition of the distinct values and relationships different communities maintain with marine resources. Finally, the precautionary principle holds that when human activities pose threats of serious environmental harm, the absence of complete scientific certainty should not be used as a reason to delay preventive action, thereby ensuring that environmental protection remains a priority even in conditions of uncertainty.³⁵

In the context of ecological justice, humans play a role as moral responsibility holders for their environment.³⁶ Humans act as ecological creatures to the same degree as other creatures. As an ecological creature, human life will depend on other creatures as environmental citizenship.³⁷ In ecological justice, the environment has rights and values so environmental citizens must enter the political sphere. This means that all environmental communities must be taken into consideration

²⁵ BAXTER, Brian. *A theory of ecological justice*. London: Routledge, 2004. DOI 10.4324/9780203458495.

²⁶ SCHLOSBERG, David. *Defining environmental justice: theories, movements, and nature*. Oxford University Press, 2009.

²⁷ BAXTER, Brian. *A theory of ecological justice*. London: Routledge, 2004. DOI 10.4324/9780203458495.

²⁸ BAXTER, Brian. *A theory of ecological justice*. London: Routledge, 2004. DOI 10.4324/9780203458495.

²⁹ BAXTER, Brian. *A theory of ecological justice*. London: Routledge, 2004. DOI 10.4324/9780203458495.

³⁰ JERMÉ, Erika S.; WAKEFIELD, Sarah. Growing a just arden: environmental justice and the development of a ardent arden policy for Hamilton, Ontario. *Planning Theory & Practice*, v. 14, n. 3, p. 295-314, 2013.

³¹ SCHLOSBERG, David. *Defining environmental justice: theories, movements, and nature*. Oxford University Press, 2009.

³² BAXTER, Brian. *A theory of ecological justice*. London: Routledge, 2004. DOI 10.4324/9780203458495.

³³ TREMMEL, Joerg Chet. *The theory of intergenerational justice*. Earthscan, 2009.

³⁴ AGYEMAN, Julian; EVANS, Bob. ‘Just sustainability’: the emerging discourse of environmental justice in Britain? *Geographical Journal*, v. 170, n. 2, p. 155-164, 2004.

³⁵ UNITED NATIONS. *Rio Declaration on Environment and Development*. 1992.

³⁶ SCHLOSBERG, David. *Defining environmental justice: theories, movements, and nature*. Oxford University Press, 2009.

³⁷ DOBSON, Andrew. Ecological citizenship and global justice: two paths converging? *In: WULFHORST, J. D.; HAUGESTAD, Anne K. (ed.). Future as fairness ecological justice and global citizenship*. Rodopi, 2004.

in determining a policy because elements in the environment have the same rights.³⁸ The concept of ecological justice emphasizes justice for all elements because they have roles and values in life so.³⁹

Justice in the relationship between humans and the universe is also reflected in environmental justice put forward by the Commonwealth of Massachusetts, as follows:⁴⁰ “Environmental justice is the equal protection and meaningful involvement, implementation and enforcement of environmental laws, regulation and policies and the equitable distribution of environmental benefits”.

Environmental justice is related to two things, namely the protection and enforcement of environmental laws and fair distribution of environmental benefits. Related to environmental justice, humans have two important roles as moral agents and moral subjects.⁴¹ In the context of international relations and international law these two roles are played by the state.

In the distribution of justice within the framework of ecological justice, natural resources have three functions: ecological, economic, and social objects. Natural resources are not only protected for their sustainability but can also provide benefits for life. These functions are also reflected in the principles of sustainable development,⁴² which are based on inter-generation and intra-generation equity.⁴³ As economic objects, natural resources must be used efficiently and fairly while as social objects, natural resources can be utilized to meet human needs as a whole. As ecological objects natural resources need to be regulated to protect their availability through various provisions, both international law and national law.⁴⁴ Therefore, the distribution of natural

benefits, including fish resources in the high seas, must be based on the function of natural resources, namely as ecological, economic, and social objects.

In environmental justice, the state has a role as moral agents. In the context of international law, the state holds the responsibility as a subject of international law that has the ability to act and be responsible.⁴⁵ Brian Baxter mentions the role of humans in the environment as human economic actors. In the context of law and international relations this role is held by the state, the state has an obligation and responsibility to protect and preserve the nature.⁴⁶ The principle of ecological justice is formulated into the principle of sustainable development where intra- and inter-generational justice are developed. The principle of sustainable development is a breakthrough in the field of development economics, which aims to minimize ecological risks. The principle of sustainable development has been adopted as part of the principles of international law. The UN has paid serious attention to the issue of ecological risks, calling for efforts to overcome and overcome the decline in the quality of the environment through development strategies that pay attention to environmental aspects. Currently, environmental issues are not a trade restriction and are not an excuse for violating the principles of national treatment and most favored nation. Therefore, products related to natural resources must be labeled as environmentally friendly.

The ethics that apply in the management of the environment and its natural resources are eco-centrism environmental ethics which are formulated in ecological justice which are further elaborated in the principles of sustainable development. Based on various opinions of several experts such as Brian Baxter, Gleeson, and David Schlosberg, the relationship between ecological justice and sustainable development is depicted in Figure 1.⁴⁷

³⁸ CAMARGO, Ximena Sierra. The ecocentric urno f environmental justice in Colombia. *King's Law Journal*, v. 30, n. 2, p. 224-233, 2019.

³⁹ DOBSON, Andrew. Ecological citizenship and global justice: two paths converging? In: WULFHORST, J. D.; HAUGESTAD, Anne K. (ed.). *Future as fairness ecological justice and global citizenship*. Rodopi, 2004.

⁴⁰ AGYEMAN, Julian; EVANS, Bob. 'Just sustainability': the emerging discourse of environmental justice in Britain? *Geographical Journal*, v. 170, n. 2, p. 155-164, 2004.

⁴¹ BAXTER, Brian. *A theory of ecological justice*. London: Routledge, 2004. DOI 10.4324/9780203458495.

⁴² HILDERING, Antoinette. *International law, sustainable development and water management*. Eburon Uitgeverij BV, 2004.

⁴³ HILDERING, Antoinette. *International law, sustainable development and water management*. Eburon Uitgeverij BV, 2004.

⁴⁴ HILDERING, Antoinette. *International law, sustainable development*

and water management. Eburon Uitgeverij BV, 2004.

⁴⁵ HILDERING, Antoinette. *International law, sustainable development and water management*. Eburon Uitgeverij BV, 2004.

⁴⁶ BAXTER, Brian. *A theory of ecological justice*. London: Routledge, 2004. DOI 10.4324/9780203458495.

⁴⁷ IRAWATI. Model kebijakan pemerintah dalam pengaturan pemanfaatan sumber daya hayati oleh negara asing di wilayah pengelolaan perikanan Indonesia. *Jurnal Hukum Ius Quia Iustum*, v. 20, n. 1, p. 72-74, 2016.

Figure 1 - Relationship between ecological justice and the principle of sustainable development

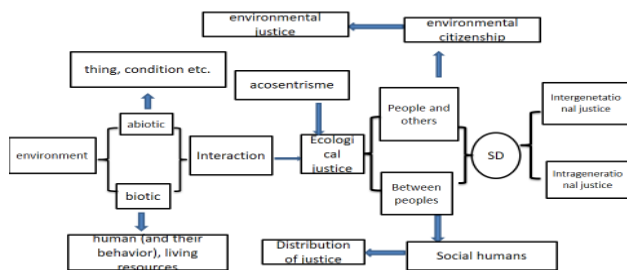


Figure 1 shows the elements that contribute to sustainable development (SD), including the interaction among humans and non-human things and ecological justice, and relationship between ecological justice and sustainable development. As shown in Figure 1, sustainable development is constructed from ecological justice. The principles of sustainable development formulate intra-generation and inter-generation justice.⁴⁸ Intergenerational justice includes ecological and economic sustainability, while intragenerational justice includes social sustainability which includes international and social justice.⁴⁹ Jenifer Elliott stated that the goal of sustainable development is the harmonization of ecological, economic and social goals. Ecological goals are related to environmental productivity and resilience, economic goals are related to efficiency and poverty reduction, and social goals are related to social justice, equity and participation.⁵⁰

3.2 A critique of the principle of freedom to fishing on the high seas from a view of ecological justice

Pound introduced the concept of social engineering which is the central idea of Pound's entire thinking about law.⁵¹ With the concept of social engineering, understanding the law must accommodate the changes that occur in society. In the other word based on Roscoe Pound's theory, good law is law that is in ac-

cordance with the development of society.⁵² All developments that occur in international society, which are influenced by non-judicial aspects such as economic, technological, social, which are increasingly developing in international society must be taken into consideration in establishing rules.

International law has undergone a fairly progressive development following developments in the international community.⁵³ This is proven by the number of various legal principles which constitute a breakthrough aimed at meeting the needs and interests of the international community. International law develops progressively through various state actions which are manifested in the form of international customary law and international treaties.⁵⁴ Anthony D'Amato stated that international law is not a perfect law, but it needs improvement and various changes.⁵⁵ In this regard, I think that the regulation of international maritime law is not yet perfect and requires various changes, especially laws regarding natural resources management. Apart from paying attention to environmental justice, the law of the sea must also pay attention to economic justice and social justice. The development of the international community which is influenced by various non-judicial aspects as well as the heterogeneous conditions of the international community requires the provisions that accommodate these conditions.⁵⁶

The concept of freedom on the high seas, including the freedom to fishing, contains the seeds of liberalism. Freedom to fishing, which was the result of the struggle of *Mare Liberum* supporters, could accommodate the sense of justice of the international community at that time. However, nowadays, the capabilities of countries in fishing technology are increasingly advanced, the population is increasing and the development of countries is also diverse, so fishing in the high seas becomes a problem if it is implemented liberally.

Modern fishing technology has revolutionized marine resource exploitation. Contemporary methods inclu-

⁴⁸ GLOTZBACH, Stefanie. On the notion of ecological justice. *Working Paper Series in Economics*, n. 204, p. 1-24, May 2011.

⁴⁹ TREMMEL, Joerg Chet. *The theory of intergenerational justice*. Earthscan, 2009.

⁵⁰ ELLIOTT, J A. *Na introduction to sustainable development*. New York: Routledge, 2006.

⁵¹ RASJIDI, Lili; THANIA, Ira. *Pengantar filsafat hukum*. Mandar Maju, 2012.

⁵² RASJIDI, Lili; THANIA, Ira. *Pengantar filsafat hukum*. Mandar Maju, 2012.

⁵³ HARRIS, D. J. *Cases and materials on international law*. 6th ed. London: Sweet & Maxwell, 2004.

⁵⁴ D'AMATO, A. A.; ABBASSI, J. *International law today: a handbook*. Thomson/West, 2006. p. 29-30.

⁵⁵ DIXON, Martin. *Textbook on international law*. Oxford: Oxford University Press, 2007.

⁵⁶ HUNTER, D.; SALZMAN, J.; ZAELEKE, D. *International environmental law and policy*. Foundation Press, 2002. p. 181.

de: GPS and satellite communication enabling precise navigation to remote areas; advanced sonar detecting fish at considerable depths; large-scale drift nets extending kilometers; purse seine nets encircling entire schools; bottom trawls operating at extreme depths; factory trawlers with onboard processing; and vessels exceeding 100 meters capable of processing hundreds of tons daily.⁵⁷

Fishing technology distribution is highly unequal. A small number of countries — China, Japan, South Korea, Taiwan, Spain, Russia — operate the majority of industrial high seas vessels.⁵⁸ These «distant water fishing nations» possess technological advantages enabling far more extensive exploitation than nations with limited capacity. Disparities manifest in capital requirements (modern vessels cost tens of millions of dollars), technical expertise, support infrastructure, and research capacity for stock assessment.⁵⁹

This transforms formal legal equality into substantive inequality. While UNCLOS Articles 87 and 116 declare all states have the right to fish on the high seas,⁶⁰ practical ability depends on technological capacity. Nations with advanced fleets can exploit resources extensively; those with traditional methods cannot meaningfully exercise their formal rights. This creates intragenerational Injustice — unequal access to common resources — and contributes to overexploitation, as technologically advanced nations disproportionately deplete stocks that all nations, including future generations, should share.

In the development of modern international law, as stated earlier, the principle of sustainable development has been recognized as a development principle.⁶¹ Antoinette Hilderling states that sustainable development is part of the development of modern international law, which today is not only a concept but has become a

principle that has been widely accepted in the international community.⁶² A just relationship between economic, social and ecological aspects contained in ecological justice, formulated in the principles of sustainable development.

Fish resources in the high seas are open access, can be categorized as a combination of communal ownership (common property) and open access.⁶³ Furthermore, Eric A Posner and Alan O Sykes stated that the high seas are part of the sea intended for all mankind, so no one owns the natural resources contained so they can be enjoyed together (common pool), so they tend to be exploited inefficiently.⁶⁴ This happens because what is produced by natural resources in the long term is not comparable to what is utilized by users.⁶⁵ Therefore, the management of fish resources in the high seas cannot be left to freedom mechanisms, but requires regulations that can take into account all the interests of the state in order to carry out its rights and obligations properly.

Economic justice requires that the environment and its natural resources can be utilized efficiently, so that it is economically sustainable. Based on the economic approach to law, efficiency is the main principle for assessing whether the policies or laws implemented are proportional to the benefits and costs. If the benefits are smaller than the costs, then the law is an inefficient law. Inefficient laws will hinder improving welfare.⁶⁶ Economic sustainability will greatly depend on the sustainability of the environment and its natural resources.

If we look at the management of fish resources in the high seas within the framework of freedom to fishing on the high seas, as regulated in the 1982 Law of the Sea Convention and its provisions for improvements, both hard-law and soft-law, which do not touch economic and social aspects, then intragenerational and intergenerational justice is violated. Limited fish resources are compared to overall human needs, so management of fish resources in the high seas must be efficient.

⁵⁷ FOOD AND AGRICULTURE ORGANIZATION (FAO). *The state of world fisheries and aquaculture: towards blue transformation*. Rome: FAO, 2022.

⁵⁸ FOOD AND AGRICULTURE ORGANIZATION (FAO). *The state of world fisheries and aquaculture: towards blue transformation*. Rome: FAO, 2022.

⁵⁹ PAULY, Daniel; CHRISTENSEN, Villy; GUÉNETTE, Sylvie; PITCHER, Tony J.; SUMAILA, U. Rashid; WALTERS, Carl J.; WATSON, R.; ZELLER, Dirk. Towards sustainability in world fisheries. *Nature*, v. 418, p. 689-695, 2002.

⁶⁰ UNITED NATIONS. *United Nations Convention on the Law of the Sea (UNCLOS)*. [n.d.].

⁶¹ HUNTER, D.; SALZMAN, J.; ZAELKE, D. *International environmental law and policy*. Foundation Press, 2002.

⁶² HILDERING, Antoinette. *International law, sustainable development and water management*. Eburon Uitgeverij BV, 2004.

⁶³ TIETENBERG, Tom; LEWIS, Lynne. *Environmental and natural resources economics*. Scott, Foresman and Company Glevieview, 2006.

⁶⁴ POSNER, Eric A.; SYKES, Alan O. Economic foundation of the law of the sea. *The American Journal of International Law*, v. 104, n. 4, 2010.

⁶⁵ ROTHWELL, Donald R.; STEPHENS, Tim. *The international law of the sea*. Bloomsbury Publishing, 2010.

⁶⁶ ROTHWELL, Donald R.; STEPHENS, Tim. *The international law of the sea*. Bloomsbury Publishing, 2010.

Good law, especially those relating to natural resources, is efficient law, namely law that proportionally integrates 3 aspects of justice, namely environmental justice, economic justice and social justice. The economic approach (the economic account), it can be understood that the law of natural resources management must take into account aspects of efficiency. It has been realized that fisheries as natural resources, although it is natural resources that can renew itself, has limited capacity for self-renewal when compared with technological developments and human consumption needs. On the one hand, technological developments in the fishing sector have resulted in problems with fish resources, thus indirectly causing economic problems.⁶⁷ In this regard, fishing on the high seas as regulated in the 1982 Law of the Sea Convention can no longer be maintained as part of the principle of freedom on the high seas, because it is no longer in accordance with developments occurring in international society, both in the technological and social fields.

Even though freedom to fishing is a traditional right like the right to sail and has become customary international law, the existence of freedom to fish on the high seas is no longer appropriate. This is because the freedom to fish is related to natural resources which are increasingly critical, while other freedoms such as the freedom to sail have no effect on the sustainability of natural resources.⁶⁸ Freedom to fish on the high seas is a matter of customary international law as is freedom of navigation. However, with developments in the international community which pay attention to conservation interests, as well as economic and social aspects, this principle is no longer in accordance with developments occurring in an increasingly dynamic international community.

International law which is based on customary international law can continue to develop. As in the decision of the International Court of Justice regarding the Anglo Norwegian fisheries case, in this case it appears that the rules which constitute customary international law in their implementation can develop. Freedom to

fishing on the high seas can also develop in accordance with developments in various non-judicial aspects. The concept of freedom over natural resources, such as the principle of freedom to fishing on the high seas, means that natural resources may be used by anyone based on free competition. The characteristics of the concept of common property have two meanings, namely, firstly, everyone is free to fish, secondly, in common property there is no distribution or quota, because what applies is the principle of free competition. Humans as rational creatures will try to maximize the benefits they can obtain. In addition, each person will be bound by a system that encourages him to increase the benefits of resources even though those resources are basically limited.⁶⁹

The weakness of the principle of freedom to fish on the high seas is that, on the one hand, conservation of biological resources is the goal, but on the other hand, the governing system and thinking patterns of the system of the principle of freedom to fishing on the high seas do not support the importance of this conservation. Even though in the high seas the state is also obliged to conserve biological resources, especially for highly migratory species, the provisions regarding the principle of freedom to fishing on the high seas as regulated in the 1982 Law of the Sea Convention, contradict the conservation objectives, because of the existing system. Built on this principle, namely free competition, which even contradicts the preamble to the 1982 Law of the Sea Convention itself.⁷⁰

The system, which was built within the framework of freedom to fishing on the high seas, is open access, making it difficult to control fishing, resulting in over-fishing. As stated above, within the framework of freedom to fishing, fish resources on the high seas are a combination of common property and open access, so it will be difficult to control their use. Even though various regulations have been established with the aim of conservation, if the management regulatory framework is based on freedom then conservation is difficult to implement. Therefore, intergenerational justice which emphasizes the importance of sustainability of natural

⁶⁷ AKBARI, Negar; PAN, Haoran; FAILLER, Pierre. The impact of fisheries on the economy: a systematic review on the application of general equilibrium and input-output methods. *Sustainability*, v. 15, n. 7, 2023.

⁶⁸ FRANK, Veronika. *The European Community and marine environmental protection in the international law of the sea*. Martinus Nijhoff Publisher, 2007.

⁶⁹ SUPRIADI; ALIMUDIN. *Hukum perikanan di Indonesia*. Sinar Grafika, 2011.

⁷⁰ See Article 116 dan 117 UNCLOS 1982, among other things, states the rights of countries to catch fish in the high seas and the obligations of countries to carry out conservation. United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 62.

resources, in this case the sustainability of fish resources in the high seas, will be very difficult to realize.

Based on the principle of intragenerational justice which emphasizes justice within a generation to protect and enjoy natural resources, regulations regarding the management of fish resources in the high seas need regulations that can provide protection for the interests of all countries in a balanced manner. This aims to realize the welfare of the international community as a whole. As stated by Anthony Nyong, one of the causes of poverty is the problem of distribution and access to natural resources.⁷¹

Based on justice in the distribution of natural resources, the use of biological resources in the high seas must be seen as the state's right to living resources. Based on states' rights to biological resources in the high seas, all countries, even though they are not economically and technologically capable, have the same right to obtain benefits from biological resources in the high seas.

Based on the concept of ecological justice, there must be justice in the use of nature and justice for natural resources themselves. This can be realized in justice based on ecological justice formulated in the principles of sustainable development. Sustainable development is based on three main pillars, namely ecology, economy and social. These three basic principles of sustainable development must be applied proportionally in the management of fish resources in the high seas.

Freedom of fishing, as it is currently practiced, is fundamentally incompatible with ecological justice because it systematically undermines core principles of intergenerational and intragenerational fairness while remaining anchored in an instrumental view of nature.

First, it potentially violates intergenerational justice by permitting fishing practices that deplete resources that should remain available to future generations. The FAO reports that 35.4% of assessed fish stocks are overfished⁷², illustrating a transfer of natural capital from the future to the present. Beyond stock depletion, fishing harms marine ecosystems through bycatch, habi-

tat destruction such as bottom trawling, and disruption of food webs⁷³, with some consequences potentially irreversible, including species extinctions, loss of genetic diversity, and long-term ecosystem regime shifts.⁷⁴ The inconsistent application of the precautionary principle further compounds this injustice, effectively allowing present generations to gamble with the ecological inheritance of those who come after them.

Second, freedom of fishing potentially violates intragenerational justice because formal equality in access masks profound substantive inequality driven by technological and economic disparities. In particular, quota allocations within RFMOs often privilege historically active participants, thereby rewarding past overexploitation rather than ensuring a fair distribution of opportunities.⁷⁵ As a result, benefits tend to concentrate among powerful states and industrial fleets, while the social and ecological costs, including depleted stocks and lost livelihoods, are borne disproportionately by coastal communities and developing countries.⁷⁶ This inequity is exacerbated by the absence of meaningful benefit-sharing mechanisms in high seas governance, despite frequent references to seabed areas as part of the "common heritage."⁷⁷

Finally, prevailing legal and governance frameworks largely fail to recognize the intrinsic value of marine life and ecosystems, treating fish and ocean environments primarily as resources for human use.⁷⁸ Management regimes commonly prioritize sustainable yield for consumption rather than safeguarding ecosystem health for its own sake, while impacts on non-target species are framed as externalities to be minimized rather than moral harms to be prevented. Fish welfare also receives li-

⁷³ WORM, Boris *et al.* Impacts of biodiversity loss on ocean ecosystem services. *Science*, v. 314, n. 5800, 2006.

⁷⁴ FOLKE, Carl; CARPENTER, Steve; WALKER, Brian; SCHEFFER, Marten; ELMQVIST, Thomas; GUNDERSON, Lance; HOLLING, C. S. Regime shifts, resilience, and biodiversity in ecosystem management. *Annual Review of Ecology, Evolution, and Systematics*, v. 35, n. 314, 2004.

⁷⁵ BAILEY, Megan; ISHIMURA, Gakushi; PAISLEY, Richard; SUMAILA, U. Rashid. Moving beyond catch in allocation approaches for internationally shared fish stocks. *Marine Policy*, v. 40, 2012.

⁷⁶ CAROTHERS, Courtney. Equity and access to fishing rights: exploring the community quota program in the Gulf of Alaska. *Human Organization*, v. 70, n. 3, p. 213-223, 2011.

⁷⁷ UNITED NATIONS. *United Nations Convention on the Law of the Sea (UNCLOS)*. [n.d.].

⁷⁸ DALY, Herman E. Sustainable development: from concept and theory to operational principles. *Population and Development Review*, v. 16, p. 25-43, 1990.

⁷¹ NYONG, Anthony. Resources and environmental security. In: BRAINARD, Lael; CHOLLET, Derek (ed.). *Too poor for peace?* global poverty, conflict, and security in the 21st century. Brookings Institution Press, 2007. p. 75.

⁷² FOOD AND AGRICULTURE ORGANIZATION (FAO). *The state of world fisheries and aquaculture: towards blue transformation*. Rome: FAO, 2022.

mitted attention, even though many fishing methods can cause prolonged suffering.⁷⁹ Taken together, these patterns demonstrate a structural and normative incompatibility between contemporary freedom of fishing and the demands of ecological justice.

3.3 Right of access to fisheries on the high seas

Based on the previous discussion, ecologically just fishing can be framed through widely recognized normative commitments in environmental governance. Ecological sustainability and integrity require fishing to maintain ecosystem health, productivity, and resilience. This can be pursued through ecosystem-based management that considers food webs, high seas marine protected areas, bans on destructive practices, precautionary catch limits, and monitoring of cumulative impacts.⁸⁰

Intergenerational equity requires present generations to leave future generations healthy oceans that can sustain biodiversity and viable fisheries. This implies long-term management horizons, rebuilding depleted stocks, preventing irreversible harm, and giving explicit weight to future interests rather than heavily discounting them.⁸¹

Intragenerational equity and fair access stress that access should not be driven only by historical advantage. It calls for quota reforms beyond past catch levels, preferential opportunities for developing states and small-scale fishers, benefit-sharing arrangements, technical and financial assistance, and meaningful stakeholder participation.⁸²

A precautionary approach requires decisions to favor conservation when science is uncertain.⁸³ It supports catch limits below maximum sustainable yield, restrictions on data-poor stocks until assessment, environmental impact assessments for new practices, clear

trigger points for management action, and a burden of proof on those proposing exploitation.

Recognition of intrinsic value treats marine ecosystems and species as more than inputs for human consumption. It supports welfare considerations in regulation, protection of endangered species regardless of commercial value, and biodiversity protection as a value in itself, including limits that allow ecosystems to flourish. Transparency and accountability require open and participatory governance.⁸⁴ This includes public access to information on stock status, catches, and decisions, oversight mechanisms, civil society involvement, and regular evaluation against ecological justice criteria.

As has been emphasized in Article 87 of the 1982 Law of the Sea Convention, freedom on the high seas must be exercised by taking into account the rights and interests of other countries in exercising the same rights. The freedom to fish on the high seas applies to all countries, whether coastal countries that are geographically disadvantaged or landlocked. Implementation of the utilization of fish resources in the high seas must take into account the interests of countries as a whole regarding their rights. If we look at the rights of these countries from the principle of ecological justice, they include the fair distribution of natural benefits. Utilization of fish resources in the high seas apart from paying attention to the rights and obligations of other countries regarding their rights in the high seas, today it has been recognized that the living environment also has value, even inanimate or abiotic objects also have value.

Ecological justice requires reframing freedom of fishing as responsibility of governance. Rather than «What rights do we have to fish?», the question becomes «How can we manage marine resources responsibly to ensure sustainability, equity, and respect for intrinsic value?» Governance entails recognizing marine resources as trust held for future generations and the ecological community, prioritizing conservation over short-term catch, accepting limits based on ecological capacity, and viewing fishing as conditional privilege rather than unlimited right.⁸⁵

As stated earlier, natural resources are assets needed by all nations. In the context of ecological justice, na-

⁷⁹ BRAITHWAITE, Victoria. *Do fish feel pain?* Oxford: Oxford University Press, 2010. Victoria Braithwaite, *Do Fish Feel Pain?* (Oxford University Press, 2010).

⁸⁰ PIKITCH, E. K. *et al.* Ecosystem-based fishery management. *Science*, v. 305, n. 5682, 2004.

⁸¹ TREMMEL, Joerg Chet. *The theory of intergenerational justice.* Earthscan, 2009.

⁸² AGYEMAN, Julian; EVANS, Bob. 'Just sustainability': the emerging discourse of environmental justice in Britain? *Geographical Journal*, v. 170, n. 2, p. 155-164, 2004.

⁸³ DOMMEN, Caroline. Raising human rights concerns in the World Trade Organization. *Human Rights Quarterly*, v. 24, n. 1, 2002.

⁸⁴ BAXTER, Brian. *A theory of ecological justice.* London: Routledge, 2004. DOI 10.4324/9780203458495.

⁸⁵ HILDERING, Antoinette. *International law, sustainable development and water management.* Eburon Uitgeverij BV, 2004.

tural resources including fish have functions as ecological, economic and social objects. The distribution of fish resources in the high seas must be based on these approaches: the economic approach emphasizes natural resources must be used efficiently; the social aspects of these natural resources must be able to pay attention to participation and equity; and the ecological approach that natural resources must be considered for their sustainability.

Ecological justice in the management of fish on the high seas in the from the distribution of justice shows an equitable relationship among countries in obtaining benefits from biological resources in the high seas.⁸⁶ The distribution of justice here means fair distribution of the benefits of nature. However, the distribution of justice for the benefits of fish resources in the high seas must be carried out in the framework of ecological justice. This means that the distribution of justice implemented among countries must be carried out with due regard to environmental justice based on the interests of the environment and natural resources for sustainability.

In the context of international relations and law, the moral responsibility for managing the environment and its natural resources is held by the state. The state has the ability to act and is responsible for managing the environment and its natural resources so that it is just, both justice between countries in utilizing nature (distributive justice of environmental benefits) and justice towards the environment itself (environmental justice). In other words, the state is obliged to manage natural resources with the aim of justice for all environmental residents.

Countries as international subjects in international society have various differences, so their treatment cannot be generalized. Laws related to natural resources must be established in addition to paying attention to ecological justice, they must also take into account the context of a heterogeneous international society. Heterogeneous in several ways, among others, apart from advances in fishing technology owned by countries, countries are also heterogeneous, it is also necessary to pay attention to the existence of countries with coasts and landlocked, countries which are geographically disadvantaged. Law plays a role so that all interests of

countries that have differences with each other can be accommodated based on the inherent rights of each country (right based weight). The role of law provides guarantees that all members of the heterogeneous international community can carry out their rights and obligations properly. Provisions for managing fish resources in the high seas, within the framework of access rights to fisheries in the high seas, will better accommodate all interests. Based on state access rights to fish in the high seas, all countries have the right to obtain proportional fisheries quotas, namely those based on the different circumstances of each country and have obligations in accordance with their rights.

Regulation of fisheries quotas, taking into account ecological, social and economic aspects and paying attention to the function of natural resources as ecological objects, economic objects and social objects. This is based on natural resources which have this function, so the distribution must also be based on the function of natural resources. From social and economic aspects such as the efficiency of natural use, the economic condition of the country concerned in terms of GNP, population, geographical conditions of the country concerned (coastal countries, countries without coasts, countries that are geographically disadvantaged). Apart from that, what must also be taken into consideration is the ecological aspect, regarding the sustainability of natural resources, this requires accurate fisheries data. This is very important so that all interests, both the state's interest in the benefits of fish resources in the high seas, and the interests of the fish resources themselves to be sustainable can be accommodated. As stated by Mark Sagoff, the distribution of economic resources must be based on the welfare economic theory. Welfare economic theory emphasizes that the distribution of economic resources is based on various aspects, namely moral, cultural and ethical, so that it can maintain social and economic stability.⁸⁷

In terms of the function of natural resources as economic and social objects, it should be noted that countries have differences in terms of economy, natural resources, geographical conditions, capabilities in science and technology, and so on. Therefore, cooperation in the form of agreements needs to exist to accommodate differences and interests of each. This agreement

⁸⁶ CAROTHERS, Courtney. Equity and access to fishing rights: exploring the community quota program in the Gulf of Alaska. *Human Organization*, v. 70, n. 3, p. 213-223, 2011.

⁸⁷ SAGOFF, Mark. *The economy of the Earth: philosophy, law, and the environment*. Cambridge University Press, 2008.

must be based on fair justice. International law is built on the consensus of the international community. All countries have the inherent rights and obligations of being a sovereign state. With regard to fair distribution of the benefits of nature, contractual justice which is based on an agreement can guarantee the interests of all parties. In the context of cooperation between countries in managing fish resources in the high seas, the relationship among states must be equal and respect each other as sovereign states. In this context, the provisions on the management of fish resources in the high seas must be built from an agreement between countries and must respect all parties to exercise the same rights and obligations. Therefore, the agreement must be based on the inherent rights of states. The differences that exist between countries must be resolved by means of agreements which aim to make each party obtain its rights and carry out its obligations.

Economic and social justice is very important in natural resources management because it relates to rights. Therefore, regulations that can optimally distribute natural resources based on ecological and economic considerations are needed.⁸⁸ International fisheries laws and the 1982 UNCLOS do not regulate distribution of justice on the resources, but only require countries to establish an RFMO. RFMO has a jurisdiction in certain regions on the high seas, so that the high seas are divided within the jurisdiction of the RFMO. It has the duty, authority and responsibility of implementing conservation within its jurisdiction by setting fisheries quotas for its members. However, there is no regulation regarding the determination of these quotas and thus causing injustice. The RFMO determines fisheries quotas for countries without a provision as a legal basis. The determination of fisheries quotas is related to social justice and economic justice in the management of natural resources in the high seas. Therefore, the authors argue that international fisheries law needs to be refined, including by setting regulations on fisheries quotas.

All countries have the right to utilize fishery resources on the high seas through their membership in the RFMO. In fact, many of these countries have become members of various RFMOs so that they can fish in

various regions of the high seas in accordance with the jurisdiction of the RFMO. The formation of RFMOs in various regions does not eliminate free competition in fishing in the high seas, even the competition is uncontrollable. This damage the sustainability of fishery resources and creates injustice. The authors argue that fishing regulation in the high seas needs to be built in a new legal framework in accordance with the development of the international community and ecological justice. In addition, it is necessary to regulate the establishment of global quotas and fisheries management institutions in the high seas, such as mineral resources management managed by the Seabed Authority – a global body under the United Nations which has the authority to manage mineral resources in the seabed area outside of national jurisdiction. The purpose of establishing this agency is so that natural resources can be used equitably. Therefore, an agency that manages the high seas also needs to be established because the legal position of the high seas is part of the sea owned by the entire nation.

4 Conclusion

This research has examined the principle of freedom of fishing on the high seas through the lens of ecological justice, revealing fundamental incompatibilities between current law and practice on one hand, and principles of sustainability, equity, and respect for nature on the other. Technological advancement has created substantive inequality from formal legal equality, with advanced nations exploiting resources extensively while others cannot meaningfully exercise rights. Despite UNCLOS, UNFSA, and 35 RFMOs, overexploitation persists. Current frameworks inadequately address enforcement, equitable allocation, diverse representation, and ecosystem intrinsic value. Freedom of fishing potentially violates intergenerational justice (depleting resources for future generations), intragenerational justice (unequal access among present populations), and fails to recognize marine life's intrinsic value. From the perspective of ecological justice, management of fish resources can be implemented based on access rights to fisheries, which views fisheries in the high seas as ecological, economic and social objects. Based on access rights to fisheries, fish resources in the high seas are not

⁸⁸ DALY, Herman E. Sustainable development: from concept and theory to operational principles. *Population and Development Review*, v. 16, p. 25-43, 1990.

categorized as a combination of communal ownership (common property) and open access.

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Coordinating conflicts between environmental standards and trade competition through legal mechanisms: transplanting EU initiatives into Vietnam's framework

Coordenação de conflitos entre normas ambientais e a concorrência comercial por meio de mecanismos jurídicos: transplante de iniciativas da União Europeia para o arcabouço jurídico do Vietnã

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Coordenação de conflitos entre normas ambientais e a concorrência comercial por meio de mecanismos jurídicos: transplante de iniciativas da União Europeia para o arcabouço jurídico do Vietnã

Linh Nguyen Huu Khanh**

Abstract

The interaction between environmental standards and trade competition has emerged as one of the most pressing legal issues in the context of next-generation free trade agreements (FTAs). While environmental regulation seeks to safeguard ecological sustainability through binding technical requirements, trade law prioritizes market liberalization and the principle of non-discrimination. Tensions surface when environmental measures are perceived as disguised restrictions on trade or create uneven compliance burdens for foreign producers. The European Union (EU), through instruments such as the Emissions Trading System (ETS), the Carbon Border Adjustment Mechanism (CBAM), and the 2022 Guidelines on State Aid for Climate, Environmental Protection and Energy (CEEAG), has constructed an integrated model in which environmental protection is mainstreamed across trade and competition policy. According to 11 of the Treaty on the Functioning of the European Union, environmental intergration has been recognized as a core principle so that environmental protection serves as a prerequisites for the legitimacy of EU trade measures. Against this background, the paper evaluates Vietnam's legal framework in light of its participation in agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the EU-Vietnam Free Trade Agreement (EVFTA), where environmental provisions though often soft-law in form, carry significant implications for domestic legislation and enforcement capacity. The fragmentation of Vietnam's legal system and the lack of an inter-ministerial coordination body have resulted in inconsistencies that harm environmental governance and compliance with international trade commitments. Accordingly, the EU's CBAM poses significant challenges, requiring accurate emissions data from supply chains. Currently, Vietnam does not have the systems to meet these requirements effectively. Under such circumstances, a hybrid legal model could be ideal for Vietnam, in which the policy makers consider transplanting the selective EU

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instruments into several domestic pieces of legislation. In particular, it is vital to harmonize trade, investment, and environmental regulations, integrating the carbon traceability and green procurement practices into legally binding rules and establishing a National Council on Green Trade Governance. These initiatives are designed to transform regulatory discrepancies into sustainable development catalysts, thereby enhancing global competitiveness and adherence to environmental standards.

Keywords: conflict management; environmental standards; trade competition; legal harmonization; EU law; coordination mechanism.

Resumo

A interação entre normas ambientais e a concorrência comercial emergiu como uma das questões jurídicas mais prementes no contexto dos acordos de livre comércio de nova geração (FTAs). Enquanto a regulação ambiental visa salvaguardar a sustentabilidade ecológica por meio de requisitos técnicos vinculantes, o direito do comércio internacional privilegia a liberalização dos mercados e o princípio da não discriminação. Tensões surgem quando medidas ambientais são percebidas como restrições disfarçadas ao comércio ou quando criam encargos de conformidade desiguais para produtores estrangeiros. A União Europeia, por meio de instrumentos como o Sistema de Comércio de Emissões (ETS), o Mecanismo de Ajuste de Carbono na Fronteira (CBAM) e as Diretrizes de 2022 sobre Auxílios Estatais para o Clima, Proteção Ambiental e Energia (CEEAG), construiu um modelo integrado no qual a proteção ambiental é transversal às políticas comercial e de concorrência. Nos termos do artigo 11 do Tratado sobre o Funcionamento da União Europeia, a integração ambiental é reconhecida como um princípio fundamental, de modo que a proteção do meio ambiente constitui um requisito para a legitimidade das medidas comerciais da União. Nesse contexto, o artigo avalia o quadro jurídico do Vietnã à luz de sua participação em acordos como o Acordo Abrangente e Progressivo para a Parceria Transpácífica (CPTPP) e o Acordo de Livre Comércio União Europeia–Vietnã (EVFTA), nos quais as disposições ambientais, embora frequentemente qualificadas como *soft law*, produzem implicações significativas para a legislação doméstica e para a capacidade de implementação. A fragmentação do sistema jurídico

vietnamita e a ausência de um órgão de coordenação interministerial têm gerado inconsistências que comprometem a governança ambiental e o cumprimento das obrigações comerciais internacionais. Ademais, o CBAM da União Europeia impõe desafios substanciais, exigindo dados precisos de emissões ao longo das cadeias de abastecimento. Atualmente, o Vietnã não dispõe de sistemas capazes de atender eficazmente a tais exigências. Diante desse cenário, um modelo jurídico híbrido revela-se adequado, no qual os formuladores de políticas considerem o transplante seletivo de instrumentos europeus para diferentes diplomas normativos internos. Em particular, mostra-se essencial harmonizar as regulações relativas ao comércio, ao investimento e ao meio ambiente, integrando mecanismos de rastreabilidade de carbono e práticas de compras públicas verdes em normas juridicamente vinculantes, bem como instituir um Conselho Nacional de Governança do Comércio Verde. Tais iniciativas visam transformar as discrepâncias regulatórias em vetores de desenvolvimento sustentável, fortalecendo, assim, a competitividade global e a conformidade com padrões ambientais.

Palavras-chave: gestão de conflitos; normas ambientais; concorrência comercial; harmonização jurídica; direito da União Europeia; mecanismos de coordenação.

1 Introduction

Alongside a global shift toward sustainable development, the environmental rules have been increasingly integrated into the next-generation FTAs. As a result, the challenges regarding the responsibilities of state coordination emerged, notably in developing countries. This paper will explore two significant questions: (i) How can legal systems mediate constraints between environmental rules and trade competition? and (ii) How to design a hybrid legal model to green the rules of free market economies based on a comparison between the EU and Vietnamese legal systems.

The authors adopt comparative legal analysis for identifying divergences and emerging convergences among FTAs. The comparison is carried out along three dimensions: horizontally across agreements such as CPTPP, EVFTA, RCEP, and USMCA to discern models of environmental chapter design; vertically - between international commitments undertaken in FTAs and the

domestic legal system of Viet Nam, to evaluate levels of consistency and challenges in the process of incorporation; and normatively through the assessment of regulatory techniques adopted to balance liberalization and sustainability. This methodological choice is grounded in international scholarship, which recognizes comparative analysis as a predominant tool in trade-and-environment law, beneficial for identifying the models of “trade for sustainable development” and the modalities of cross-sectoral legal coordination.

2 Theoretical framework for coordinating conflicts between environmental standards and trade competition through legal mechanisms

2.1 The nature of the conflict between environmental standards and trade competition

Environmental protection and trade liberalization represent critical paradigms that contribute to realizing sustainable development, a multifaceted goal aiming to balance economic growth, environmental care, and social fairness. Sustainable development requires a balanced approach that fosters economic advancement while ensuring ecological integrity and fair treatment of all stakeholders.

Environmental protection and trade liberalization can be synergistic, provided that appropriate regulatory frameworks are established. However, in practice, tensions often emerge between these two domains. Such conflicts may arise from divergent national priorities, varying degrees of regulatory intervention, or asynchronous policy implementation timelines among trading partners. Disputes frequently stem from perceptions that newly instituted environmental regulations impose unjust trade restrictions or preferential treatment for domestic over foreign products. For instance, if a jurisdiction implements stringent standards regarding product quality, greenhouse gas emissions, or sustainability certifications, it may inadvertently create competitive disadvantages for its trade partners that lack the infrastructure or capability to comply with the

se requirements. This situation can lead to allegations of non-compliance with international trade agreements, particularly those stipulating equitable treatment and non-discrimination.¹

At the national level, conflicts often manifest as legal fragmentation² - the coexistence of parallel yet uncoordinated sectoral legal systems, including environmental law, trade law, investment law, and corporate law. Instead of integrated and cross-referenced provisions aligned toward the goal of sustainable development, these systems frequently operate without effective intersectoral coordination mechanisms and lack a unified strategic vision.

Inconsistency and disconnect within environmental policy frameworks diminish the efficacy of implementation and heighten the risk of non-compliance with international obligations. This scenario burdens enterprises with complex legal requirements and complicates adherence to sustainable commitments at the global level.

The challenges are particularly pronounced in next-generation FTAs, where sustainable development commitments are categorized as “soft law.” Despite this legal characterization, they significantly shape national legal systems. Agreements such as the EVFTA, the CPTPP, and the UKVFTA incorporate dedicated environmental chapters. These provisions mandate member states to uphold their environmental standards rather than compromise them to attract foreign investment or enhance export capabilities, potentially leading to friction with domestic economic policies designed to support local industries.

2.2 The concept of coordinating conflicts between environmental standards and trade competition

In an era marked by advanced development and global interconnectivity, countries are increasingly compelled to balance economic growth with stringent demands for environmental sustainability. While both goals are inherently aligned towards achieving sustainable deve-

¹ SASMAL, S. *New approaches and challenges regarding trade, climate action, and the WTO*. New York: Columbia Center on Sustainable Investment (CCSI), 2024. p. 12–13.

² KOSKENNIEMI, M. *Report of the study group of the ILC, A/CN.4/L.682*. Apr. 2006. Available at: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf. Access on: 2 Aug. 2025.

lopment, they frequently generate conflicts in legal enforcement and policymaking at the national level. These conflicts can manifest within domestic legal frameworks and between national statutes and international obligations, especially in the context of next-generation FTAs that increasingly encompass provisions related to sustainable development, environmental protection, climate change initiatives, and corporate social responsibility.³

An essential component of coordinating conflicts between environmental standards and trade competition is the application of comparative law as an effective tool to identify similarities or differences and to formulate appropriate legal recommendations in the context of legal harmonization and integration.⁴ Among the methods of comparative law, the functional method allows for assessing the suitability of adopting foreign legal models based on their regulatory functions rather than merely on the textual content of the legislation.⁵ As Alan Watson has pointed out, the transfer of law between legal systems can be effective, provided that the receiving institutions possess sufficient capacity to absorb and adapt it in accordance with endogenous conditions.⁶ To manage conflicts effectively, the comparison of legal systems serves as an important tool.⁷ Such comparison not only helps identify the strengths and limitations of each system but also enables countries to find optimal solutions for resolving legal conflicts.

As a result, effectively navigating the conflicts between environmental regulations and trade competition through legal frameworks involves intricate legislative technicalities and a comprehensive and systematic legal analysis. In this context, by harmoniously combining selective legal adoption, the development of a flexible legal framework, and the establishment of effective coordination mechanisms among regulations, Vietnam can fully transform challenges into driving forces-moving

toward the creation of a proactive and sustainable conflict management model.

2.3 Environmental standards and trade competition from a legal perspective

Environmental standards⁸ are regulatory frameworks designed to mitigate adverse environmental impacts from production and consumption processes. These standards consist of precise legal stipulations, typically of a binding character, that delineate acceptable thresholds or technical criteria applicable to the actions of governments, corporations, or individuals. Their primary objective is to preemptively address, regulate, and diminish detrimental effects on the ecosystem, ensuring compliance with ecological conservation principles. According to the OECD, environmental standards encompass various forms, such as emission limits, requirements for the adoption of clean technologies, product standards linked to carbon traceability or eco-labeling, and obligations for environmental reporting and monitoring throughout the entire supply chain.⁹ The World Trade Organization (WTO) considers these standards to be part of “Technical Barriers to Trade” (TBT), which are governed by the TBT Agreement within the WTO legal framework.¹⁰ Accordingly, for environmental standards to be recognized as legitimate in international trade, they must meet the requirements of non-discrimination, be based on scientific evidence, and avoid creating unnecessary barriers to trade.

These standards are typically grounded in scientific evidence, empirical data, and technical criteria to ensure both effectiveness and feasibility in implementation. According to the OECD, they include: (i) emission limits; (ii) mandatory clean technologies; (iii) product

³ COTTIER, T.; DELIMATISIS, P. *The prospects of international trade regulation in the era of sustainable development*. Cambridge: Cambridge University Press, 2011. p. 17–22.

⁴ LE XUAN, T. Applying the comparative method in legal science research: some issues to ponder. *Journal of Legislative Studies*, v. 12, n. 396, p. 68–76, 2021.

⁵ MICHAELS, R. The functional method of comparative law. In: REIMANN, M.; ZIMMERMANN, R. (eds). *The Oxford handbook of comparative law*. Oxford: Oxford University Press, 2005. p. 339–382.

⁶ WATSON, A. *Legal transplants: an approach to comparative law*. 2. ed. Georgia: University of Georgia Press, 1993. p. 21–23.

⁷ HOAN, N. Q. *Comparative law textbook*. Ho Chi Minh City: People's Police Publishing House, 2017. p. 43–45.

⁸ The term “environmental standards” is derived from the term “Rule-setting” as “rule-setting” are specific and often legally binding obligations imposed on states, industries or individuals to prevent environmental damage, often based on scientific and technical criteria”. See: COX. Environmental regulation and international trade. *International Environmental Law Review*, p. 213, 2004. See also: SANDS, P. et al. *Principles of international environmental law*. 4. ed. Cambridge: Cambridge University Press, 2018. pt 2.

⁹ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Environmental requirements and market access*. 2011. Available at: <https://www.oecd.org/env/ehs/non-tariff-measures.htm> Access on: 1 Aug. 2025.

¹⁰ WORLD TRADE ORGANIZATION. *Agreement on technical barriers to trade (TBT)*. 1995 Available at: https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf Access on: 1 Aug. 2025.

standards such as carbon traceability or eco-labeling; and (iv) obligations for transparency, environmental reporting, and monitoring throughout the entire supply chain.¹¹ In the context of integration, these standards have become binding components of FTAs such as the EVFTA, CPTPP, UKVFTA, and USMCA, in the form of sustainable development provisions and environmental obligations.

Trade competitiveness refers to the capacity of a nation or enterprise to efficiently produce and export goods and services that satisfy international market requirements regarding quality, pricing, and standards, all while maintaining or expanding its global market presence. This competitiveness is regulated by domestic competition statutes and core WTO principles, including trade liberalization, anti-dumping regulations, subsidy oversight, and the Most-Favoured Nation principle.¹² As globalization progresses and free trade commitments expand, trade competition law increasingly intersects with so-called “non-traditional” issues, such as environmental standards, labor rights, and sustainable development practices.¹³

The interplay between environmental regulations and trade competitiveness can be synergistic and contentious. On one side, robust environmental standards can drive the transition toward sustainable business practices and enhance long-term competitive advantage. Conversely, poorly conceived or executed standards can be construed as technical barriers to trade, violating the tenets of international free trade. For instance, if a country mandates that imported goods possess carbon certifications or eco-labels without offering adequate technical support to exporting nations, it could lead to discriminatory practices and potential trade conflicts. Consequently, legal frameworks must be adeptly designed to create standards that fulfill environmental protection mandates while ensuring equity and transparency in global trade negotiations and practices.¹⁴

¹¹ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Environmental performance reviews: key environmental indicators*. Paris: OECD Publishing, 2020. p. 8–14.

¹² MATSUSHITA, M.; SCHOENBAUM, T. J.; MAVROIDIS, P. C.; HAHN, M. *The world trade organization: law, practice, and policy*. 3. ed. Oxford: Oxford University Press, 2015. p. 548–557.

¹³ EUROPEAN COMMISSION. Trade and Sustainable Development (TSD). *Chapters in EU Free Trade Agreements*. 2020. Available at: <https://policy.trade.ec.europa.eu/> Access on: 1 Aug. 2025.

¹⁴ BONSI, R.; HAMMETT, A. L.; SMITH, R. Eco-labels and international trade: problems and solutions. *Journal of World Trade*, v. 42, n. 3, p. 407, 2008.

3 The EU's model for coordinating conflicts between environmental standards and trade competition

3.1 Integration of environmental standards into European Union law

The EU has crafted a unique regulatory and institutional coordination framework to align environmental objectives with international trade imperatives. Emphasizing sustainable development while maintaining fair competition, the EU has implemented a cohesive legal architecture and multi-tiered coordination mechanisms to effectively reconcile the tensions between rigorous environmental standards and trade liberalization principles. This framework is anchored in foundational legal principles such as the rule of law, proportionality, and transparency, facilitating a balanced approach to policymaking in environmental protection and trade relations.¹⁵

Environmental integration is explicitly recognized and made legally binding under Article 11 of the Treaty on the Functioning of the European Union (TFEU), which provides: “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.” The EU Charter of Fundamental Rights and cross-sectoral initiatives such as the European Green Deal significantly support the integration of environmental considerations within EU policy frameworks. Notably, Article 11 of the Treaty on the Functioning of the European Union (TFEU) mandates the inclusion of environmental protection criteria in all EU policies and activities, encompassing areas like trade and competition, to foster sustainable development.¹⁶ This provision embodies the “mainstreaming” approach¹⁷ prevalent in EU jurisprudence, signifying that environmental protection is no longer relegated to a secondary

¹⁵ ARIAS, C.; VARELA-ALDÁS, J. Sustainable development as a transformative axis of the European Union’s trade policy. *Sustainability*, v. 17, n. 15, p. 7151, 2025.

¹⁶ JORDAN, A.; LENSCHOW, A. Environmental policy integration: a state of the art review. *Environmental Policy and Governance*, v. 20, n. 3, p. 147, May 2010.

¹⁷ This is the principle of horizontal environmental integration.

status but is considered a fundamental prerequisite for the legitimacy of trade policy.¹⁸

To operationalize the integration of environmental standards into the fields of trade and investment, the EU has developed a comprehensive set of legal instruments, encompassing market-based mechanisms, border adjustment measures, and green finance support schemes. Three key instruments exemplify the EU's multi-layered regulatory framework and methodology for reconciling environmental and trade priorities, highlighting its systemic legal strategy to foster a sustainable internal market. These include:

First, the EU Emissions Trading System (ETS) which is the world's largest greenhouse gas emissions trading scheme, operates as a market-based mechanism built on the cap-and-trade principle.¹⁹ The EU Emissions Trading System sets an overall emission cap for the entire region²⁰, allocates or auctions emission allowances to businesses and permits the trading of these allowances on the market. In the EU ETS, the "emission cap" refers to the total volume of GHG²¹ emissions allowed within the EU for each trading period, codified in EU directives. This is a system-level emission control instrument that facilitates the creation of a market for trading allowances, thereby achieving environmental objectives in a cost-effective manner. In essence, the EU ETS is not only an environmental protection tool but also a financial-commercial regulatory institution²², generates a carbon price signal to influence corporate behavior in a cost-effective manner.²³ Businesses can

trade these allowances on the market to optimize compliance costs. A key characteristic of the EU Emissions Trading System (EU ETS) is its capability to convert environmental obligations into financial instruments, facilitating not only the attainment of emission reduction targets but also influencing market dynamics in a streamlined and transparent fashion. This framework exemplifies the effective use of regulatory mechanisms to align environmental priorities with market objectives through carbon pricing signals. Currently, the EU ETS is operating within its fourth phase (2021–2030), aiming for a minimum 62% reduction in emissions by 2030 compared to 2005.²⁴ This system's distinctive feature lies in its role as a regulatory tool that enhances market behavior regulation by transforming environmental commitments into tradable commodities.

Second, the Carbon Border Adjustment Mechanism (CBAM). The EU has designed CBAM as an environmental regulatory safeguard²⁵, to address the phenomenon of "carbon leakage".²⁶ The proposed mechanism mandates that imported goods from nations lacking equivalent environmental standards undergo a financial adjustment reflecting their embedded carbon emissions. The CBAM serves not only as a tool for environmental protection but also as a pivotal mechanism for ensuring competitive equity in international trade, promoting a level playing field among domestic and foreign producers.²⁷ Under this mechanism, imported products such as steel, cement, aluminum, fertilizers, and electricity must declare their embedded carbon emissions and are subject to a corresponding financial adjustment if they do not meet standards equivalent to those of the EU ETS. CBAM thus serves both as an environmental protection measure and as a means of maintaining fairness in international competition, ensuring the principle of a "level playing field".²⁸ At the same time, the EU has de-

¹⁸ PAUWELYN, J. *International trade and environmental regulation*. Cambridge: Cambridge University Press, 2006. p.143.

¹⁹ "Cap-and-trade" is a combined legal-economic mechanism that helps turn environmental protection goals into cost-effective business practices, creating a more dynamic, flexible and efficient carbon market than rigid administrative measures. The "cap-and-trade" principle is institutionalized in the EU Directive 2003/87/EC, Article 17 of the Kyoto Protocol, and domestic laws of many countries such as the US and China.

²⁰ EUROPEAN UNION. Directive (EU) 2018/410 amending Directive 2003/87/EC [2018] OJ L76. *Official Journal of the European Union*, Mar. 2018.

²¹ Total greenhouse gas emissions (GHG emissions) are the total mass of greenhouse gases emitted into the atmosphere from natural and human activities over a given period of time, usually calculated annually and converted to standard units of tonnes of CO₂ equivalent (tCO₂-eq).

²² EUROPEAN UNION. Regulation (EU) 2023/956 establishing a carbon border adjustment mechanism, recital 12. May 2023. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32023R0956> Access on: 15 July 2025

²³ ELLERMAN, D. *Emission trading in the European Union*. Cam-

bridge: Cambridge University Press, 2008. p. 67–95.

²⁴ EUROPEAN COMMISSION. *EU Emissions Trading System (EU ETS)*. Available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en Access on: 2 Aug. 2025.

²⁵ VAN ASSELT, H.; MEHLING, M. Trade and climate change: towards a legal framework for border carbon adjustments. *European Journal of International Law*, v. 29, n. 2, p. 411–436, 2018.

²⁶ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Aligning policies for a low-carbon economy*. Paris: OECD Publishing, 2021. p. 94–95.

²⁷ LAFARGE, A. The impact of CBAM on international trade. *Journal of Environmental Law*, 2021. p. 121.

²⁸ The "level playing field" principle is a fundamental principle in trade and competition policy, aiming to ensure that all market entities, regardless of country or region of origin, operate in a fair legal

signed CBAM with clear criteria for transparency, non-discrimination, and compliance with WTO principles, so as to avoid being perceived as a disguised form of protectionism.²⁹

Third, the Green State Aid mechanism. To promote the green transition in key economic sectors, the EU has issued the 2022 Guidelines on State Aid for Climate, Environmental Protection and Energy (CEEAG). The Green State Aid framework enables Member States to grant financial assistance to enterprises implementing clean technologies while remaining compliant with the competition rules outlined in Article 107 TFEU. The CEEAG serves a regulatory function, ensuring that environmental protection mandates are harmonized with the necessity of preserving competitive dynamics within the internal market.³⁰ To facilitate the green transition, the EU has implemented a framework that allows Member States to channel financial assistance to enterprises embracing clean technologies, all while adhering to competition regulations. The CEEAG articulates the specific criteria for permissible state aid, underscoring the principles of transparency, necessity, and the efficient allocation of public resources. This approach exemplifies the EU's adaptive interpretation of competition law to further sustainable development goals.³¹

Integrating the EU Emissions Trading System (ETS), the CBAM, and the Green State Aid framework has resulted in a cohesive regulatory landscape within the European Union. This ecosystem³² facilitates realizing environmental objectives by blending market-based instruments, border adjustment measures, and

and cost environment. See: EUROPEAN COMMISSION. *Regulation (EU) 2023/956 establishing a carbon border adjustment mechanism OJ L130*. Recital 12. May. 2023. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32023R0956> Access on: 15 July 2025.

²⁹ EUROPEAN COMMISSION. *CBAM transitional period guidance document*. 2023. Available at: https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en Access on: 1 Aug. 2025.

³⁰ EUROPEAN COMMISSION. *2022 Guidelines on state aid for climate, environmental protection and energy (CEEAG)*. Nov. 2022.

³¹ EUROPEAN COMMISSION. *2022 Guidelines on state aid for climate, environmental protection and energy (CEEAG)*. Nov. 2022. OJ C80/1.

³² The EU's "regulatory ecosystem" is an integrated, multi-layered, and cross-sectoral regulatory system, institutionalized through: i) Foundational Treaties (TEU, TFEU); ii) Strategies such as the Green Deal, Fit for 55; iii) Operational mechanisms such as the Better Regulation Guidelines. This ecosystem allows the EU to balance trade, environmental and sustainable development goals within a unified legal framework, while also being able to adapt to partner countries such as Vietnam through the EVFTA.

state support mechanisms. Such an approach maintains an equilibrium between environmental stewardship and the incentives for free trade.

The interplay between the EU ETS, CBAM, and Green State Aid creates a robust regulatory architecture in which environmental goals are closely intertwined with trade dynamics and economic imperatives. This framework mitigates potential clashes between environmental regulations and competitive trade practices. It provides a flexible institutional model that can be tailored and disseminated to trading partners, particularly in developing nations.

3.2 Intersectoral coordination mechanisms and co-governance institutions under the EU Model

The EU has developed a practical framework for reconciling environmental standards with trade competition, establishing a governance structure and inter-institutional coordination mechanisms that promote policy coherence across various sectors. This multi-tiered integrated governance model is particularly prominent in the execution of the European Green Deal, facilitating both horizontal and vertical alignment among EU institutions and Member States. As outlined, "Governance mechanisms will ensure horizontal and vertical coordination among EU institutions and Member States," thereby enhancing synergies and fostering cohesive policy implementation.³³ The text embodies a fundamental tenet of the EU's environmental governance framework, emphasizing the necessity of cross-sectoral and multi-level coordination. This institutional architecture is pivotal for effectively executing key climate initiatives, including the Green Deal, the CBAM, and the Fit for 55 package³⁴. It ensures synergies and coherence among the diverse environmental policy objectives, trade regulations, and sustainable development strategies.

Within the framework of the European Union, the Directorate-General for the Environment (DG ENV) and the Directorate-General for Trade (DG TRADE)

³³ EUROPEAN COMMISSION. *The European Green Deal*. COM. 640-final. Brussels, Dec. 2019.

³⁴ "Fit for 55" is a comprehensive policy package of the European Union (EU) announced by the European Commission on July 14, 2021 to achieve the target of reducing greenhouse gas (GHG) emissions by at least 55% by 2030 compared to 1990 levels to achieve carbon neutrality by 2050, according to the European Climate Law.

are pivotal in the coordination process regarding environmental standards and FTAs. All significant decisions related to formulating environmental regulations and negotiating and ratifying FTAs are subject to an extensive consultation protocol between these two directorates. This ensures that environmental considerations are integrated into trade policies and agreements effectively.³⁵ This reflects the principle of “mandatory inter-departmental consultation”³⁶ with the aim of minimizing policy conflicts and ensuring that sustainable development objectives are mainstreamed throughout the trade policymaking process. In addition, the EU implements a soft co-regulation mechanism through institutions such as the Trade and Sustainable Development (TSD) Committees established under its FTAs³⁷. The TSD Committees function as crucial intergovernmental dialogue platforms, facilitating stakeholder engagement with entities such as the business sector, civil society organizations, and international environmental agencies. This framework promotes transparency in the formulation and execution of environmental standards linked to trade, thereby enhancing accountability and institutional legitimacy. These committees are grounded in the constitutional provisions of the Treaty on European Union (TEU). They are supported by the White Paper on European Governance,³⁸ with implementation guided by the Better Regulation Guidelines.³⁹ These principles apply to internal EU policymaking and extend to the governance frameworks of FTAs, such as the EVFTA, through institutions like the TSD Committee and the Civil Society Forum. The incorporation of intersectoral institutions and soft co-regulation mechanisms within the EU’s coordination system has effectively mitigated

³⁵ YOUNG, O. R. The coordination of environmental and trade policies in the EU. *European Law Journal*, p. 76, 2020.

³⁶ EUROPEAN COMMISSION. *Commission Decision (EU) 2021/2121*. Rules of procedure of the commission. Dec. 2021. p. 8759-final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021D2121> Access on: 2 Aug. 2025.

³⁷ BARTELS, L. The EU’s trade and sustainable development chapters: towards co-regulatory governance?. *Journal of International Economic Law*, v. 24, n. 3, p. 465-491, 2021.

³⁸ White Paper on European Governance published by the European Commission on 25 July 2001, is a strategic policy document aimed at reforming governance in the European Union (EU) to meet the demands for transparency, efficiency, legitimacy and democratic participation in the context of the EU’s enlargement and the challenge of globalization.

³⁹ Better Regulation Guidelines is an official guideline document of the European Commission, issued to improve the quality of EU policy and law-making through the principles of soundness, transparency, responsiveness and efficiency.

legal conflicts between environmental goals and trade imperatives, while offering a flexible framework for resolving potential disputes in next-generation FTAs.

4 Harmonizing environmental and trade law in the implementation of the EVFTA and implications for Vietnam

4.1 Harmonizing environmental and trade policies within the framework of the EVFTA

In the context of international integration and increasing pressure from global environmental standards, Vietnam is confronted with substantial challenges in reconciling environmental protection with trade development. The implementation of FTAs and adherence to international commitments necessitate that Vietnam pursue sustainable economic growth while meeting rigorous environmental regulations. Drawing from the EU’s experiences can provide valuable legal frameworks that Vietnam can leverage to navigate environmental-trade conflicts, emphasizing the integration of national and international legal instruments to create a cohesive and adaptable regulatory environment.

The EU has established an adequate legal framework for aligning environmental protection with trade policies through mechanisms like the ETS and the CBAM. Although the EU has successfully executed these instruments and achieved significant policy coherence between its environmental and trade objectives, Vietnam currently struggles to harmonize its legal frameworks across these two critical areas. This presents an opportunity for Vietnam to analyze and adapt strategies that ensure compliance with environmental standards while facilitating trade growth. Existing regulations in Vietnam are not yet fully integrated, resulting in inconsistencies in implementing international commitments on environmental protection and free trade.⁴⁰

The EU endorses the principle of CBDR in implementing environmental standards for its partner countries, especially those in the developing world. Rather

⁴⁰ VAN ASSCHE, A.; SORSA, M. *European Union law and policy on trade and environment*. Oxford: Oxford University Press, 2018. p. 74.

than enforcing uniformly stringent standards from the outset, the EU employs a phased adjustment strategy. This strategy includes establishing transitional mechanisms and providing technical assistance programs aimed at bolstering the capacity of these nations to meet green compliance benchmarks. The objective is to facilitate the process of “domesticating international standards” methodically, which aligns with each country’s unique institutional, economic, and technical capabilities.

A notable example is the implementation of EVFTA support programs. These programs are designed not only to meet the requirements of CBAM and the sustainability commitments under the EVFTA, but also to strengthen the endogenous capacity of Vietnam’s private sector in the green transition and in deeper integration into global value chains. The strategic integration of adaptive policy frameworks and tailored technical support has allowed the EU to uphold the international legitimacy of its environmental regulatory instruments, such as the CBAM. This approach simultaneously fosters the acceptability and practical execution of environmental commitments within trade agreements, particularly for developing nations.⁴¹ The EVFTA enhances the synergy between the two parties in enforcing environmental standards alongside free trade obligations. It includes explicit provisions to bolster environmental protection measures and green standards, mandating Vietnam to elevate its environmental protection protocols. This is particularly critical in carbon emissions reduction, sustainable procurement practices, and eco-certification processes.

The EVFTA transcends a standard trade agreement, functioning as a strategic framework that empowers Vietnam to refine its legal policies in response to the interplay between trade and environmental sustainability. The environmental stipulations in the agreement mandate that Vietnam ensure its environmental regulations facilitate rather than obstruct trade activities while concurrently promoting sustainable production practices. Furthermore, the EVFTA incentivizes the establishment of a cohesive legal infrastructure whereby key governmental entities, including the Ministry of Agriculture and Environment, the Ministry of Industry and Trade, and the Ministry of Finance, collaborate to align environmental regulations with trade policies,

⁴¹ SMITH, A. *The EU and developing countries: environmental trade policy*. England: Routledge, 2017. p. 89.

thereby fostering a synergistic approach to regulatory governance.

This calls for institutional reform and the development of intersectoral coordination mechanisms, similar to the EU model, so that environmental and trade policies can be compatible and mutually supportive. In this process, Vietnam can draw lessons from the EU on applying regulatory tools such as CBAM and the EU ETS to control carbon emissions while adjusting trade policies to protect clean, environmentally friendly industries. However, Vietnam must adapt the implementation timeline for these standards to its domestic realities, particularly with regard to small and medium-sized enterprises and the constraints of a developing economy.

Both the EU and Vietnam face significant challenges in harmonizing environmental and trade policies, particularly as international environmental standards become increasingly stringent. However, through the EVFTA, Vietnam has the opportunity to develop a flexible legal environment that integrates both national and international legal instruments, such as green procurement regulations and carbon traceability requirements, to ensure that these policies do not hinder but rather promote trade development. This represents an opportunity for Vietnam not only to comply with its international commitments but also to establish a strong legal foundation aligned with its long-term sustainable development objectives.⁴² Navigating the intersection of environmental protection and trade development presents a significant challenge for Vietnam, particularly in the context of deepening international integration and the adoption of increasingly rigorous environmental standards. Vietnam can establish a streamlined legal infrastructure by employing adaptive legal strategies and drawing lessons from the European Union’s regulatory frameworks. This will mitigate potential conflicts and foster sustainable development while adhering to its international obligations regarding free trade and environmental stewardship.

The rise of global environmental standards, especially within the framework of FTAs, has intensified the scrutiny on Vietnam’s environmental-trade legal architecture and its institutional governance mechanisms. Addressing these pressures is crucial for aligning

⁴² SMITH, A. *The EU and developing countries: environmental trade policy*. England: Routledge, 2017. p. 89.

Vietnam's economic growth trajectory with sustainable environmental practices. Commitments on sustainable development in agreements such as the EVFTA, CP-TPP, and RCEP are no longer mere declarations but have been translated into binding legal obligations, making the need for public policy coordination extend well beyond the remit of individual sectors.

Vietnam's legal framework and institutional architecture exhibit several endogenous deficiencies that pose considerable obstacles to reconciling environmental standards with trade objectives. A key institutional challenge in embedding environmental priorities within trade policy is the absence of legal and procedural coherence, which undermines effective integration and management of these often conflicting priorities. For example, while the 2020 Law on Environmental Protection has begun to domesticate environmental obligations linked to economic activities, such as Extended Producer Responsibility (EPR) and obligations for environmental impact-related product traceability, these provisions have yet to be harmonized with the 2020 Law on Investment, the amended 2005 Law on Commerce, and the 2020 Law on Enterprises. The absence of cross-references and integrated environmental obligations across these laws has resulted in overlapping legal provisions and, in some cases, conflicting rules on compliance responsibilities for exporting enterprises.

Beyond legal constraints, Vietnam also lacks an official intersectoral coordination mechanism among the relevant ministries. While the Ministry of Natural Resources and Environment (MONRE) is responsible for environmental policy, the Ministry of Industry and Trade (MOIT) oversees import–export management, and the Ministry of Planning and Investment (MPI) manages public investment and enterprise development, there is currently no horizontal, binding coordination body with clearly allocated authority to address cross-cutting issues such as green trade standards, carbon traceability, or pressures arising from the EU's CBAM. This lack of institutional linkage not only hampers the development of coherent policies but also creates enforcement gaps, where environmental obligations and trade interests may be overlooked or come into conflict without an effective resolution mechanism.⁴³

⁴³ UNITED NATIONS DEVELOPMENT PROGRAMME. *Vietnam, policy brief: governance for green trade and carbon border adjustment mechanism (CBAM)*. Vietnam: UNDP, 2022. Available at: <https://www.undp.org/vietnam/publications> Access on: 15 July

The EU's official launch of the CBAM transitional phase in October 2023 for products with a high risk of carbon leakage, such as steel, cement, aluminum, and fertilizers, has placed Vietnam, a major exporter to this market, in a position where it must develop infrastructure for measuring and tracing product emissions across the supply chain. However, as of now, Vietnam has yet to establish a national system capable of collecting, verifying, and standardizing product-level emissions data, a prerequisite for enterprises to make accurate and compliant CBAM declarations that will be accepted by the EU.⁴⁴ This situation not only forces exporting enterprises to rely on foreign certification bodies, thereby increasing costs and reducing competitiveness but also undermines the country's autonomy in controlling emissions and advancing the development of a domestic carbon market, as required under the Law on Environmental Protection and the Government's plans related to the Net Zero 2050 commitment.⁴⁵

4.2 Prospect of integration into Vietnam's legal framework

Based on the foregoing analysis, this article outlines potential solutions that could be incorporated into Vietnam's legal framework for consideration as follows: First, harmonizing laws to coordinate conflicts between trade competition and environmental standards. Legal harmonization is a crucial step in improving Vietnam's legal framework, especially in the context of international integration. At present, Vietnam's legal provisions on the environment, investment, and trade remain fragmented and have not yet been fully integrated in a coherent manner.⁴⁶ The current situation has resulted in discrepancies in enforcing international environmental protection and free trade obligations. Vietnam must

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⁴⁴ EUROPEAN COMMISSION. *CBAM: implementing regulation – transitional period [2023]* OJ L230/Annex IV.

⁴⁵ EURO CHAM VIETNAM. *Position paper on CBAM and Vietnam's readiness*. 2023. p. 5–7.

⁴⁶ The 2020 Law on Environmental Protection has made commitments on natural resource management, emission reduction, and biodiversity protection. However, these regulations are mainly aimed at domestic management and have not been fully integrated into economic and trade policies, especially when Vietnam participates in international agreements such as the EVFTA with the EU. See: UNITED NATIONS DEVELOPMENT PROGRAMME. *Vietnam and CIEM: report assessing the legal framework on trade–environment linkage in the context of EVFTA implementation*. Vietnam: UNDP Vietnam, 2023. p. 7–15.

create a comprehensive intersectoral legal review mechanism to mitigate these challenges. This mechanism should ensure the alignment of regulations governing environmental standards, investment protocols, and trade policies. Such a mechanism must ensure that environmental regulations do not conflict with international trade rules, while also avoiding the creation of unnecessary trade barriers. Relevant agencies, such as the Ministry of Agriculture and Environment, the Ministry of Industry and Trade, and the Ministry of Finance, should work closely together to develop harmonized regulations across these sectors.

In this regard, close and intersectoral coordination can be reflected through specific provisions so as to require State agencies to implement robust regulations in public procurement that enhance green procurement practices. These regulations should incentivize enterprises and public organizations to prioritize acquiring environmentally sustainable products and services within their procurement frameworks. When evaluating public procurement contracts, government entities must prioritize offerings that possess recognized environmental certifications, such as eco-labels or ISO 14001 accreditation. To facilitate this, it is necessary to establish clear and comprehensive green procurement standards, specifying criteria that include minimizing carbon emissions, utilizing recycled materials, and integrating clean production technologies into the procurement process.

Public investment projects must also apply green procurement standards when selecting contractors, ensuring that projects do not harm the environment and that products with minimal impact on nature are used. Enterprises supplying goods and services to government agencies must ensure transparency in reporting emissions levels and resource use in the production of their goods and services.⁴⁷

In addition to green procurement practices, introducing carbon traceability regulations is essential to enable enterprises and government agencies to easily track and report carbon emissions throughout the supply chain. This will help Vietnam meet international standards such as the EU's CBAM.⁴⁸ To take advantage of

Vietnam's export opportunities in key sectors in the EU market, the Ministry of Agriculture and Environment should create a clear carbon emissions reporting system for important industries like steel, cement, agribusiness, and textiles. This system would require companies to provide official emissions data for each product along the supply chain. A national carbon certification program should also be established to recognize products that meet specific low-carbon standards. This allows businesses to share certified carbon emissions data for their products when exporting to international markets, especially the EU. It is also essential for companies to ensure carbon traceability. This means providing clear information about the entire production process, from acquiring raw materials to manufacturing, showing the total carbon emissions linked to each product. To help businesses meet these goals, the government should offer strong technological and technical support to help them reduce emissions and comply with low-carbon standards.

Second, establishing a coordination mechanism for managing conflicts between trade and the environment is an equally essential task. To effectively implement legal strategies, it is crucial to undertake institutional reforms that enhance coordination among relevant entities. Government agencies and organizations engaged in environmental protection, investment, and trade must develop the capacity to collaborate and provide coherent intersectoral policy guidance. This approach will facilitate aligning environmental protection initiatives with trade development objectives. One viable solution to achieve this synergy is the establishment of a National Council on Green Trade Governance. This council would serve as an intersectoral coordination and policy advisory body, helping to design appropriate policies and measures to resolve conflicts between environmental and trade objectives. It would also play a role in developing a digital platform to support enterprises in complying with green standards and minimizing environmental impacts. In addition to creating such coordinating bodies, integrating digital platforms to assist businesses in meeting green standards is crucial.⁴⁹ Enterprise platforms can facilitate real-time compliance with evolving environmental regulations, enabling organizations to systematically implement measures that align with international standards. This proactive ap-

⁴⁷ VIETNAM. Ministry of Natural Resources and Environment. *National action plan on green public procurement for the period 2021–2025*. Decision n° 889/QĐ-BTNMT. 25 May 2021.

⁴⁸ LAFARGE, A. The impact of CBAM on international trade. *Journal of Environmental Law*, 2021. p. 121.

⁴⁹ EURO CHAM VIETNAM. *Position paper on CBAM and Vietnam's readiness*. 2023. p. 8–10.

proach ensures regulatory adherence and bolsters the global competitiveness of Vietnamese products in the international marketplace.⁵⁰

The third suggestion for Vietnam is to apply the principle of environmental integration through conditional adoption. Vietnam is currently in a transitional phase in the process of domesticating trade commitments alongside international environmental standards, particularly within the framework of next-generation FTAs such as the EVFTA and CPTPP. Implementing the principle of integrating environmental policy into other sectors - especially trade and investment - requires progress in both legislative development and institutional enforcement. From a comparative law perspective, the EU's horizontal integration model, established in Article 11 TFEU, exemplifies Environmental Policy Integration (EPI) by imposing a legal requirement to incorporate environmental considerations across all policy domains. While Vietnam has yet to adopt a counterpart to this framework within its legal architecture, the provisions outlined in Article 3 of the 2020 Law on Environmental Protection indicate a preliminary move towards EPI. This article articulates that "environmental protection is the right, obligation, and responsibility of all entities in socio-economic development," signifying a foundational step towards integrating environmental concerns into broader socio-economic policies in Vietnam. To operationalize this principle, Vietnam needs to shift from a voluntary, encouragement-based approach to a legislative approach to environmental standards, whereby trade and environmental policies are developed in parallel and in an integrated manner.⁵¹

Moreover, it is vital to establish intersectoral coordination institutions and domesticating green standards. Vietnam could establish a National Green Trade Policy Coordination Council, leveraging the EU's framework. This intersectoral body would provide expert advice, conduct policy reviews, and facilitate enhanced policy alignment among pertinent ministries. Its role would be crucial in promoting the cohesive development of green trade initiatives across sectors. This institution would be designed to ensure coherence between emission reduc-

tion objectives and the maintenance of trade competitiveness.⁵² At the same time, to enhance implementation effectiveness, Vietnam should gradually domesticate international-standard green technical criteria, such as: (i) regulations on product carbon traceability; (ii) criteria for green public procurement; and (iii) eco-label and green certification standards. These standards should be embedded in binding legal instruments - such as the 2024 Law on Public Investment and the 2023 Law on Procurement - thereby shifting from a recommendatory level to a mandatory legal framework. In addition, digital data platforms for emissions inventories and carbon traceability should be developed, serving as soft institutional infrastructure to support the future implementation of EVFTA-CBAM commitments.⁵³

5 Conclusion

The interplay between environmental regulations and competitive trade dynamics poses significant legal hurdles, especially in comprehensive FTA integrations. Vietnam can leverage insights from the EU model to craft a legal framework that effectively reconciles these conflicts, promoting a transition to greener practices while safeguarding national trade interests. Navigating the tension between environmental sustainability and economic growth presents a formidable challenge for Vietnam, particularly in the context of increasing international integration and evolving global environmental standards. Nonetheless, by adopting flexible legal mechanisms informed by EU experiences and the stipulations of the EVFTA, Vietnam can cultivate a cohesive legal landscape that mitigates conflicts and fosters sustainable development while adhering to its international obligations concerning free trade and environmental stewardship.

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⁵⁰ EUROPEAN COMMISSION. *Working better together: inter-service cooperation in trade and environment policies*. Brussels: European Commission, 2021. Available at: <https://ec.europa.eu/> Access on: 5 July 2025.

⁵¹ WATSON, A. *Legal transplants: an approach to comparative law*. 2. ed. Georgia: University of Georgia Press, 1993. p. 21-23.

⁵² YOUNG, O. R. The coordination of environmental and trade policies in the EU. *European Law Journal*, p. 76, 2020.

⁵³ SIANI, B.; MEHMETI, S. The importance of comparative law for the development of contemporary law. *Juridical Tribune*, v. 15, n. 1, p. 5-23, 2025.

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**III. TENSÕES DE SOBERANIA NA GOVERNANÇA
MARÍTIMA INTERNACIONAL**

REVISTA DE DIREITO INTERNACIONAL
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Rights and obligations in marine scientific research: legal insights from chinese research/survey vessels operating in maritime zones under Vietnam's sovereign rights

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Abstract

This article examines the rights and obligations of coastal States and foreign vessels in conducting maritime scientific research within maritime zones under coastal State sovereign rights, focusing on legal issues arising from the operation of the Chinese research/survey vessel *Bei Diao 996* in Vietnam's exclusive economic zone. The study aims to clarify whether Vietnam has a sufficient legal basis under the 1982 United Nations Convention on the Law of the Sea to require prior authorization for foreign research and survey activities and to assess the adequacy of Vietnam's domestic regulatory framework. Using doctrinal, historical, and comparative legal methods, the article analyses provisions of 1982 United Nations Convention on the Law of the Sea on marine scientific research, Vietnamese legislation governing foreign scientific activities at sea and evaluates the legal distinction between marine scientific research and hydrographic surveying. The findings indicate that although hydrographic surveying differs conceptually from marine scientific research, it does not constitute an unrestricted freedom of the seas when conducted in another State's exclusive economic zone and involving marine data collection relevant to resource management or maritime governance. Accordingly, unauthorized survey activities by the *Bei Diao 996* vessel are inconsistent with United Nations 1982 Convention on the Law of the Sea and infringe Vietnam's sovereign rights. The research further identifies regulatory fragmentation and procedural limitations within Vietnam's maritime scientific research licensing regime and recommends clarifying legal classifications, strengthening authorization procedures, and improving institutional coordination while ensuring compliance with international obligations to facilitate legitimate scientific research. Although limited by reliance on publicly available information and a single case study, the article provides policy – relevant insights for maritime governance and contributes an original, practice – oriented analysis clarifying the evolving legal status of

MSR and maritime survey activities under 1982 United Nations Convention on the Law of the Sea.

Keywords: UNCLOS 1982; marine scientific research; Bei Diao 996; hydrographic survey; sovereign rights; Vietnam.

Resumo

O presente artigo examina os direitos e as obrigações dos Estados costeiros e de embarcações estrangeiras na condução de pesquisa científica marinha em zonas marítimas sob direitos soberanos do Estado costeiro, com enfoque nas questões jurídicas decorrentes da atuação da embarcação chinesa de pesquisa/exploração Bei Diao 996 na zona econômica exclusiva do Vietnã. O estudo tem por objetivo esclarecer se o Vietnã dispõe de base jurídica suficiente, nos termos da Convenção das Nações Unidas sobre o Direito do Mar, para exigir autorização prévia para atividades estrangeiras de pesquisa e levantamento, bem como avaliar a adequação do arcabouço regulatório doméstico vietnamita. Por meio de métodos jurídicos doutrinário, histórico e comparado, o artigo analisa as disposições da UNCLOS de 1982 relativas à pesquisa científica marinha, a legislação vietnamita que rege atividades científicas estrangeiras no mar e examina a distinção jurídica entre pesquisa científica marinha e levantamento hidrográfico. Os resultados indicam que, embora o levantamento hidrográfico se distinga conceitualmente da pesquisa científica marinha, não constitui uma liberdade irrestrita dos mares quando realizado na zona econômica exclusiva de outro Estado e quando envolve a coleta de dados marinhos relevantes para a gestão de recursos ou a governança marítima. Nesse sentido, as atividades de levantamento não autorizadas realizadas pela embarcação Bei Diao 996 mostram-se incompatíveis com a UNCLOS de 1982 e configuram violação dos direitos soberanos do Vietnã. A pesquisa identifica, ademais, fragmentação normativa e limitações procedimentais no regime vietnamita de licenciamento da pesquisa científica marinha, recomendando a clarificação das categorias jurídicas, o fortalecimento dos procedimentos de autorização e a melhoria da coordenação institucional, em conformidade com as obrigações internacionais, a fim de viabilizar a pesquisa científica legítima. Embora limitado pela dependência de informações publicamente disponíveis e pela análise de um único estudo de caso, o artigo oferece con-

tribuições relevantes para a formulação de políticas de governança marítima e apresenta uma análise original, orientada à prática, que esclarece a evolução do estatuto jurídico da pesquisa científica marinha e das atividades de levantamento marítimo no âmbito da UNCLOS de 1982.

Palavras-chave: UNCLOS 1982; pesquisa científica marinha; Bei Diao 996; levantamento hidrográfico; direitos soberanos; Vietnã.

1 Introduction

Marine scientific research (MSR) has long been recognized as a lawful use of the seas under international law. As early as 1956, the International Law Commission affirmed MSR as a freedom of the high seas¹, and the 1982 United Nations Convention on the Law of the Sea (UNCLOS) subsequently devotes Part XIII to regulating the conduct and management of MSR². Under UNCLOS, coastal States have the right to regulate MSR within their exclusive economic zones (EEZs) and continental shelves, and although they may grant or withhold consent, they are not permitted to unreasonably refuse requests in normal circumstances³.

Despite this detailed regulatory framework, UNCLOS does not define the term “marine scientific research”. In fact, during the negotiation of UNCLOS 1982, many proposals were made to define MSR activities; however, none of them were ultimately adopted⁴, and international tribunals have not yet provided

¹ UNITED NATIONS. General Assembly. *Report of the International Law Commission covering the work of its eighth session, 23 April–4 July 1956*. New York: United Nations, 1956. (Vol. II, UNYBILC, p. 253). United Nations. Available at: <https://digitallibrary.un.org/record/710819?v=pdf>. Access on: 27 Jun. 2025.

² UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Part III. Access on: 27 Jun. 2025.

³ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 238–257; MUKHERJEE, P.K. The Consent Regime of Oceanic Research in the New Law of the Sea. *Marine Policy*, v. 5, n. 2, p. 98–113, Apr. 1981.

⁴ UNITED NATIONS. Office of Legal Affairs. Division for Ocean Affairs and the Law of the Sea. *Marine scientific research: A revised guide to the implementation of the relevant provisions of the United Nations Convention on the Law of the Sea*. New York: United Nations, 2010. Available at: https://www.un.org/Depts/los/doalos_publications/publicationtexts/msr_guide%202010_final.pdf. Access on: 27 Jun. 2025.

authoritative clarification⁵. This definitional ambiguity has led to significant legal uncertainty, especially when distinguishing MSR from other data-gathering activities such as hydrographic surveys. While Part XIII expressly governs MSR, UNCLOS contains no equivalent regime for hydrographic surveys even though modern hydrographic data now has dual civilian, economic, and security applications. This has led to very different academic and practical debates among countries about the legal jurisdiction of the coastal states over this activity. So, is a hydrographic survey a kind of MSR activity, or is it a separate activity from MSR?

The legal and practical consequences of this uncertainty are particularly evident in the East Sea. As a member of UNCLOS 1982⁶, Vietnam is obliged to respect the freedoms of navigation and MSR while exercising its sovereign rights over resources and research within its EEZ and continental shelf. Yet, to date, Vietnam has issued seven MSR licences, reflecting administrative, procedural and doctrinal constraints that may hinder legitimate research activities. At the same time, the repeated presence of Chinese “research” or “survey” vessels—most recently the Bei Diao 996 vessel in June 2025⁷, has heightened controversy regarding the legality of foreign data-gathering operations in areas claimed by Vietnam⁸.

The Bei Diao 996 vessel— a small-waterplane-area twin hull (SWATH)⁹, has underwater capabilities and a

UAV launcher¹⁰. The design of the Bei Diao 996 ship allows for testing of equipment, acoustic sensors and underwater data cables¹¹. With such modern technological equipment, the Bei Diao vessel is completely capable of performing both MSR and hydrographic survey activities. This creates a “grey zone” in the argument about the activities of Chinese vessels in Vietnam’s EEZs, because according to UNCLOS, foreign vessels have the right to freedom of navigation in the EEZ and continental shelf of a coastal state. Therefore, the next question is, what obligations and rights do the UNCLOS impose on foreign vessels, including Bei Diao, when conducting research/surveys in Vietnam’s EEZs? and (ii) what lawful measures are available for Vietnam to both facilitate genuine MSR and respond effectively to unlawful or unconsented research or survey activities?

This paper addresses these questions. It does not examine disputed maritime claims, as the Arbitral Tribunal in the *South China Sea Arbitration (Philippines v. China)* has already rejected China’s nine-dash-line or “historic rights” claim in the relevant maritime area¹². The analysis therefore proceeds on the premise that the operations of the Bei Diao 996 occurred within maritime zones over which Vietnam enjoys sovereign rights under UNCLOS. For the purposes of this study, MSR is understood in the sense contemplated by UNCLOS—namely, research conducted for the benefit

⁵ INTERNATIONAL COURT OF JUSTICE. *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgement, 31 Mar. 2014. Available at: <https://www.icj-cij.org/sites/default/files/case-related/148/148-20140331-JUD-01-00-EN.pdf>. Access on: 27 Jun. 2025. In this case, the Court avoided explaining the concept of marine scientific research under international conventions, but instead approached whether Japan’s whaling practices were consistent with the scientific aims of the Japanese whaling program.

⁶ Vietnam submitted its ratification documents to the UN Secretariat on July 27, 1994.

⁷ DU, Lan. Chinese ship conducts survey off Vietnam but Hanoi’s state media stays silent. *Radio Free Asia*, 2025. Available at: <https://www.rfa.org/english/southchinasea/2025/06/26/vietnam-china-survey-ship/>. Access on: 27 Jun. 2025.

⁸ DU, Lan. Chinese ship conducts survey off Vietnam but Hanoi’s state media stays silent. *Radio Free Asia*, 2025. Available at: <https://www.rfa.org/english/southchinasea/2025/06/26/vietnam-china-survey-ship/>. Access on: 27 Jun. 2025.

⁹ BAIRD MARITIME. VESSEL REVIEW | Bei Diao 996 – New Chinese built deep – sea research and testing support ship. *Baird Maritime*, 22 Jul. 2022. Available at: <https://www.bairdmaritime.com/work-boat-world/research-environment-training/vessel-review-bei-diao-996-new-chinese-built-deep-sea-research-and-testing-support-ship>. Access on: 27 Jul. 2025.

¹⁰ 中国船舶集团有限公司 [China State Shipbuilding Corporation Limited]. 深海装备综合试验船“北调996”首航开赴海南三亚 [The deep-sea equipment comprehensive test ship “Beidiao 996” sets sail for its maiden voyage]. 2022. Available at: <http://www.csic.com.cn/n5/n21/c22360/content.html>. Access on: 29 Jul. 2025.

¹¹ PHẠM. Thanh Vân; et al. *Một phân tích tính pháp lý và hậu quả hoạt động của tàu Bắc Điều 996 trong vùng đặc quyền kinh tế và thềm lục địa của Việt Nam* [A legal analysis and consequences of the operations of the Beidiao 996 vessel in Vietnam’s exclusive economic zone and continental shelf]. *Dự án Đại Sự Ký Biển Đông*, 22 Jun. 2025. Available at <https://dskbd.org/2025/06/22/mot-phan-tich-phap-ly-va-hau-qua-hoat-dong-cua-tau-bac-dieu-996-trong-vung-dac-quyen-kinh-te-va-them-luc-dia-cua-viet-nam/>. Access on: 2 Aug. 2025; BAIRD MARITIME. VESSEL REVIEW | Bei Diao 996 – New Chinese built deep – sea research and testing support ship. *Baird Maritime*, 22 Jul. 2022. Available at: <https://www.bairdmaritime.com/work-boat-world/research-environment-training/vessel-review-bei-diao-996-new-chinese-built-deep-sea-research-and-testing-support-ship>. Access on: 27 Jul. 2025; MEHNAZD. What is a SWATH Ship?. *Marine insight*, 10 Jan. 2021. Available at: <https://www.marineinsight.com/types-of-ships/what-is-a-swath-ship/>. Access on: 27 Jul. 2025.

¹² PERMANENT COURT OF ARBITRATION. *Case 2013-19 in the matter of the South China Sea (Philippines v. China)*, Award, 12 Jul. 2016. Available at: <https://pca-cpa.org/es/cases/7/>

of humankind—and excludes research conducted for military purposes.

2 International legal framework governing the rights and obligations of coastal states and foreign vessels in marine scientific research

2.1 Rights and obligations of foreign research/survey vessels

Coastal states have sovereignty over territorial seas, archipelagic waters and straits used for international navigation in accordance with UNCLOS 1982¹³. MSR in these maritime zones may only be carried out with the consent of the coastal states¹⁴. Coastal states have sovereign rights and jurisdiction in their EEZs and continental shelves¹⁵. MSR in the EEZ and on the continental shelf of coastal states is subject to a specific regulatory regime set out in Part XIII of UNCLOS.

Under Part XIII, all States have the right to conduct MSR¹⁶. However, this right is circumscribed by a set of general obligations that reflect the balance UNCLOS strikes between freedom of the seas and coastal State jurisdiction. Central to this balance is the duty of all States to “promote and facilitate” MSR¹⁷, which demonstrates that UNCLOS treats research as a cooperative endeavour serving the interests of the international community as a whole, rather than as a unilateral entitlement of individual States. MSR must comply with three principles. *Firstly*, MSR must be conducted solely for peaceful purposes. *Secondly*, MSR must be conducted by “appropriate scientific methods and means that do not result in the interference of other lawful uses of

the sea in accordance with other conventions”¹⁸. *Thirdly*, MSR must be conducted in accordance with UNCLOS, including the rules in Part XII on the protection of the marine environment¹⁹. Notably, MSR does not provide a legal basis for any claim to any part of the marine environment or its resources²⁰.

The fundamental requirement for foreign vessels conducting MSR within the maritime zones of another state is to secure prior consent from the coastal State prior to the initiation of any research activities in their EEZs and on their continental shelves²¹. It is incumbent upon these foreign vessels to provide the coastal state with comprehensive information at least six months before the anticipated commencement date of any research project²². According to Article 248 of UNCLOS, this notification should be a complete description of: the nature and objectives of the project; the method and means to be used, including name, tonnage, type and class of vessels and a description of scientific equipment; the precise geographical areas in which the project is to be conducted; the expected date of first appearance and final departure of the research vessels, or deployment of the equipment and its removal, as appropriate; the name of the sponsoring institution, its director, and the person in charge of the project; and the extent to which it is considered that the coastal State should be able to participate or to be represented in the project.

In the specific case of the *Bei Diao 996*, it is crucial to include detailed specifications regarding the SWATH design, equipment testing targets, underwater acoustic sensors, and the submarine data cables intended for evaluation. Furthermore, the technical capabilities of the vessel—such as its dynamic positioning system and unmanned aerial vehicle (UAV) launch platform—must also be disclosed. Should the coastal state fail to respond within four months of receiving the notification, the *Bei Diao 996* is permitted to proceed with the research project six months following the submission of

¹³ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art.2.

¹⁴ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 245.

¹⁵ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 56, 77.

¹⁶ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 238 - Opening provisions of Part XIII.

¹⁷ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 239.

¹⁸ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 240.

¹⁹ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 240.

²⁰ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 241.

²¹ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 246.

²² UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 248.

information to the coastal state, pursuant to the “implied consent” provision stipulated in Article 252 of UNCLOS. However, it is important to note that this provision is not applicable in circumstances where the coastal state has explicitly denied consent or requested further information.

Upon acquiring permission from the coastal state, the foreign vessel undertaking MSR within the EEZ and continental shelf of the coastal state must comply with several obligations as outlined in Article 249 of UNCLOS. Specifically, the foreign vessel must ensure that the coastal state has the opportunity to participate or be represented in the research project, particularly onboard, when feasible. Such participation must occur without any remuneration for scientists from the coastal state and without any requirement for the coastal state to contribute to the project’s costs.

Additionally, the foreign vessel must provide the coastal State with a preliminary report as soon as practicable; the results and conclusions after the completion of the research; the assessment of all data and samples derived from the MSR project; the evaluation of such data, samples, and research results if requested by the coastal State²³. When it comes to the Bei Diao 996, this vessel must ensure that the research results are made available to the international community through appropriate channels; promptly notify the coastal State of any significant changes to the research program; and dismantle scientific research equipment or facilities once the research is completed, unless otherwise agreed.

In summary, the regulatory framework governing MSR is subject to coastal state control over activities in the territorial sea, the exclusive economic zone, and on the continental shelf. Although flag states maintain jurisdiction over MSR conducted from their vessels, this jurisdiction may be concurrent with coastal state jurisdiction in their maritime zones. Consequently, MSR is conducted under the principle of freedom of navigation on the high seas only when performed beyond national jurisdiction. Therefore, the freedom to conduct MSR applies only in maritime areas that lie outside of national jurisdiction.

²³ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 249 (1).

2.2 Rights and obligations of coastal states in marine scientific research

Coastal states have the obligation to cooperate and facilitate the conduct of MSR²⁴, to enact appropriate regulations and to provide procedures to promote MSR²⁵, Coastal states have exclusive jurisdiction to regulate MSR in their territorial seas²⁶. However, coastal states must ensure, “in normal circumstances”, that they consent to MSR projects for peaceful purposes and to increase scientific knowledge of the marine environment for the benefit of mankind²⁷. In which, the definition of “normal circumstances” that is mentioned in UNCLOS can be inferred from Article 246 (3) and Article 246(4)²⁸. Accordingly, the “normal circumstances” are those that: (i) do not result in an unjustifiable prohibition on the granting of authorization for MSR for peaceful purposes and for the advancement of scientific knowledge of the marine environment for the benefit of mankind (coastal states must adopt regulations and procedures to ensure such authorization) and (ii) the absence of diplomatic relations between the coastal state and the state conducting the MSR would not be a reason for the absence of the normal circumstances.

In normal circumstances, coastal states shall grant permission for MSR activities. However, in certain circumstances, a coastal state may withhold permission to conduct MSR in the EEZ and continental shelf if the project has “direct significance” for the exploration and exploitation of natural resources, involves drilling on the continental shelf or the use of explosives, involves the construction, operation or use of artificial islands, installations and structures, or is communicated by a proposal containing inaccurate information²⁹. Foreign vessels conducting MSR in the EEZ and on the continental shelf of another state may rely on the tacit

²⁴ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. Art. 243.

²⁵ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. Art. 245.

²⁶ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. Art. 245.

²⁷ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. Art. 246.

²⁸ GRAGL, P. Marine scientific research. In ATTARD, David; et al. *The IMLI manual on international maritime law: Volume I: The law of the sea*. The United States of America: Oxford University Press, 2014. Chapter 14, p. 396-430.

²⁹ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*: UNCLOS. [1982]. Art. 246 (5), 252.

consent of that state if the coastal state has not notified its decision to refuse permission³⁰. A decisive principle that is essential to understanding the scope and limits of coastal state jurisdiction over MSR in the EEZ and on the continental shelf is that MSR shall be conducted solely for peaceful purposes and “to increase scientific knowledge of the marine environment for the benefit of all mankind”³¹.

The purpose of MSR is to benefit all mankind, meaning that information collected for exclusive purposes and not for the benefit of all mankind is not MSR. Therefore, marine data collected for limited purposes, such as commercial enterprises or for military or intelligence operations, and will not be shared with the global scientific community for the benefit of all humanity, is not MSR.

In short, it can be said that the MSR regulations are established to give coastal states greater control over whether to consent or not to foreign research activities in their waters, their sovereign rights. This regime reflects sovereignty and jurisdiction over activities designed to promote understanding of the marine environment.

3 Hydrographic survey – one of the marine data collection activities outside the marine scientific research regime under UNCLOS

The MSR regime in UNCLOS was designed for research on board vessels of non-military expeditions, which is also known as the primary method of ocean research in the post-World War II period³². However, even when UNCLOS was being negotiated as well as when it entered into force, new methods of data collection and new purposes for the data emerged. Some of these, such as data collection in the Area or natural resource exploration in the EEZ, on the continental shelf, were included in UNCLOS but were outside Part

XIII³³. With the development of scientific methods, marine data may be collected under other provisions of UNCLOS or not addressed in the Convention. For example, vessels of all flag States may collect marine or oceanographic data to support the safe transit of ships. While oceanographic data collection may be used to pursue knowledge that benefits all mankind, it is primarily used for real-time weather forecasting to ensure the safety of navigation. Therefore, such data collection in this manner is not regulated by the MSR regime. Generally, the exceptions to Part XIII are those activities that are not intended to promote MSR and therefore are not regulated through the MSR regime in Part XIII, even if they use similar or sometimes identical MSR facilities³⁴.

Hydrographic surveys are among the activities not regulated by Part XIII of UNCLOS. Currently, the legality of hydrographic survey activities by other States in the EEZ without the permission of the coastal State is a controversial issue³⁵. The lack of uniformity in the provisions of UNCLOS 1982 is the cause of this controversy. To be more specific, the clear distinction between the two concepts (1) MSR and (2) Hydrographic survey is expressed in Articles 19, 21, 40 of the UNCLOS 1982. According to Article 21 (g), coastal States may invoke laws and regulations relating to innocent passage through their territorial sea in connection with marine scientific research and hydrographic survey. However, regarding the jurisdiction of coastal states over EEZ, Article 56 UNCLOS 1982 only mentions MSR activities but does not mention hydrographic survey activities. Furthermore, while UNCLOS devotes Part XIII to specific regulations on the regulation and management of MSR in the EEZ and continental shelf, UNCLOS does not have corresponding provisions for hydrographic survey. This leads to debates on the legal jurisdiction of coastal states over this activity. The question arises whether hydrographic surveying is a kind of MSR or a separate activity from MSR. If hydrographic

³⁰ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 246(3).

³¹ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 246(3).

³² KRASKA, James. Marine Data Collection Outside the MSR Regime. In NGUYEN, Lan Anh T.; VU, Hai Dang. (eds.). *Viability of UNCLOS amid Emerging Global Maritime Challenges*. [S.I.]: Springer, 2025. Chapter 4, p. 41-58.

³³ Exploration of natural resources in the EEZ, on the continental shelf may be regulated by the coastal State under separate legal jurisdictions, including Parts V, VI of UNCLOS; Data collection in the Area may be regulated by Part XI of the Convention if it relates to seabed minerals.

³⁴ KRASKA, James. Marine Data Collection Outside the MSR Regime. In NGUYEN, Lan Anh T.; VU, Hai Dang. (eds.). *Viability of UNCLOS amid Emerging Global Maritime Challenges*. [S.I.]: Springer, 2025. Chapter 4, p. 41-58.

³⁵ TREVES, Tullio. Coastal States' rights in the maritime areas under UNCLOS. *Brazilian Journal of International Law*, v.12, n.1, p.39-48, 2015.

surveying is part of MSR, then it will be within the jurisdiction of the coastal State. However, if it is not, the absence of mention of this activity within the jurisdiction of coastal States raises the question of whether it is freely exercised by other States.

Firstly, the origins of hydrographic surveying lie in marine scientific research, and this partly explains why the boundary between marine scientific research and hydrographic surveying is challenging to draw³⁶. Secondly, the inconsistency of the provisions of UNCLOS may be caused by the fact that the provisions relating to MSR were negotiated and drafted by different committees. During the drafting of UNCLOS 1982, several committees were responsible for drafting provisions relating to MSR³⁷. During the negotiations of UNCLOS III (1973–1982), technical experts from the International Hydrographic Organization (IHO), the agency responsible for navigation safety and mapping of coastal waters, were consulted. Before the deployment of the Navistar Global Positioning System (GPS) in the 1990s, accurate surveying beyond territorial waters was technologically not feasible without the assistance of coastal stations established by the coastal States. Therefore, the drafters considered that the provisions on hydrographic surveys within the territorial sea were sufficient and they did not foresee widespread hydrographic survey activities beyond the territorial sea. In addition, hydrographic surveys were identified to serve the purpose of safety of navigation, including the activities of warships. Survey data could be used to create navigation charts and digital terrain models³⁸. Security issues were raised during the discussion of the EEZ regime but were not accepted because the EEZ is not sovereign national territory.

Thus, the absence of a provision for hydrographic surveys in the sea beyond the territorial sea reflects a historical assumption, not a tacit acceptance of the

freedom of offshore hydrographic surveys. The development of GPS, technology and subsequent survey platforms have made hydrographic surveys beyond the territorial sea possible³⁹. Moreover, this the potential of hydrographic survey data has extended beyond its original purpose of serving the safety of navigation, for example, to include economic potential, supporting coastal zone management, and coastal science and engineering⁴⁰. Hydrographic surveys can be carried out without the need for onshore facilities near the hydrographic survey sites. Therefore, hydrographic survey activities in the EEZ have become a controversial issue in recent decades, as it is difficult for coastal states to identify these activities in their own waters. Differences in views between countries have led to many clashes in the EEZ, including the incident in which Chinese ships and aircraft blocked the US warships Impeccable and Victorious while they were conducting hydrographic surveys in China's EEZ⁴¹.

The position of the maritime powers (e.g., the United States or the United Kingdom) on this issue is that hydrographic surveys are carried out freely in the EEZ without the permission of the coastal states⁴². The basis

³⁶ GORINA-YSERN, Montserrat & TSAMENYI, Martin. Defence Aspects of Marine Scientific Research. *Maritime Studies*, v. 1997, n. 96, p. 13-23, Oct. 1997.

³⁷ UNITED NATIONS. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs. *Marine scientific research: A revised guide to the implementation of the relevant provisions of the United Nations Convention on the Law of the Sea*. New York: United Nations publication, 2010. Available at: https://www.un.org/Depts/los/doalos_publications/publicationtexts/msr_guide%202010_final.pdf. Access on: 27 Aug. 2025.

³⁸ U.S. NAVY, U.S. MARINE CORPS, & U.S. COAST GUARD. *The commander's handbook on the law of naval operations*. US: Navy warfare development command, 2022.

³⁹ TANAKA, Yoshifumi. *The International Law of the Sea*. 1. ed. Cambridge: Cambridge University Press, 2012.

⁴⁰ BATEMAN, Sam. Hydrographic surveying in the EEZ: differences and overlaps with marine scientific research. *Marine Policy*, v. 29, n. 2, p. 163-174, Mar. 2005. Available at: <https://www.defence.gov.uk/upload/ebooks/Hydrographic%20surveying%20in%20the%20EEZ-%20differences%20and%20overlaps%20with%20marine%20scientific%20research.pdf>. Access on: 22 Jul. 2025; CONNOR, Brian Douglas; NAIRIN, Rod. Economic impact of hydrographic surveys. In: FIG Congress, 24., 2010, Australia. *Facing the Challenges – Building the Capacity: proceedings*. [S.I.]: FIG, 2010. Available at: https://www.fig.net/resources/proceedings/fig_proceedings/fig2010/papers/ts08i/ts08i_connon_nairn_4588.pdf. Access on: 28 Jul. 2025.

⁴¹ PEDROZO, Raul. Close encounters at sea: the USNS Impeccable incident, *Naval War College Review*, v. 62, n. 3, p. 100-11, 2009. Available at: <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1692&context=nwc-review>. Access on: 22 Jul. 2025; MORGAN, David. U.S. says Chinese vessels harassed Navy ship. *Reuters*, 9 Mar. 2009. Available at: <https://www.reuters.com/article/world/us-politics/us-says-chinese-vessels-harassed-navy-ship-idUSTRE52845A/>. Access on: 22 Jul. 2025; O'ROURKE, Ronald. U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress. The US: Congress, 2025. Available at: https://www.congress.gov/crs-product/R42784#_Toc197064723. Access on: 22 Jul. 2025; BATEMAN, Sam. Hydrographic surveying in the EEZ: differences and overlaps with marine scientific research. *Marine Policy*, v. 29, n. 2, p. 163-174, Mar. 2005. Available at <https://www.sciencedirect.com/science/article/abs/pii/S0308597X04000855>. Access on: 22 Jul. 2025.

⁴² COUNCIL FOR SECURITY COOPERATION IN THE

of this position is the peaceful use of the sea related to the freedom of navigation and overflight under Article 58 UNCLOS 1982. On the contrary, some coastal states, such as Australia and Canada, hold the view that hydrographic survey activities in the EEZ must be approved by the coastal states⁴³. China has been one of the leading countries in advocating this view. In December 2002, China announced that it had enacted a new law requiring Chinese permission for all survey and mapping activities within China's EEZ and stating that unauthorized ocean survey activities would be subject to fines, and confiscation of equipment and data⁴⁴. There is a growing trend among states to regulate hydrographic surveys under consent or notification to the coastal state as a regime of MSR⁴⁵. In practice, the International Hydrographic Organization implicitly supports coastal State jurisdiction over hydrographic surveys beyond the territorial sea, under a licensing regime model as for MSR⁴⁶.

In short, in the UNCLOS 1982 negotiations, hydrographic survey was a different concept from MSR. However, over time, with technological evolution, these two kinds of activities have technical similarities in practice, and hydrographic survey data have not only signi-

ficance for maritime safety but also have economic potential and maritime management. In fact, hydrographic surveys are reflected in the MSR regime of UNCLOS. Therefore, applying the interpretation of development, that is, interpretation is based upon an evolution intended by the parties to the treaty for the unclear provisions in UNCLOS⁴⁷. Specifically, in this case, hydrographic surveys in the EEZ must have the permission of the coastal State and should only be conducted with the participation of that State. Even though "hydrographic surveys and nautical charting" is not identical to MSR, States exercising their rights and performing their duties in EEZ of the coastal states shall have "due regard to" the rights and duties of the coastal states in the spirit of Article 58(3) UNCLOS. According to the International Hydrographic Organization, hydrographic surveys include

the measurement and description of the physical features of oceans, seas, coastal areas, lakes and rivers, as well as with the prediction of their change over time, for the primary purpose of safety of navigation and in support of all other marine activities, including economic development, security and defense, scientific research, and environmental protection.⁴⁸

Due to the potential implications related to the sovereign rights and jurisdiction of coastal states recognized by the Convention, obtaining permission when conducting hydrographic surveys in the EEZ is an expression of the "due regard" obligation. As Tullio Treves noted: "It is an obligation for both States to exercise their rights respecting those of the other States and to endeavour in good faith to find accommodations permitting the exercise of the rights of both."⁴⁹ Coastal states generally consent to hydrographic surveys if they are solely related to the safety of navigation, but consent may be withheld if the surveys are related to the exploration or exploitation of resources. Technological developments have made hydrographic survey data economically viable and difficult to distinguish from MSR. This has given coastal states the basis to require foreign

ASIA PACIFIC. *Memorandum 6: "The practice of the law of the sea in the Asia Pacific"*. Kuala Lumpur: CSCAP, 2002. Cited in: BATEMAN, Sam. Hydrographic surveying in exclusive economic zones: Jurisdictional issues. *The International Hydrographic Review*, v.5, n. 1, p. 24-33, Apr. 2004. Available at: <https://journals.lib.unb.ca/index.php/ihr/article/view/20645>. Access on: 22 Jul. 2025. Cited in: BATEMAN, Sam. Hydrographic surveying in the EEZ: differences and overlaps with marine scientific research. *Marine Policy*, v. 29, n. 2, p. 163-174, Mar. 2005. Available at: <https://www.defence.lk/upload/ebooks/Hydrographic%20surveying%20in%20the%20EEZ-%20differences%20and%20overlaps%20with%20marine%20scientific%20research.pdf>. Access on: 22 Jul. 2025.

⁴³ BATEMAN, Sam. Hydrographic surveying in the EEZ: differences and overlaps with marine scientific research. *Marine Policy*, v. 29, n. 2, p. 163-174, 2005. Available at: <https://www.sciencedirect.com/science/article/abs/pii/S0308597X04000855>. Access on: 22 Jul. 2025.

⁴⁴ SHIP AND OCEAN FOUNDATION; EAST – WEST CENTER. *The Regime of the Exclusive Economic Zone: Issues and Responses: A Report of the Tokyo Meeting*. Honolulu, Feb. 2003, p.39. Available at: <https://www.eastwestcenter.org/sites/default/files/private/EEZTokyoMeeting.pdf>. Access on: 27 Jul. 2025.

⁴⁵ BATEMAN, Sam. Hydrographic surveying in the EEZ: differences and overlaps with marine scientific research. *Marine Policy*, v. 29, n. 2, p. 163-174, 2005. Available at <https://www.sciencedirect.com/science/article/abs/pii/S0308597X04000855>. Access on: 22 Jul. 2025.

⁴⁶ AUSTRALIA. Department of Foreign Affairs. *Report of the Australian Delegation*. Canberra: Australian Government Publishing Service, 1977.

⁴⁷ BJORGE, Eirik. *The Evolutionary Interpretation of Treaties*. The United States of America: Oxford University Press, 2014. Chapter 3, p. 56-141.

⁴⁸ International Hydrographic Organization. *Definition & Importance of Hydrography*. [2019]. https://legacy.iho.int/srv1/index.php?option=com_content&view=article&id=299&Itemid=289&language=en. Access on: 2 Mar. 2026.

⁴⁹ TREVES, Tullio. Coastal States' rights in the maritime areas under UNCLOS. *Brazilian Journal of International Law*, v.12, n.1, p.39-48, 2015.

states to provide at least information on the nature of the activities they are conducting in their EEZ.

4 Vietnam's practice on marine scientific research - assessment from the perspective of international law enforcement

4.1 Vietnam's legal framework on marine scientific research

Before Vietnam became a member of UNCLOS⁵⁰, the Council of Ministers issued Decree No. 242/HDBT in 1991, which regulated the entry of foreign parties and foreign means into the seas of the Socialist Republic of Vietnam for marine scientific research, contributing to creating favorable conditions for foreign MSR activities in Vietnam⁵¹. In 2016, Decree No. 242/HDBT officially expired and was replaced by Decree No. 41/2016/ND-CP on detailing the licensing of foreign organizations and individuals to conduct scientific research in Vietnam's maritime zones, in accordance with the Constitution, laws and treaties. Currently, Vietnam's legal documents such as the Law on the Sea of Vietnam (2012)⁵², the Law on Marine and Island environmental resources (2015) have provisions related to MSR activities⁵³, the Law on science, technology, and innovation (2025)⁵⁴. The basic science development Program in the fields of chemistry, life sciences, earth sciences and marine sciences for the period 2017-2025 was approved by the Prime Minister on April 25, 2017, MSR has become an important priority area in the development policy of Vietnam. Vietnam also prioritizes building a team of highly qualified scientists in accordance with internatio-

nal standards⁵⁵. These efforts contribute to the goal of making Vietnam a strong and prosperous country based on its maritime resources⁵⁶.

- Regarding the definition of marine scientific research

Like UNCLOS 1982, Vietnamese law does not define the term "marine scientific research". However, this term is mentioned in Article 4(2) Law on Marine and Island environment resources (2015) with the provision:

The State mobilizes resources, encourages and promotes basic investigation and scientific research on marine and island resources and environment; giving priority to deep sea, distant sea, islands, adjacent international waters...⁵⁷.

Additionally, Article 2 Decree No. 242/HDBT once listed an open list of MSR activities and the objectives of these activities, including "investigation, exploration, research on resources, natural conditions, marine environment and other activities for civil purposes and serving peaceful purposes"⁵⁸. Scientific research activities on marine and island resources and environment must be for "peaceful purposes" and carried out in accordance with international law and Vietnamese law⁵⁹, including law on science and technology, law on marine and island resources and environment⁶⁰.

Regarding hydrographic survey, the approach of Vietnamese law is like that of UNCLOS 1982 when "hydrographic survey" is separate from "MSR"⁶¹. The Law on the Sea of Vietnam 2012 has a separate provision, Article 36, regulating MSR, which is compatible with regulations in UNCLOS. By contrast, hydro-

⁵⁰ VIETNAM. National Assembly. *Resolution of 23 June 1994 on ratifying the 1982 UNCLOS*. Hanoi, 1994.

⁵¹ VIETNAM. Council of Ministers. *Decree No. 242/HDBT of 5 August 1991 on the entry of foreign parties and foreign means into scientific research in the sea areas of the Socialist Republic of Vietnam*. Hanoi, 1991.

⁵² UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 36.

⁵³ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 19 - 20 on licensing and rights and obligations of foreign organizations and individuals conducting marine scientific research in Vietnam's waters.

⁵⁴ UNITED NATIONS. General Assembly. *United Nations Convention on the Law of the Sea*. UNCLOS. [1982]. Art. 3, 6-7) explain the terms "scientific activities", "basic research", "applied research".

⁵⁵ VIETNAM. Prime Minister. *Decision No. 562/QĐ-TTg of 10 March 2025 on approving the Program on the development of basic sciences in chemistry, life sciences, earth sciences, and marine sciences for the period 2017-2025*. Hanoi, 2017.

⁵⁶ VIETNAM. Communist Party of Vietnam. *Resolution No. 36-NQ/TW of 22 October 2018 on Strategy for Sustainable Development of Vietnam's marine economy by 2030, with Visions towards 2045*. Hanoi, 2018.

⁵⁷ VIETNAM. National Assembly. *Law No.82/2015/QH13 of 10 July 2015 on Marine and Island environment resources*. Hanoi, 2015.

⁵⁸ VIETNAM. Council of Ministers. *Decree No. 242/HDBT of 5 August 1991 on the entry of foreign parties and foreign means into scientific research in the sea areas of the Socialist Republic of Vietnam*. Hanoi, 1991.

⁵⁹ VIETNAM. National Assembly. *Law No. 82/2015/QH13 of 10 July 2015 on Marine and Island environment resources*. Hanoi, 2015.

⁶⁰ VIETNAM. National Assembly. *Law No.18/2012/QH13 of 21 June 2012 on the Sea of Vietnam*. Hanoi, 2012. Art. 17.

⁶¹ VIETNAM. National Assembly. *Law No.18/2012/QH13 of 21 June 2012 on the Sea of Vietnam*. Hanoi, 2012. Art. 25.

graphic measurement is only mentioned together with MSR, and it is not regulated separately. Based on Decree No. 242/HDBT and Vietnam's response to incidents of Chinese survey vessels (e.g. Haiyang Dizhi 8⁶², Bei Diao 996) operating in Vietnam's EEZ, it can be shown that foreign vessels/ships conducting hydrographic surveys in Vietnam's waters must also carry out prior permission procedures like MSR.

- Regarding marine scientific cooperation

Foreign organizations and individuals conducting scientific research in Vietnam's internal waters and territorial sea must obtain permission from the competent Vietnamese government authority. If this activity is conducted in Vietnam's EEZ and continental shelf, it must be approved by a competent Vietnamese state agency⁶³. This permission/approval is demonstrated by a decision to grant a scientific research license.

Conditions, responsibilities, and rights of foreign organizations and individuals are stipulated in Articles 19, 20 and 21 of the law on Marine, Island resources and Environment (2015). Some conditions for being licensed are that scientific research activities are conducted for peaceful purposes; MSR does not harm national sovereignty, defense, and security activities of Vietnam; does not pollute the marine environment; and does not hinder the legitimate activities of organizations and individuals in Vietnam's sea areas.

- Regarding the expense for licensing appraisal

Foreign organizations and individuals must pay licensing appraisal costs at the levels prescribed in Circular No. 07/2024/TT-BTC, specifically:

Table 1 – The expense for MSR licensing appraisal in Vietnam

No.	Licensing appraisal	Expense (VND/each appraisal)			
		Grant	Amendments and supplements	Extend	Re-issue
1	MSR that are outside the internal waters and territorial waters of Vietnam and do not use drilling methods on the seabed or underground under the seabed	4.000	3.700	2.200	1.300
2	MSR are conducted within the scope of Vietnam's internal waters and territorial waters Vietnam, and in which, there is no using drilling methods on the seabed or underground under the seabed.	5.300	4.000	3.400	2.200
3	MSR uses the method of drilling on the seabed, underground under the seabed	6.000	4.500	3.700	2.500

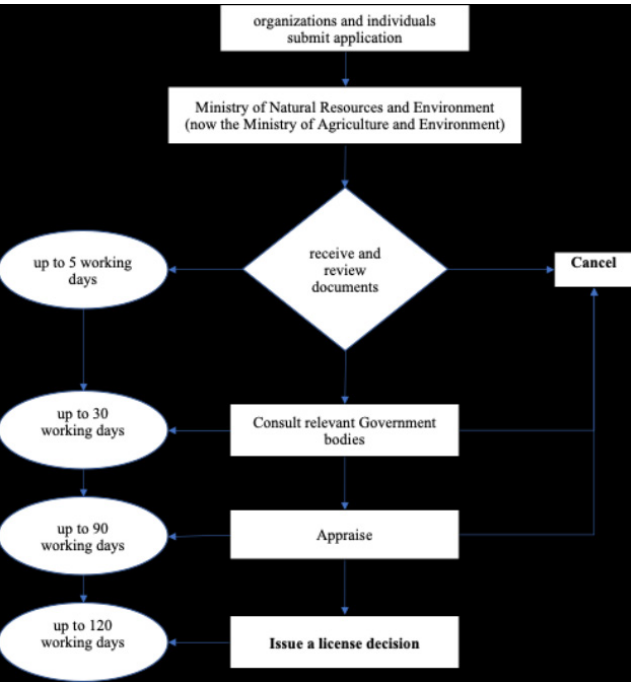
⁶² VIETNAM. Embassy of the Socialist Republic of Vietnam in Austria. *Statement by the spokesperson of the Vietnamese Ministry of Foreign Affairs Le Thi Thu Hang regarding the Chinese vessel Haiyang Dizhi 8's resumption of its violation of the Vietnamese Exclusive Economic Zone and Continental Shelf*. Available at: <http://www.vietnamembassy.at/en/news/statement-spokesperson-vietnamese-ministry-foreign-affairs-le-thi-thu-hang-regarding-chinese>. Access on: 5 Sep. 2025.

⁶³ VIETNAM. Government. *Decree No. 41/2016/ND-CP of 15 May 2016 on detailing the licensing for foreign organizations and individuals to conduct scientific research in the maritime zones of Vietnam*. Hanoi, 2016. Art 3(1)(b).

According to the table, the licensing fee for MSR in Vietnam's maritime zones depends on the geographical location and the use of drilling methods on the seabed and underground. Compared to that of other countries, some countries have specific fees, such as the Bahamas (about 56 USD)⁶⁴, the UK (about 50 to 2,200 pounds)⁶⁵, etc. Some countries, such as the US, China, and Australia do not have specific regulations on this fee, so the fee is decided depending on each project. When it comes to Vietnam, it has implemented the provisions of UNCLOS on not imposing costs and requirements that hinder MSR in the EEZ and on the continental shelf.

The licensing process for foreign organizations and individuals to conduct research and surveys in Vietnam's maritime zones is implemented according to Decree No. 41/2016/ND-CP as follows:

Figure 1 – MSR licensing process



In the above procedure for granting scientific research licenses, the competent authority receiving the application is the Ministry of Agriculture and Environment. Additionally, the processing time for MSR licensing applications is clear. Accordingly, at least 245 days from the date of receiving the application (more than 8 months), the scientific license is granted.

Compared to other countries, this process usually lasts about 6 months, and the application is submitted to a diplomatic agency, in addition to the marine management agency. For example, the agencies receiving applications in the US, China and Australia are the US Department of State and the National Oceanic and Atmospheric Administration⁶⁶; the Chinese Embassy and the State Oceanic Administration⁶⁷; the Australian Embassy, the Department of Foreign Affairs and Trade⁶⁸, respectively.

- Regarding the network of monitoring stations serving basic investigation and monitoring of the marine environment

Vietnam has built a system of monitoring stations serving basic investigation and monitoring of the marine environment along the coastal strip. Currently, there are 117 stations in this network, including 27 meteorological and oceanographic stations, of which 25 are automated; 90 water environment stations and 04 resource monitoring stations⁶⁹. The distribution density of meteorological and oceanographic stations is 27 stations/3260km of coastline, equivalent to about 121km/station.

According to the Station Network Plan to 2030, with a vision to 2050, by 2030, the national station network will be upgraded and developed with a total of 27 oceanographic stations, 3 marine radar stations and 6 marine environmental stations. By 2050, the total number of oceanographic stations will be increased to 79 stations, 21 marine radar stations, 14 marine buoy stations and 30 marine environmental stations⁷⁰. This network of

⁶⁴ BAHAMAS. Department of marine resources. *Scientific research permit*. 2025. Available at: <https://www.bahamas.gov.bs/service/scientific-research-permit>. Access on: 7 Sep. 2025

⁶⁵ UNITED KINGDOM. Marine management organisation. *Apply for a marine licence*. 2024. Available at: <https://www.gov.uk/apply-marine-licence>. Access on: 7 Sep. 2025.

⁶⁶ THE UNITED STATES OF AMERICA. *President of the United States. Proclamation No. 100710 of 09 September 2020 - Revision to United States Marine Scientific Research Policy*. Available at: <https://www.presidency.ucsb.edu/documents/proclamation-100710-revision-united-states-marine-scientific-research-policy>. Access on: 10 Sep. 2025.

⁶⁷ CHINA. State Council. *Decree No. 199 of 10 January 1996 on regulation on administration of foreign - related marine scientific research*. Available at: <http://www.lawinfochina.com/display.aspx?lib=law&tid=12053&CGid=&EncodingName=big5>. Access on: 27 Sep. 2025.

⁶⁸ AUSTRALIA. Department of Foreign Affairs and Trade. *Marine scientific research*. Available at: <https://www.dfat.gov.au/international-relations/themes/environment-sea-law/marine-scientific-research/Pages/marine-scientific-research>. Access on: 27 Sep. 2025.

⁶⁹ VIETNAM. Prime Minister. *Decision No. 433/QĐ-TTg of 24 March 2021 on approving the task of planning the national network of Hydro-Meteorological stations for the period 2021-2030, with a vision to 2050*. Hanoi, 2021.

⁷⁰ VIETNAM. Prime Minister. *Decision No. 224/QĐ-TTg of 7 March 2024 on approving the master plan for national environmental monitoring for the 2021-2030 period, with a vision to 2050*. Hanoi, 2024.

monitoring stations is the basic data in MSR activities, facilitating foreign research agencies, organizations and individuals to assess the current status of meteorological, hydrographic and marine environmental data in the research marine areas before conducting specific scientific research activities in these areas. This also shows the interest and encouragement of the Vietnamese Government for MSR.

- Regarding the results of handling requests for licensing for hydrographic survey/measurement activities

Since Decree No. 41/2016/ND-CP took effect from 2016 to 2025, the Ministry of Natural Resources and Environment (now the Ministry of Agriculture and Environment) has granted 07 licenses to foreign organizations and individuals to cooperate in research in Vietnam's maritime zones, including:

Table 2 - List of for hydrographic survey/measurement projects licensed by competent authorities of Vietnam in the period 2016 to 2025

No.	Foreign organization	Partner organizations in Vietnam	Survey period	Maritime zones	The objective
	Georgia Institute of Technology - USA	<i>the Institute of Oceanography - Vietnam Academy of Science and Technology</i>	June, 2016	Internal waters, territorial waters, and contiguous zone in southern Vietnam	Study on nutrient dynamics and plankton under the biogeochemical impact of material flow from the Mekong River to the sea

No.	Foreign organization	Partner organizations in Vietnam	Survey period	Maritime zones	The objective
	Pacific Institute of the Bioorganic chemistry of the Far Eastern Branch of Russian Academy of Sciences	<i>the Institute of Oceanography - Vietnam Academy of Science and Technology</i>	November – December, 2016	Internal waters, territorial waters, and contiguous zone of Vietnam	Further research and updating documents on biodiversity and biological community structure, collecting specimens for biochemical and environmental research
	Pacific Institute of the Bioorganic chemistry of the Far Eastern Branch of Russian Academy of Sciences	<i>the Institute of Oceanography - Vietnam Academy of Science and Technology</i>	July, 2018	Internal waters, territorial waters, and contiguous zone in southern Vietnam	Additional research and updating documents on biodiversity, environment, biochemistry, marine toxins and community structure of organisms, microorganisms, and seaweed for biomedical and pharmaceutical research

No.	Foreign organization	Partner organizations in Vietnam	Survey period	Maritime zones	The objective	No.	Foreign organization	Partner organizations in Vietnam	Survey period	Maritime zones	The objective
	V. I. Ilichev Pacific Oceanological Institute of the Far Eastern Branch of Russian Academy of Sciences	Institute of Marine Geology and Geophysics, Vietnam Academy of Science and Technology	December, 2019	Internal waters, territorial waters, and contiguous zone of Vietnam	Research on geology, marine environment and assessment of oil and gas potential in some sedimentary basins on the continental shelf of Vietnam						
	Pacific Institute of the Bioorganic chemistry of the Far Eastern Branch of Russian Academy of Sciences	<i>the Institute of Oceanography - Vietnam Academy of Science and Technology</i>	May, 2021	Internal waters, territorial waters, and contiguous zone in northern Vietnam	Additional research and updating documents on biodiversity, environment, biochemistry, marine toxins and community structure of organisms, microorganisms, and seaweed for biomedical and pharmaceutical research		Pacific Oceanographic Institute of the Far Eastern Branch of Russian Academy of Sciences (POI FEB RAS)	Institute of Marine geology and geophysics, Vietnam Academy of Science and Technology (VAST)	May-June, 2023	Area I on Southeast continental shelf (Nam Con Son sedimentary basin, Southeast sub-basin in the deep depression in the East Sea); Area II on the continental shelf in South Central Vietnam (Phu Khanh sedimentary basin), and Area III on the continental shelf in North Central Coast of Vietnam (south of the Red River sedimentary basin)	Sampling of bottom sediments, marine minerals, water, microorganisms and measuring geophysics, oceanographic and hydroacoustic parameters; conducting some on-site analytical experiments in laboratories equipped on board

ANH, Dao Le Thi; DUC, Dung Le; BAC, Ha Pham Thi. Rights and obligations in marine scientific research: legal insights from Chinese research/survey vessels operating in maritime zones under Vietnam's sovereign rights. *Revista de Direito Internacional, Brasília*, v. 22, n. 3, p. 125-145, 2025.

No.	Foreign organization	Partner organizations in Vietnam	Survey period	Maritime zones	The objective
	French National research Institute for sustainable development (IRD)	Institute of Marine Environmental Resources, Vietnam Academy of Science and Technology	May-July/2024	Vietnam's maritime zones	General survey of marine ecology and environment

Source: The Vietnam Administration of Seas and Islands, Ministry of Agriculture and Environment

4.2 Assessing the legality of the activities of the Bei Diao 996 in Vietnam's maritime zones

The provisions of UNCLOS and Vietnamese law provide additional nuance and context when thinking about the activities of the Bei Diao 996 vessel in Vietnam's EEZ and extended continental shelf. According to publicly available data from Marine Traffic, the Bei Diao 996, flying the flag of the People's Republic of China, departed from Hainan province on 10 June 2025. After conducting operations in the Spratly Islands on 15 June 2025, it proceeded to conduct activities approximately 160 nautical miles off the coast of Tuy Hoa, within maritime zones that, under Articles 56 and 76 of UNCLOS, constitute Vietnam's EEZ and extended continental shelf⁷¹.

The *Bei Diao 996*, equipped for underwater acoustic testing, sensor deployment, environmental data collection, and other research functions, is capable of conducting both marine scientific research (MSR) and hydrographic surveys⁷². The dual-purpose nature of such activities—potentially serving both civilian and military objectives—raises legal questions regarding their conformity with the MSR regime under Part XIII of UNCLOS, particularly in relation to the requirement of

coastal State consent for research conducted within its EEZ and continental shelf. Consequently, the vessel's operations in these zones warrant scrutiny under both international law and Vietnamese domestic law governing research and survey activities in maritime areas under national jurisdiction.

The movements of the Bei Diao 996 vessels in Vietnam's EEZ exhibit characteristics consistent with scientific or survey activities rather than mere navigation. The vessel's recorded movements—marked by slow speed, systematic and grid-like trajectories, repeated crossings, and intermittent stationary periods—are indicative of data collection operations controlled by onboard equipment. Such patterns, when assessed in light of UNCLOS, may be functionally equivalent to marine scientific research (MSR) activities, thereby subject to the specific consent regime applicable under Part XIII of the Convention⁷³.

Under Article 58 of UNCLOS, foreign vessels enjoy the freedom of navigation within the EEZ of coastal States, provided that such activities are consistent with the rights and duties of the coastal State under Article 56. The legal complexity arises from the blurred distinction between MSR and hydrographic surveys. While hydrographic surveys are traditionally associated with navigational safety and may fall under the general freedom of navigation, an increasing number of States have sought to regulate them under the MSR regime, requiring prior consent or notification. The absence of explicit provisions on hydrographic surveys beyond the territorial sea in UNCLOS creates a normative “gray area,” leaving room for divergent interpretations and potential jurisdictional disputes. This ambiguity constitutes a significant legal bottleneck in determining the appropriate response of Vietnam to such foreign operations.

The determination of whether the activities of a foreign vessel in Vietnam's maritime zones constitute legitimate navigation or unauthorized research/survey

⁷¹ VIETNAM. *Statement of 12 May 1977 on Vietnam's territorial waters, contiguous zone, exclusive economic zone and continental shelf*. Hanoi, 1977; VIETNAM. *Declaration of 12 November 1982 on baselines of Vietnam*. Hanoi, 1982; VIETNAM. National Assembly. *Law No.18/2012/QH13 of 21 June 2012 on the Sea of Vietnam*. Hanoi, 2012.

⁷² THE MARITIME EXECUTIVE. Shipbuilder CSSC Builds Base for “National Defense” Sonar Testing. *The Maritime Executive*, 19 Jun. 2023. Available at: <https://maritime-executive.com/article/vietnam-objects-to-chinese-seismic-activity-in-its-eez>. Access on: 19 Aug. 2025.

⁷³ PHẠM, Thanh Vân *et al.* *Một phân tích tính pháp lý và hậu quả hoạt động của tàu Bắc Triều 996 trong vùng đặc quyền kinh tế và thềm lục địa của Việt Nam* [A legal analysis and consequences of the operations of the Beidiao 996 vessel in Vietnam's exclusive economic zone and continental shelf]. *Dự án Đại Sự Kỵ Biển Đông*, 22 Jun. 2025. Available at <https://dskbd.org/2025/06/22/mot-phan-tich-phap-ly-va-hau-qua-hoat-dong-cua-tau-bac-dieu-996-trong-vung-dac-quyen-kinh-te-va-them-luc-dia-cua-viet-nam/>. Access on: 2 Aug. 2025.

operations is contingent upon access to detailed information regarding the vessel's equipment and objectives—information that is often unavailable in the case of Chinese State-operated vessels. Nevertheless, regardless of whether the *Bei Diao 996* was engaged in MSR or hydrographic surveying, both categories of activity are subject to Vietnam's jurisdictional and regulatory authority when conducted within its EEZ and continental shelf. As established in prior analysis, UNCLOS differentiates MSR from hydrographic surveying, and the latter cannot automatically be considered an exercise of freedom of navigation under Article 87 or 58. The omission of explicit reference to hydrographic surveys in areas beyond the territorial sea should not be construed as granting implicit freedom to conduct such activities without coastal State consent.

Vietnam's formal protest against the operations of the *Bei Diao 996*⁷⁴ underscores the legal position that the vessel entered and conducted research or survey activities within Vietnam's EEZ and continental shelf without prior consent, in contravention of Articles 246 and 258 of UNCLOS. The absence of notification or information from China concerning the nature and purpose of the vessel's activities further reinforces Vietnam's claim that such operations were inconsistent with the legal regime governing the rights and obligations of States in the EEZ and on the continental shelf under international law.

5 Solutions and recommendations for Vietnam

5.1 Recommendations on Vietnam's policies and laws

In light of the evolving practice of States and the growing international consensus on the regulation of hydrographic surveys⁷⁵, Vietnam should consider adop-

ting a legal instrument that explicitly classifies hydrographic surveys within the regime of marine scientific research (MSR) under the United Nations Convention on the Law of the Sea (UNCLOS). Such recognition would ensure consistency between Vietnamese domestic law and international legal developments while strengthening Vietnam's regulatory authority over foreign research and survey activities in its maritime zones. Furthermore, Vietnam should improve and amend some regulations on licensing to organizations and individuals that want to conduct MSR/hydrographic surveys, as follows:

- Regarding the time to process MSR license applications

Vietnam should shorten the processing period for MSR license applications to fewer than six months. An expedited procedure would enhance administrative efficiency, promote legitimate scientific cooperation, and align Vietnam's practice with that of many coastal States that facilitate timely authorization of research activities within its maritime jurisdictions. This reform would also demonstrate Vietnam's commitment to the UNCLOS principles of promoting and facilitating MSR (Article 239).

- Regarding the handover and preservation of research stem specimens to competent authorities:

According to Article 20 (2) (i) Law on Marine and Island resources and environment 2015, researchers must submit original specimens to the Ministry of Natural Resources and Environment upon the completion of MSR. However, this provision lacks clarity concerning the procedural steps, designated authorities, and technical standards for specimen handover and preservation. Given that marine specimens—biological, environmental, and sedimentary—often require specialized storage conditions and costly preservation equipment, it is necessary for the Ministry to issue detailed guidelines specifying the methods, responsibilities, and financial arrangements for handling such materials. In addition, it is necessary to specify the responsibilities of functional units (such as the Institute of Oceanography, Institute of Marine Resources and Environment, Institute of Marine Research, Institute of Geological Sciences and Mineral Resources, etc.) so that they can receive the above stem specimens.

⁷⁴ VOV. Việt Nam lên tiếng về hoạt động khảo sát trái phép của tàu Trung Quốc trong EEZ [Vietnam speaks up about the Chinese vessel's unauthorised survey in Vietnam's EEZ]. *VOV*, 3 Jul. 2025. Available at: August 5, 2025, from <https://vov.vn/chinh-tri/viet-nam-len-tieng-ve-hoat-dong-khao-sat-trai-phep-cua-tau-trung-quoc-trong-eez-post1212108.vov>. Access on: 5 Aug. 2025

⁷⁵ UNITED NATIONS. Office for Ocean Affairs and the Law of the Sea. *The Law of the Sea: National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas under National*

Jurisdiction. New York: United Nations Publication, 1989.

- Regarding the penalty for violations by foreign organizations and individuals

Vietnamese law currently lacks explicit provisions imposing penalties or enforcement mechanisms against foreign organizations or individuals that violate national regulations on MSR or hydrographic surveys. The absence of such provisions weakens the State's capacity to ensure compliance and protect its sovereign rights under Articles 56 and 246 of UNCLOS. Therefore, Vietnam should introduce specific legal measures establishing administrative and criminal sanctions for non-compliance, including suspension of ongoing operations, confiscation of unlawfully collected data, and restrictions on future research authorizations. The development of a comprehensive enforcement regime would contribute to safeguarding Vietnam's legitimate interests and affirming its jurisdictional authority over MSR and hydrographic activities conducted within its maritime zones.

5.2 Recommendations for Vietnam's legal and policy responses to unauthorized marine scientific research and hydrographic surveys in its maritime zones⁷⁶

In the spirit of applying international legal instruments and national law together with utilizing modern maritime domain identification tools, Vietnam has a fully legal basis and ample historical evidence to assert and protect its rights firmly. There is the fact that, regardless of Vietnam's efforts to strengthen its maritime law enforcement capacity in recent years, China still dominates in terms of quantity, scale, and modernity of its maritime forces. The constant presence of Chinese coast guard and fishing vessels in Vietnam's EEZs may quickly create a protective layer around Chinese research/survey vessels, making it difficult for Vietnam to approach and board the vessel for inspection, and potentially escalating the conflict if miscalculated.

⁷⁶ PHẠM. Thanh Vân; et al. *Một phân tích tính pháp lý và hậu quả hoạt động của tàu Bắc Điều 996 trong vùng đặc quyền kinh tế và thềm lục địa của Việt Nam* [A legal analysis and consequences of the operations of the Beidiao 996 vessel in Vietnam's exclusive economic zone and continental shelf]. *Dự án Đại Sự Ký Biển Đông*, 22 Jun. 2025. Available at <https://dskbd.org/2025/06/22/mot-phan-tich-phap-ly-va-hau-qua-hoat-dong-cua-tau-bac-dieu-996-trong-vung-dac-quyen-kinh-te-va-them-luc-dia-cua-viet-nam/>. Access on: 2 Aug. 2025.

Given this context, several legal and practical measures are recommended to strengthen Vietnam's response to unlawful or unauthorized foreign activities in its maritime zones:

Firstly, enhanced monitoring and evidence collection. Vietnam should prioritize both direct and remote monitoring of foreign vessel activities to collect verifiable evidence of potential violations. This includes the use of coastal radar systems, remote sensing satellites, high-resolution or synthetic aperture radar (SAR) imagery, and aerial reconnaissance. These tools enable Vietnam to identify vessel behaviors indicative of research or survey activities—such as grid-pattern navigation, reduced speed, or equipment deployment—that go beyond the normal exercise of freedom of navigation under Article 58(1) of UNCLOS. Reliable documentation of such patterns would serve as the evidentiary basis for invoking Vietnam's jurisdiction under Articles 56 and 246 of UNCLOS.

Secondly, diplomatic requests for information. Upon surveillance data shows reasonable suspicion that the vessel is conducting activities in maritime zones under Vietnam's jurisdiction and information about the modern equipment equipped on Bei Diao 996, which allows for conducting MSR/hydrographic surveys and activities with potential for economic purposes, Vietnam has the right to request China to provide information based on the principle that Vietnam has jurisdiction over such activities. In accordance with Article 58 (3) UNCLOS, China "shall have due regard to the rights and duties of the coastal states", implying that it is compulsory for China to consider the legitimate interests of the coastal state and to comply with requests for providing information about unusual activities. Vietnam can also invoke Article 300 UNCLOS, which stipulates that member states must exercise the rights and freedoms of navigation in good faith and in a manner that does not constitute an abuse of rights. In this context, Vietnam may invoke both provisions to require China to cooperate in transparency and compliance with applicable legal regimes.

Procedurally, since Bei Diao 996 operates as a civilian vessel under the management of Chinese governmental authorities, the Vietnamese Ministry of Foreign Affairs may submit an official diplomatic note requesting disclosure of operational details through bilateral

channels, consistent with the cooperative obligations of States under Part XIII of UNCLOS.

Thirdly, lawful enforcement measures. If the vessel's activities continue without authorization or satisfactory explanation, Vietnam retains the right to take proportionate enforcement actions consistent with international law. Such measures may include boarding and inspection of the vessel, ordering the temporary suspension of activities pending clarification, or directing the vessel to withdraw from Vietnam's maritime zones where a violation of sovereign rights is reasonably suspected. Any enforcement measure must, however, adhere to the principle of proportionality and avoid escalation inconsistent with the peaceful settlement of disputes under Part XV of UNCLOS.

Fourthly, diplomatic and multilateral responses. In anticipation of China's assertion that such operations occur within waters under its claimed jurisdiction, Vietnam should reaffirm that these activities constitute a violation of its sovereign rights and jurisdiction as defined by Articles 56 and 77 of UNCLOS. Should bilateral dialogues fail to produce compliance, Vietnam may:

- Deliver a diplomatic note (via diplomatic channels and public channels) demanding cessation of unauthorized activities and condemning any MSR or hydrographic survey conducted without Vietnam's permission.

- Enhance the presence of Vietnamese maritime law enforcement forces to monitor and document foreign vessel operations, thereby reinforcing its jurisdictional claim;

- Systematically collect and archive data, imagery, and records of such activities to develop a comprehensive evidentiary dossier for potential use in international legal proceedings or advocacy; and

- Raise the issue within multilateral fora such as ASEAN, the ASEAN Regional Forum (ARF), and the United Nations, thereby generating diplomatic pressure and mobilizing regional support for adherence to UNCLOS norms.

Through these measures, Vietnam can assert its rights under international law in a manner that is both legally grounded and strategically prudent. By combining legal diplomacy, maritime domain awareness, and multilateral engagement, Vietnam would reinforce its position as a coastal State committed to upholding

the rule of law at sea and maintaining stability in the East Sea.

6 Conclusion

Technological advancements have blurred the distinction between hydrographic surveys and marine scientific research (MSR), rendering both activities subject to similar regulatory scrutiny under UNCLOS. Given the dual scientific and economic implications of hydrographic data, such activities should fall within the MSR regime and thus require the prior consent of the coastal State. As a responsible member of UNCLOS, Vietnam must continue to balance its obligation to promote international scientific cooperation with the imperative of safeguarding its sovereign rights and jurisdiction. Strengthening Vietnam's legal framework—through clearer licensing procedures, expedited approval processes, and defined responsibilities for specimen management—will enhance transparency and compliance. At the same time, by combining legal diplomacy, maritime domain awareness, and proportionate enforcement, Vietnam can reinforce its capacity to respond to unauthorized research or survey operations. In doing so, Vietnam affirms its commitment to the rule of law at sea and to fostering peaceful, sustainable, and cooperative marine development in the region.

Author Statement

We the undersigned declare that this manuscript is original, has not been published before and is currently not being considered for publication elsewhere. We confirm that the manuscript has been read and approved by all named authors and that there are no other persons who satisfied the criteria for authorship but are not listed. We further confirm that the order of authors listed in the manuscript has been approved by all of us. We understand that the Corresponding Author is the sole contact for the Editorial process. They are responsible for communicating with the other authors about progress, submissions of revisions and final approval of proofs.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

Data availability

Data will be made available on request

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**IV. TENSÕES EM DIREITOS HUMANOS
PROTEÇÃO DE GRUPOS VULNERÁVEIS**

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Resumen

El presente artículo, por medio de una metodología analítico-descriptiva, estudia la compleja situación de la comunidad indígena Choréachi en México la cual ha sufrido una vulneración histórica de sus derechos humanos y territoriales. La investigación estudia las respuestas y actuaciones del Estado mexicano y del Sistema Interamericano de Derechos Humanos frente a las violaciones sistemáticas de sus derechos. El estudio demuestra una falta de reconocimiento a los Pueblos Originarios sobre sus recursos y su cultura, debido a la pasividad del Estado frente al crimen organizado y la violencia que impactan a la comunidad y el territorio que habitan. Se concluye que, a pesar de las acciones propuestas por la Corte y Comisión Interamericana, estas no han sido efectivamente aplicadas y, por lo tanto, es necesario que el Estado implemente acciones efectivas para garantizar el respeto a los derechos de los Pueblos Originarios.

Palabras clave: comunidad indígena; Choréachi; posesión ancestral; Corte Internacional de Derechos Humanos; pueblos originarios.

Summary

This article, through an analytical-descriptive methodology, studies the complex situation of the Choréachi Indigenous community in Mexico, which has suffered a historical violation of its human and territorial rights. The research analyzes the responses and actions of both the Mexican State and the Inter-American Human Rights System in the face of systematic violations of their rights. The study proves a lack of recognition to the Indigenous Pe-

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ople of their resources and culture, due to the passivity of the State in the face of organized crime and violence that affect the community and the territory they inhabit. It is concluded that, despite the actions proposed by the Inter-American Court and Commission, these have not been effectively applied and, therefore, it is necessary for the State to implement effective actions to guarantee respect for the rights of the Indigenous Peoples.

Keywords: indigenous Community; Choréachi; ancestral possession; International Court of Human Rights; native people.

Resumo

O presente artigo, por meio de uma metodologia analítico-descritiva, examina a complexa situação da comunidade indígena de Choréachi, no México, a qual tem sido historicamente submetida à violação de seus direitos humanos e territoriais. A pesquisa analisa as respostas e as ações tanto do Estado mexicano quanto do Sistema Interamericano de Direitos Humanos diante das violações sistemáticas de seus direitos. O estudo evidencia a ausência de reconhecimento dos povos indígenas em relação aos seus recursos e à sua cultura, em razão da passividade estatal frente ao crime organizado e à violência que afetam a comunidade e o território que habitam. Conclui-se que, apesar das medidas propostas pela Corte Interamericana de Direitos Humanos e pela Comissão Interamericana de Direitos Humanos, estas não têm sido efetivamente implementadas, tornando, portanto, necessária a adoção de ações estatais eficazes para garantir o respeito aos direitos dos povos indígenas.

Palavras-chave: comunidade indígena; Choréachi; posse ancestral; Corte Interamericana de Direitos Humanos; povos originários.

1 Introducción

El reconocimiento de derechos de las comunidades indígenas en América Latina ha sido un tema de discusión internacional en los últimos años, dada su estrecha relación con la protección del medio ambiente y con las dinámicas sociales, históricas y políticas de los territorios en los que los Pueblos Originarios habitan. Estos

pueblos comúnmente se enfrentan a diversas amenazas, como la pérdida de tierras, recursos naturales, violencia y discriminación sistémica por parte de comunidades no indígenas que habitan sus territorios y el mismo Estado. Esta situación pone en riesgo su supervivencia física y cultural.

El presente artículo estudia y profundiza el caso de la comunidad indígena Choréachi que se ubica en la Sierra Tarahumara de México por medio de una metodología analítico-descritiva. Esta comunidad ha sufrido, históricamente, vulneraciones a sus derechos humanos entre los cuales se destacan el derecho a la vida y la integridad personal, así como los derechos específicos de los pueblos originarios como la propiedad colectiva o ancestral, la consulta previa, libre e informada, el acceso a la justicia y la protección al medio ambiente sano. Asimismo, se analiza el papel del Estado mexicano en estas violaciones como actor pasivo y activo.

Con una población de alrededor de 800 personas pertenecientes al pueblo rarámuri o tarahumara, la comunidad indígena Choréachi no sólo ha sufrido la falta de reconocimiento de su calidad como pueblo originario, sino también la vulneración a sus derechos territoriales dado que nunca se les adjudicaron los títulos de propiedad del territorio que ancestralmente habitan. En su lugar, estos fueron adjudicados a terceros que explotaron el territorio sin consultarles previamente. Además, dichas tierras cuentan con una presencia creciente del crimen organizado por su ubicación estratégica entre Estados Unidos y México, lo que ha incrementado su situación de marginación social y política.

En el presente análisis se estudian las respuestas y acciones del sistema interamericano de derechos humanos para contrarrestar la situación de vulnerabilidad de la comunidad indígena Choréachi, principalmente las tomadas por la Corte Interamericana de Derechos Humanos y las medidas cautelares establecidas por la Comisión Interamericana de Derechos Humanos. Se analizan, adicionalmente, las vulneraciones llevadas a cabo por el Estado Mexicano contra los Derechos Humanos y otros instrumentos internacionales de protección y su incapacidad para cesar la vulneración de derechos de estos.

Por lo tanto, el artículo se divide en tres acápites, el primero titulado “La comunidad indígena Choréachi y los desafíos en la protección de sus derechos humanos”, en el cual se hace una recapitulación de los antecedentes

del caso Choréachi vs. México y los hechos que dieron nacimiento a las vulneraciones de sus derechos humanos. El segundo acápite, titulado “El marco de protección de derechos de la CIDH y su aplicación fallida en el Caso Choréachi” hace un estudio de las interpretaciones jurisprudenciales de los derechos humanos vulnerados al pueblo originario Choréachi, entendiendo su concepto y alcance. Por último, el tercer acápite, titulado “Intervenciones de la Corte Interamericana de Derechos Humanos” examina las pronunciaciones por medio de resoluciones de la Corte Interamericana de Derechos Humanos y las medidas cautelares promovidas por la Comisión Interamericana de Derechos Humanos.

2 La comunidad indígena Choréachi y los desafíos en la protección de sus derechos humanos

La comunidad indígena de Choréachi está ubicada en la Sierra Tarahumara, en el Estado de Chihuahua, México. Este pueblo originario está integrado por aproximadamente 800 personas rarámuri o tarahumaras. Históricamente, los indígenas ubicados en la Sierra Tarahumara han sido parte de diversas problemáticas que dificultan su supervivencia, como la falta de reconocimiento de sus derechos territoriales por parte del Estado, la indebida adjudicación de títulos de propiedad a particulares y los permisos de explotación forestal y turística a inversionistas privados y empresas de capital extranjero. Además, la alta marginación social y exclusión de políticas sociales, corrupción gubernamental, delincuencia organizada, la presencia del narcotráfico en la región y el despojo de sus territorios y bienes naturales¹.

La comunidad Choréachi ha sido afectada desde la llegada de los conquistadores españoles, cuando fueron concentrados en lugares distintos a sus territorios originales, con el fin de controlarlos y evangelizarlos. Este patrón continuó bajo el mandato del Estado mexicano que no solo no corrigió lo sucedido con los españoles, sino que lo ratificó y perpetuó. Con el pasar de los siglos, la responsabilidad de estas afectaciones recayó en el Estado mexicano, que en el artículo 27 de la Consti-

tución Mexicana de 1917 hace entrega de sus territorios originarios a campesinos sin tierra, lo que dio lugar al reparto agrario y creación de ejidos² y al reconocimiento de derechos de posesión a las personas que en su momento contaban con títulos entregados por los españoles. Como consecuencia, la comunidad indígena no obtuvo reconocimiento de sus derechos ancestrales a sobre los territorios que históricamente han habitado, pues se asumió que no existían asentamientos originarios en la zona.

Con la reforma agraria en el año 1923, se esperaba un reconocimiento a los pueblos indígenas, no obstante, ellos no se tuvieron en cuenta en la organización territorial. Esta exclusión se reafirmó en 1992, cuando se implementó una nueva reforma agraria por parte del gobierno mexicano³. En consecuencia, se generaron una serie de injusticias “legales” para la referida comunidad, ya que, al emitirse resoluciones presidenciales de dotación y ampliación de Ejidos y comunidades agrarias en sus tierras ancestrales, también se permitió la explotación de recursos naturales del territorio que habitaban. Esto implicó la tala de los bosques y el establecimiento de grandes proyectos de desarrollo sin permitir ni la participación ni la consulta a las comunidades indígenas. Estas reformas agrarias profundizaron el despojo y la segregación de los pueblos indígenas.

El Estado mexicano no le reconoce a la comunidad Choréachi su calidad de pueblo Indígena, sino que los considera una comunidad de “hecho”, lo que impide el pleno ejercicio de sus derechos territoriales. En 1996, debido a un error técnico de localización del gobierno mexicano, se superpusieron los límites de 15.200 hectáreas del territorio Choréachi. Estas tierras fueron entregadas a la Comunidad de Coloradas de los Chávez⁴. Esta comunidad, además, obtuvo autorizaciones de aprovechamiento forestal de parte de la Secretaría de Medio Ambiente y Recursos Naturales (SEMARNAT), sin consultar a los Choréachi. Al considerarlos solo una

¹ KWIRA. *Informe sobre los derechos territoriales de los pueblos indígenas de la Sierra Tarahumara*. Chihuahua México, 2016. Disponible en: <https://kwira.org/wp-content/uploads/informeterritorialtarahumara.pdf>. Acceso en: 21 feb. 2025.

² KWIRA. *Informe sobre los derechos territoriales de los pueblos indígenas de la Sierra Tarahumara*. Chihuahua México, 2016. Disponible en: <https://kwira.org/wp-content/uploads/informeterritorialtarahumara.pdf>. Acceso en: 21 feb. 2025.

³ KWIRA. *Informe sobre los derechos territoriales de los pueblos indígenas de la Sierra Tarahumara*. Chihuahua México, 2016. Disponible en: <https://kwira.org/wp-content/uploads/informeterritorialtarahumara.pdf>. Acceso en: 21 feb. 2025.

⁴ LA JORNADA. *México: organizaciones denuncian despojo de tierras indígenas en la Sierra Tarahumara*. 6 julio, 2021. Disponible en: <https://www.jornada.com.mx/2021/07/06/politica/016a1pol>.

comunidad indígena de hecho la SEMARNAT consideró que no es su obligación preguntarles sobre permisos que puedan afectar el territorio donde habitan.

Esto desató una larga y violenta disputa por las tierras, que derivó en un proceso judicial agrario iniciado por la comunidad Choréachi que resultó en la suspensión de los permisos en el año 2017. A pesar de esto, se empezó a dar la tala ilegal, así como incendios forestales presuntamente provocados para ocultar la deforestación mencionada. Adicionalmente, se ha documentado que continúa el aprovechamiento forestal por personas armadas ajenas a la Comunidad, lo que ha sido denunciado a las autoridades sin que hagan nada al respecto.

Este conflicto tuvo como consecuencia que dos personas de la Comunidad Choreáchi conocidas por ser defensoras del territorio, fueran asesinadas. Estos líderes de la comunidad fueron Jaime Zubia Cevallos y Socorro Ayala en el año 2013 y Juan Ontiveros en 2017. Las autoridades locales, a pesar de estos hechos, no hicieron actuaciones propicias para investigar o prevenir estos hechos, lo que obligó a la comunidad a solicitar medidas cautelares ante la Corte Interamericana de Derechos Humanos.

En este caso, los agresores han sido identificados como aquellos que pretenden despojarlos de sus territorios ancestrales, y que están ligados al crimen organizado, lo que ha provocado que sus habitantes se desplacen dejando de lado sus casas y animales por miedo a ser asesinados.

En el año 2014, integrantes de la Asociación civil Alianza Sierra Madre A.C., junto con miembros de otras organizaciones, médicos voluntarios y representantes de la Comisión Nacional de Derechos Humanos, solicitaron el apoyo de la Policía Federal Preventiva para trasladarse hacia la Comunidad Choréachi. Sin embargo, la policía informó a la directora de la organización que no se le brindaría protección durante la caravana argumentando que había una situación de seguridad grave en el territorio y que los agentes del Estado no cuentan con la infraestructura necesaria para brindar una protección adecuada⁵. Esto denota no sólo el previo conocimiento del Estado sobre la peligrosidad del territorio y la no realización de ninguna acción positiva para evitar la vio-

lencia, sino también su incapacidad para proporcionar seguridad.

El 19 de junio de 2014, la misma organización realizó una reunión con la fiscalía general de Justicia del Estado de Chihuahua, donde solicitaron se hicieran efectivas las órdenes de aprehensión en contra de los responsables de los asesinatos de dos personas de la Comunidad Choréachi. Asimismo, pidieron que se diera una propuesta de protección a la comunidad, sin tener una respuesta favorable por parte de la autoridad estatal.

Por lo anterior, el 6 de octubre de 2014, la Comisión Interamericana de Derechos Humanos, solicitó al Estado mexicano la adopción de medidas cautelares para proteger la vida e integridad personal de integrantes de la comunidad indígena Choréachi, debido a la serie de homicidios presuntamente cometidos por miembros de la comunidad de Colorada de Chávez, así como por parte del crimen organizado.

Otra problemática relevante de la comunidad es la presencia de la delincuencia organizada en su territorio que con fines de narcotráfico han desplazado de sus tierras a los habitantes del pueblo indígena. Debido a que la Sierra Tarahumara colinda con las montañas rocallosas de los Estados Unidos, lo que asegura rutas directas para el trasiego de drogas con el vecino país. Adicionalmente, las características del territorio facilitan la siembra de marihuana y amapola (para producir heroína), lo que ha generado una lucha sangrienta para despojar a los rarámuris de Choréachi, quienes han sido víctimas de amenazas, golpizas y asesinatos por parte de los grupos criminales.

La omisión de las autoridades mexicanas para investigar y sancionar a los responsables ha sido tan negligente que los miembros del crimen organizado imponen toques de queda en las poblaciones de Baborigame, Guachochi y Guadalupe y Calvo, para evitar que los pobladores circulen por los diferentes caminos y les impidan realizar la cosecha y el trasiego de las drogas que siembran y distribuyen.

Durante los últimos 20 años, los habitantes de la comunidad Choréachi ejercieron su legítima labor en defensa de su territorio, luchando por la anulación de los linderos ilegales y las licencias forestales que se dieron a la comunidad agraria Coloradas de Chávez. En consecuencia, los integrantes de la comunidad de indígenas han sido blancos de amenazas, hostigamientos, y

⁵ LA JORNADA. *México: organizaciones denuncian despojo de tierras indígenas en la Sierra Tarahumara*. 6 julio, 2021. Disponible en: <https://www.jornada.com.mx/2021/07/06/politica/016a1pol>.

asesinatos, mientras otros han sido desplazados por la violencia en su comunidad.

El litigio generado del despojo de tierras fue llevado a los Tribunales Agrarios y administrativos y tardó más de 20 años en resolverse. No obstante, en el año 2021, fue atraído por la Suprema Corte de Justicia de la Nación, para resolver el conflicto en definitiva. Es decir, el proceso inició en el año 2007 cuando la Comunidad Choréachi, demandó a la SEMARNAT ante el Tribunal Unitario Agrario del Distrito 45 solicitando la nulidad absoluta de la autorización a la modificación del aprovechamiento de recursos forestales y programa de manejo forestal avanzado otorgado a la Comunidad de Coloradas de los Chávez.

Además, demandó el reconocimiento judicial de su comunidad, el cumplimiento del artículo 2 constitucional y el Convenio 169 de la Organización Internacional del Trabajo (OIT) sobre pueblos indígenas y tribales, el reconocimiento al derecho a la propiedad y posesión sobre la tierra que tradicionalmente ocupan, y el derecho a disponer y conservar los recursos naturales⁶.

La Corte emitió sentencia en la que declara improcedentes las pretensiones de la comunidad. Por lo que, en el año 2018, ante el Tribunal Superior Agrario, la Comunidad Choréachi interpuso un recurso de revisión que resultó en la revocación de la sentencia por considerar que existía una violación al derecho fundamental de acceso a la justicia completa, así como a la protección del derecho de propiedad comunal protegido por el artículo 21 de la Convención Americana sobre Derechos Humanos (CADH). Esto debido a que el juez omitió pronunciarse sobre el reconocimiento de la Comunidad accionante.

Asimismo, el Tribunal Superior Agrario reconoció por unanimidad el territorio de la comunidad rarámuri de Choréachi, con una superficie de 32,832 hectáreas y también ratificó el derecho que tenían de disfrutar y explotar a los recursos naturales que existen dentro de este territorio. En consecuencia, se declaró la nulidad de la autorización de aprovechamiento de recursos forestales en favor de la Comunidad Las Coloradas de Chávez y

otros Ejidos beneficiados con ellos. En razón a que se ignoró la obligación de consultar a la comunidad Choréachi para autorizar estas actividades, lo que vulnera lo establecido en la Ley General de Desarrollo Forestal Sustentable, así como en los artículos 2 de la Constitución mexicana y el Convenio 169 de la OIT en sus artículos 13, 14 y 15.

Inconformes con esta resolución, en el año 2019, los integrantes del Ejido Pino Gordo interpusieron un Juicio de Amparo en contra de la sentencia emitida por el Tribunal Superior Agrario, por considerar que se vulneraron los artículos 1, 2, apartado A, fracción VI, 14, 16, 17 y 27 de la Constitución Política de los Estados Unidos Mexicanos, argumentando que el Tribunal pasó por alto las resoluciones presidenciales emitidas en 1961 y 1967 en la comunidad mencionada fue reconocida como ejido. Esta normativa prohibía que una comunidad pudiera reclamar la restitución de tierras dotadas a un ejido. Argumentaron, además, que ellos también eran indígenas y, por ende, se encontraban protegidos por los mismos preceptos convencionales y constitucionales.

En consecuencia, en el año 2020, la Suprema Corte de Justicia de la Nación ejerció su facultad de atracción, a petición de Tribunal Colegiado de Circuito. Un año después, emitió la sentencia del amparo directo 33/2020 en la que considera que: primero, ambos grupos de población en conflicto, les asiste el derecho a ser protegidos por el artículo 2 Constitucional así como del Convenio 169 de la OIT; segundo, el principio de libre determinación de los pueblos y el respeto a sus usos y costumbres, tiene retroactividad; tercero, para respetar efectivamente el principio de seguridad jurídica debe atenderse el derecho sobre la tierra; y cuarto, en este caso, debe resolver a partir de los lineamientos constitucionales y la normativa existente en la legislación agraria aplicable en la época en que acontecieron los hechos⁷.

La Suprema Corte, entonces, concluyó en la misma sentencia que de acuerdo con los registros, se puede determinar que ambas poblaciones, la Comunidad Choréachi y el Ejido Pino Gordo formaban parte del mismo grupo en el pasado. Sin embargo, solamente el grupo

⁶ SUPREMA CORTE DE JUSTICIA DE LA NACIÓN. *Extracto del Amparo Directo 33/2020*. Dirección General de Derechos Humanos, México. 2020 Disponible en: <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/resumen/2022-06/Resumen%20AD33-2020%20DGDH.pdf>. Acceso en: 21 feb. 2025.

⁷ SUPREMA CORTE DE JUSTICIA DE LA NACIÓN. *Extracto del Amparo Directo 33/2020*. Dirección General de Derechos Humanos, México. 2020 Disponible en: <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/resumen/2022-06/Resumen%20AD33-2020%20DGDH.pdf>. Acceso en: 21 feb. 2025.

Ejido acudió a regularizar su situación a efecto de ser dotadas de tierras por la autoridad de ese entonces, por lo que es a ellos a los que se les expidieron los títulos de propiedad o de dotación de tierras a través de las resoluciones presidenciales.

En consecuencia, consideraban que deben prevalecer los derechos generados con la Resolución Presidencial del 17 de octubre de 1967, la Resolución Presidencial 1 del 5 de agosto de 1969 y la Resolución Presidencial 2 del 5 de agosto de 1969, es decir, las resoluciones por medio de las cuales se les dotó de tierras a los Ejidos de nueva creación. Se argumenta que dichos títulos fueron emitidos hace más de 60 años y que no existe la seguridad de que las tierras que reclama la Comunidad Choréachi, sean las mismas sobre las que versa el conflicto, por lo que se protege al Ejido con todos los derechos inherentes.

Aunado a lo anterior, la Suprema Corte añade que los demandados perdieron el derecho a impugnar las resoluciones presidenciales señaladas, derivado a que, en la época de los hechos, la Ley de Amparo establecía un término de 15 días para impugnarlas, lo que no aconteció, por lo que no procede declarar la nulidad de las referidas resoluciones. La decisión de la Suprema Corte ratifica el despojo territorial de la comunidad de estudio, y continúa privilegiando los derechos que fueron inicialmente establecidos en el sistema colonial español⁸.

Por lo anterior, se puede concluir, que la Comunidad Choréachi no solo no fue reconocida jurídicamente como una Comunidad de derecho, sino que, con la sentencia, se consolida jurídicamente el despojo de sus tierras ancestrales, al haberse reconocido la validez de las Resoluciones Presidenciales por medio de las cuales se dotó de estas tierras al Ejido Pino Gordo, Las Coloradas de Chávez, y demás comunidades circundantes.

Es por esto que, después de la solicitud de protección realizada el 20 de febrero de 2014 a la Comisión Interamericana, la Corte Interamericana de los Derechos Humanos la Corte Interamericana de Derechos Humanos asumió conocimiento sobre el caso de la comunidad indígena Choréachi vs. México cobra especial importancia por las implicaciones que tienen las dife-

rentes pronunciaciones de la Corte para la comunidad indígena en su persistente lucha no solamente por la protección de sus derechos humanos como la vida y la integridad personal, sino también para el reconocimiento y protección de los derechos territoriales como pueblo originario en un contexto marcado por la violencia y la omisión estatal.

En el próximo acápite se hará un estudio de los derechos vulnerados a la comunidad indígena Choréachi, analizando su concepto y acepciones jurisprudenciales de las sentencias de la Corte Interamericana de Derechos Humanos, entendiendo cómo han sido vulnerados estos derechos para el pueblo originario en estudio.

3 El marco de protección de derechos de la CIDH y su aplicación fallida en el Caso Choréachi

Como observó en la contextualización histórica del caso de la comunidad indígena de Choréachi vs. México, el reconocimiento y la protección de los derechos de esta comunidad ha sido un tema relevante de debate tanto en el ámbito jurídico nacional mexicano como en el internacional. Los múltiples conflictos derivados de la desprotección del Estado, la presencia de grupos al margen de la ley que explotan ilegalmente los recursos naturales de los territorios en los que habitan, el despojo progresivo de sus tierras y la violencia latente a la que han sido sometidos sus integrantes reflejan la urgencia de garantizar una efectiva protección de los derechos de la comunidad indígena.

La Corte Interamericana, en ese contexto, ha emitido diversas resoluciones que buscan garantizar que el derecho a la vida, la integridad personal, la propiedad colectiva, la consulta previa, el acceso a la justicia, la protección de los defensores de derechos humanos, el medio ambiente sano y la participación en decisiones públicas de las comunidades indígenas sean efectivamente protegidos por el derecho internacional, debido a la falla del derecho interno del Estado⁹. A pesar de esto, no ha habido una gran acogida de las medidas promovidas por la Corte de parte de México, lo que ha

⁸ MOTA DIAS, Audic; MIRCÍLIO PEMPEU, Gina. Autonomia municipal em litígios internacionais: desafios ao pacto federativo e à soberania nacional diante do desastre de Mariana. *Revista de Direito Internacional*, Brasília, v. 22, n. 2, 2025. DOI: <https://doi.org/10.5102/rdi.v22i2.9882>.

⁹ SILVA, José. *Direito ambiental constitucional*. 11. ed. São Paulo: Malheiros, 2019.

perpetrado una situación de riesgo y vulneración de la comunidad originaria en sus derechos.

Por lo tanto, es menester desarrollar los derechos que hacen parte de este conflicto y que la Corte Interamericana ha buscado proteger en favor de la comunidad indígena Choréachi en el siguiente orden:

- Derecho a la vida.
- Derecho a la integridad personal.
- Derecho a la propiedad colectiva o ancestral.
- Derecho a la consulta previa, libre e informada.
- Derecho al acceso a la justicia.
- Derecho a la protección al medio ambiente sano.

El derecho a la vida se ha visto vulnerado en el caso de estudio debido a la situación de riesgo extremo en el que se encuentran los integrantes de la comunidad originaria, quienes han sido víctimas de amenazas, desplazamientos forzados y homicidios de líderes de la comunidad como lo fueron Jaime Zubia Cevallos y Socorro Ayala en 2013, así como de Juan Ontiveros en el año 2017.

La Corte Interamericana de Derechos Humanos ha abordado en diversas ocasiones el derecho a la vida, considerándolo uno de los pilares fundamentales de la protección de los derechos humanos¹⁰. Este trascendente derecho está consagrado en el artículo 4 de la Convención Americana de Derechos Humanos¹¹ y ha sido reconocido como un derecho fundamental del cual nacen todos los demás derechos humanos¹², ya que, sin su respeto, el resto de los derechos humanos carecerían de sentido.

El derecho a la vida comprende tanto no ser privado de ella arbitrariamente (obligación negativa), como también garantizar el acceso a las condiciones que aseguren una existencia digna (obligación positiva)¹³. La relevancia de este derecho obliga a los Estados parte de la Convención, como lo es México, a garantizar la creación de condiciones que no permitan violaciones a este derecho de carácter inalienable¹⁴. En el caso de estudio, este derecho no solamente se vio vulnerado por los homicidios de los líderes de la comunidad sino también por el continuo incumplimiento por parte del Estado parte de las resoluciones de la Corte Interamericana, que lo obligan a proteger este derecho y cesar su vulneración¹⁵.

El derecho a la integridad personal, al igual que el derecho a la vida, fue gravemente vulnerado por la latente violencia física, psicológica y sexual que se realizó a la comunidad por parte de los grupos armados que habitan sus territorios. Esta violencia incluye amenazas con armas de fuego, constante vigilancia y ataques a las familias y defensores de la comunidad¹⁶. Este derecho, consagrado en el artículo 5.2 de la convención, se define como el derecho que tiene toda persona a que se respete su integridad física, psíquica y moral, evitando que se le someta a cualquier tipo de trato cruel, inhumano o degradante¹⁷.

La integridad personal cuenta con diversos grados de afectación y abarca desde la tortura hasta cualquier tipo de trato denigrante que genere secuelas físicas o mentales, así haya ausencia de lesiones¹⁸. En este caso,

¹⁰ GÓMEZ PATIÑO, Dilia; GARCÍA VARGAS Juan. La dimensión normativa de la debida diligencia en Derechos humanos. *Revista de Direito Internacional*, Brasília, v. 22, n. 1, 2025. DOI: <https://doi.org/10.5102/rdi.v22i1.9810>.

¹¹ COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS. *Medida Cautelar N.º 60-14. Organización de los Estados Americanos*. 2014. Disponible en: <https://www.oas.org/es/cidh/decisiones/pdf/2014/MC60-14-ES.pdf>. Acceso en: 21 feb. 2025.

¹² C CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Caso de los "Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala*. Fondo. Sentencia de 19 de noviembre de 1999. Serie C, No. 63. Disponible en: https://www.corteidh.or.cr/docs/casos/articulos/seriec_63_esp.pdf. Acceso en: 21 feb. 2025.

¹³ CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 21: Derecho a la vida*. 2021. Disponible en: <https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo21.pdf>. Acceso en: 21 feb. 2025.

¹⁴ CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Caso Zambrano Vélez y otros Vs. Ecuador*. Fondo, Reparaciones y Costas. Sentencia de 4 de julio de 2007. Serie C No. 166. Disponible en: https://www.corteidh.or.cr/docs/casos/articulos/seriec_166_esp.pdf. Acceso en: 21 feb. 2025.

¹⁵ SILVA, Thiago dos Santos da. Cosmovisao indígena e a relacao ética com o ambiente: Pacha Mama, Bem viver e oocentrismo. *Revista de Direito Internacional*, Brasília, v. 21, n. 3, 2014. DOI: <https://doi.org/10.5102/rdi.v21i3.9672>.

¹⁶ COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS. *Medida Cautelar N.º 60-14. Organización de los Estados Americanos*. 2014. Disponible en: <https://www.oas.org/es/cidh/decisiones/pdf/2014/MC60-14-ES.pdf>. Acceso en: 21 feb. 2025.

¹⁷ COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS. *Medida Cautelar N.º 60-14. Organización de los Estados Americanos*. 2014. Disponible en: <https://www.oas.org/es/cidh/decisiones/pdf/2014/MC60-14-ES.pdf>. Acceso en: 21 feb. 2025.

¹⁸ CORTE INTERAMERICANA DE DERECHOS HU-

la enfática insistencia de la Corte Interamericana para investigar y sancionar los actos de violencia en las comunidades indígenas ha caído en oídos sordos, pues las vulneraciones a este derecho aún persisten¹⁹.

Los Estados parte tienen obligaciones de garantía y respeto frente a la protección de este derecho, que va de la mano del derecho a la vida²⁰. En este caso, el deber de garantizar implica a México la obligación positiva de adoptar conductas que no permitan la vulneración del derecho²¹. Es decir, el país latinoamericano no solamente tenía el deber de respetar la integridad personal de todos los integrantes de la comunidad Choréachi, sino que también establecer medidas positivas y urgentes de protección que revirtieran y acabaran con el estado de extrema vulnerabilidad en la que se encuentra la comunidad debido a la violencia sistemática que reconoció la Corte Interamericana en su resolución del 10 de junio de 2020²².

Adicional a los derechos base, es relevante para el caso explorar y analizar los derechos territoriales de los Pueblos Indígenas. Estos derechos fueron reconocidos por el país mexicano en el Convenio 169 de la Organización Internacional del Trabajo vigente desde el año 1991²³. En este se reconoce a los indígenas el derecho

de propiedad y posesión de las tierras que ocupan tradicionalmente. Además, le impone al Estado la obligación de tomar las medidas necesarias para garantizar este derecho de propiedad y posesión; y responsabilidad de creación de procedimientos jurídicos adecuados para decidir sobre las reivindicaciones de las tierras²⁴. Este convenio es una herramienta fundamental para la protección de los derechos de los pueblos originarios, no obstante, su aplicación en México y en el caso de estudio ha sido, cuanto menos, limitada.

Este derecho de posesión territorial indígena está también compuesto por otros derechos territoriales como el acceso a los recursos naturales, la consulta y estudios de impacto en materia de industrias extractivas, el derecho a no ser desplazados y las garantías necesarias en caso de reubicación, derechos sobre las formas de transmisión de la tierra, la protección contra la intrusión o apropiación de las tierras y la no discriminación en las políticas agrarias²⁵. La posesión territorial, además, es un elemento clave para la protección del derecho humano a la identidad cultural, que es especialmente importante para las comunidades indígenas como la del caso en estudio²⁶.

Estos derechos territoriales indígenas van de la mano con el derecho a la propiedad privada contenido en el artículo 21 de la Convención Americana²⁷, que reconoce el uso y goce de los bienes propios de la persona sin intromisiones que no son justas²⁸. Este derecho está estrechamente relacionado con los derechos de los Pueblos Indígenas, pues les permite hacer uso de los recur-

MANOS. *Caso Caesar Vs. Trinidad y Tobago*. Fondo, Reparaciones y Costas. Sentencia de 11 de marzo de 2005. Serie C, No. 123. Disponible en: https://www.corteidh.or.cr/docs/casos/articulos/seriec_123_esp.pdf. Acceso en: 21 feb. 2025.

¹⁹ POZZATTI, Ademar; ROVEDA, Daniela. A politizacao do direito internacional do reconhecimento na Corte Interamericana de Direitos Humanos. *Revista de Direito Internacional, Brasília*, v. 21, n. 3, 2024. DOI: <https://doi.org/10.5102/rdi.v21i3.9626>.

²⁰ CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Cuadernillos de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 10: Integridad personal / Corte Interamericana de Derechos Humanos*. 2021. Disponible en: https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo10_2021.pdf. Acceso en: 21 feb. 2025.

²¹ CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Cuadernillos de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 10: Integridad personal / Corte Interamericana de Derechos Humanos*. 2021. Disponible en: https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo10_2021.pdf. Acceso en: 21 feb. 2025.

²² CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Medidas Provisionales respecto de México en el asunto Comunidad Indígena Choréachi*. Resolución de la Corte Interamericana de Derechos Humanos de 10 de junio de 2020. Disponible en: https://www.corteidh.or.cr/docs/medidas/choreachi_se_02.pdf. Acceso en: 21 feb. 2025.

²³ ORGANIZACIÓN INTERNACIONAL DEL TRABAJO. *Convenio 169 sobre Pueblos Indígenas y Tribales en Países Independientes*. 1989. Disponible en: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_205229.pdf. Acceso en: 21 feb. 2025.

²⁴ ORGANIZACIÓN INTERNACIONAL DEL TRABAJO. *Convenio 169 sobre Pueblos Indígenas y Tribales en Países Independientes*. 1989. Disponible en: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_205229.pdf. Acceso en: 21 feb. 2025.

²⁵ KWIRA. *Informe sobre los derechos territoriales de los pueblos indígenas de la Sierra Tarahurama*. Chihuahua México, 2016. Disponible en: <https://kwira.org/wp-content/uploads/informeterritorialtarahurama.pdf>. Acceso en: 21 feb. 2025.

²⁶ FAUNDES, Juan Jorge. Diálogo entre la Corte Interamericana de Derechos Humanos y el Tribunal Europeo de Derechos Humanos en torno al derecho humano a la identidad cultural. *Revista de Derecho Internacional*, v. 17, n. 3, p. 222-255, 2020. DOI: 10.5102/rdi.v17i3.6990.

²⁷ COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS. *Medida Cautelar N.º 60-14*. Organización de los Estados Americanos. 2014. Disponible en: <https://www.oas.org/es/cidh/decisiones/pdf/2014/MC60-14-ES.pdf>. Acceso en: 21 feb. 2025.

²⁸ FERRERO HERNÁNDEZ, Ricardo. *Protección de la propiedad comunal indígena por la Corte Interamericana*. 2015. Disponible en: <https://www.corteidh.or.cr/tablas/r35518.pdf>. Acceso en: 21 feb. 2025.

sos presentes en los territorios ancestrales²⁹. Se entiende que los Pueblos Indígenas tienen una tradición comunal de propiedad colectiva de la tierra en la que habitan³⁰.

En el caso de estudio, la comunidad Choréachi ha sufrido una vulneración directa a sus derechos territoriales, pues la continua y progresiva adjudicación de terceros sobre sus tierras, la explotación forestal sin consulta y la persistente negativa Estatal a reconocer el derecho ancestral de esta han generado para ellos una violación clara de lo establecido tanto en el convenio 169 de la Organización Internacional del Trabajo, la Convención Americana de Derechos como la propia constitución Mexicana. Esta última, en su artículo 17, se compromete a garantizar la protección de los Pueblos indígenas y el acceso a recursos necesarios para su subsistencia³¹.

Además, el derecho a la consulta previa, libre e informada se ve también vulnerado por el Estado Mexicano, pues este tiene, como fue mencionado anteriormente, la obligación de consultar a la comunidad Indígena antes de autorizar actividades extractivas en su territorio ancestral. Este derecho fue vulnerado cuando se otorgaron permisos de tala ilegal a la comunidad mestiza “Coloradas de los Cháves” sin consultar a la comunidad Choréachi.

Este derecho humano está contenido también en el artículo 6 del Convenio 169 de la Organización Internacional del Trabajo³² y busca que los pueblos indígenas sean consultados de manera previa, es decir, antes de que la decisión estatal que los afecta directamente pue-

da surtirse, para que puedan influir efectivamente en el proceso; libre, es decir, que la comunidad indígena consultada debe poder dar sus opiniones sin inferencias; e informada, lo que significa que la comunidad debe tener conocimiento total de lo que significará la medida para su comunidad, incluyendo ventajas y desventajas³³.

El derecho a la posesión ancestral y la consulta previa, contienen también el derecho a la protección ambiental y la necesidad de un medio ambiente sano para todas las personas que habitan el territorio que se posee. Hay una inminente relación entre la calidad de vida en el lugar que se posee y la calidad del ambiente en que se habita, máxime cuando se trata de comunidades indígenas cuya subsistencia está proporcionalmente relacionada al territorio que habita³⁴.

Este derecho fue claramente vulnerado por la tala indiscriminada y la explotación irregular de los recursos naturales del territorio indígena de la comunidad Choréachi. Estas acciones han generado un detrimento ambiental no exclusivo del Pueblo indígena en estudio, sino que también a toda la Sierra Tarahumara. El Estado Mexicano ha incumplido su deber de garantizar un entorno saludable para la comunidad indígena y los habitantes del territorio en disputa³⁵.

El derecho al medio ambiente sano está reconocido en el Protocolo de San Salvador, no obstante, su interpretación ha sido explorada principalmente desde la visión no antropocéntrica que entiende que este derecho trasciende la esfera humana, comprendiendo la indispensable relación entre el planeta y la humanidad. El derecho al medio ambiente es generalmente estudiado en relación con los Pueblos Indígenas, pues es preciso hacer una protección generalizada de los recursos naturales en su propiedad colectiva³⁶.

²⁹ CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Caso Comunidad Indígena Xákmok Kásek Vs. Paraguay*. Sentencia de 24 de agosto de 2010. Disponible en: https://www.corteidh.or.cr/docs/casos/articulos/seriec_214_esp.pdf. Acceso en: 21 feb. 2025.

³⁰ CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Caso de la Comunidad Mayagna (Sumo) Awas Tingni Vs. Nicaragua*. Sentencia de 31 de agosto de 2001. Disponible en: https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_esp.pdf. Acceso en: 21 feb. 2025.

³¹ MÉXICO. *Constitución Política de los Estados Unidos Mexicanos*. 1917. Disponible en: <https://www.scjn.gob.mx/sites/default/files/cpeum/documento/2020-06/CPEUM-017.pdf>. Acceso en: 21 feb. 2025.

³² INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS. *El derecho a la consulta previa, libre e informada: una mirada crítica desde los pueblos indígenas*. 2016. Disponible en: <https://www.iidh.ed.cr/images/Publicaciones/PersonasColect/El%20derecho%20a%20la%20consulta%20previa%20libre%20e%20informada%20una%20mirada%20critica%20desde%20los%20pueblos%20indigenas.pdf>. Acceso en: 21 feb. 2025.

³³ AGENCIA NACIONAL DE DEFENSA JURÍDICA DEL ESTADO. *Consulta Previa a Comunidades Étnicas*: Circular 12 de 2024. Disponible en: <https://www.defensajuridica.gov.co/docs/BibliotecaDigital/Documentos%20compartidos/0757.pdf>. Acceso en: 21 feb. 2025.

³⁴ CALDERÓN GAMBOA, Jorge. *Pueblos indígenas y medio ambiente en la jurisprudencia de la Corte Interamericana de Derechos Humanos: Un desafío verde*. 2014. Disponible en: <https://www.corteidh.or.cr/tablas/r33329.pdf>. Acceso en: 21 feb. 2025.

³⁵ KWIRA. *Informe sobre los derechos territoriales de los pueblos indígenas de la Sierra Tarahumara*. Chihuahua México, 2016. Disponible en: <https://kwira.org/wp-content/uploads/informeterritorialtarahumara.pdf>. Acceso en: 21 feb. 2025.

³⁶ FERRERO HERNÁNDEZ, Ricardo. *Protección de la propiedad comunal indígena por la Corte Interamericana*. *Revista IIDH*, n. 63, p. 65-103, 2016. Disponible en: <https://www.corteidh.or.cr/>

El derecho al acceso a la justicia se ve vulnerado a la comunidad indígena en diversas ocasiones, pues la comunidad ha encontrado dificultades para acceder a la justicia y obtener medidas de protección, a pesar de la insistencia de la Corte en sus resoluciones. Adicionalmente, este derecho fue afectado debido a la impunidad en las investigaciones de los asesinatos de los miembros de la comunidad. Este derecho está consagrado en los artículos 8.1 y 25 de la Convención Americana y se entiende como la posibilidad de toda persona o comunidad indígena, como lo es en este caso, a acudir al sistema propio de cada país para la resolución de conflictos y la protección de sus derechos³⁷.

Estos derechos fueron los señalados por la Corte Interamericana de Derechos Humanos como los afectados en las diferentes resoluciones y medidas cautelares solicitadas y enviadas a México. A través de estas comunicaciones internacionales, se ha instado al Estado a que cesen las graves y claras vulneraciones cometidas y que se diera paso a una reparación efectiva para la comunidad indígena Choréachi. No obstante, la falta de implementación de estas medidas perpetua la vulneración sistémica de los derechos de las comunidades indígenas de la región, pues la impunidad del país ha sido reiterativa.

4 Intervenciones de la Corte Interamericana de Derechos Humanos

La Corte Internacional de Derechos Humanos adquiere conocimiento con la solicitud realizada el 20 de febrero de 2014 a la Comisión Interamericana de Derechos Humanos pidiendo que se ordenara al Estado mexicano adoptar las medidas de protección necesarias para garantizar la vida y seguridad de todos los integrantes de la Comunidad Indígena Choréachi y los defensores de derechos humanos integrantes de la Asociación Civil Alianza Sierra Madre, quienes han sido objeto de amenazas y agresiones debido a la disputa territorial en la zona.

tablas/r35518.pdf. Acceso en: 21 feb. 2025.

³⁷ VENTURA ROBLES, Manuel E. *La jurisprudencia de la Corte Interamericana de Derechos Humanos en materia de acceso a la justicia e impunidad*. 2007. Disponible en: <https://www.corteidh.or.cr/tablas/r24428.pdf>. Acceso en: 21 feb. 2025.

A raíz de estas peticiones, la Comisión considera, en la medida cautelar número 60-14 que los pobladores de nombres Prudencio Ramos y Ángela Ayala se encuentran en una situación de “gravedad y urgencia”³⁸, dado que su vida e integridad se encuentran en estado de riesgo inminente. La Comisión Interamericana, en su medida, precisó no es un tribunal interno que pueda determinar la responsabilidad penal, administrativa o disciplinaria de las personas, además, aclara que su competencia no está encaminada a evaluar la información relacionada con el conflicto territorial, en el sentido de delimitar a quién corresponde la posesión sobre dichos terrenos, sino únicamente la protección de los derechos humanos de las personas en riesgo.

En razón a esto, se evocó al análisis de la situación alegada por los de nombres Prudencio Ramos y Ángela Ayala, miembros de la Comunidad Indígena, así como de los defensores de derechos humanos, solicitando al Estado Mexicano que: primero, adopte las medidas necesarias para preservar la vida e integridad de Prudencio Ramos, Angela Ayala Ramos y sus respectivos núcleos familiares; segundo, encuentre y adopte las medidas necesarias para que Prudencio Ramos, pueda desarrollar sus funciones como defensor de derechos humanos, sin ser objeto de violencia y hostigamientos; tercero, que concerte las medidas que deberán adoptarse con los beneficiarios y sus representantes; y, cuarto, informar sobre las acciones adoptadas a fin de investigar los hechos alegados que dieron lugar a la adopción de la presente medida cautelar y así evitar su repetición³⁹.

A pesar de lo precisado por la Comisión Interamericana, el Estado Mexicano argumentó que la Comisión no debería otorgar medidas cautelares en virtud de que el Estado estaría adoptando medidas a nivel doméstico, y que ya había realizado todas las acciones necesarias para resguardar y salvaguardar la vida de los miembros de la Comunidad Choréachi. Asimismo, argumentan que ya se encontraban realizando las investigaciones sobre los asesinatos de los dos miembros del Pueblo Indígena, y las autoridades se habrían puesto a disposición de ellos para cualquier situación de emergencia.

³⁸ COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS. *Medida Cautelar N.º 60-14. Organización de los Estados Americanos*. 2014. Disponible en: <https://www.oas.org/es/cidh/decisiones/pdf/2014/MC60-14-ES.pdf>. Acceso en: 21 feb. 2025.

³⁹ COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS. *Medida Cautelar N.º 60-14. Organización de los Estados Americanos*. 2014. Disponible en: <https://www.oas.org/es/cidh/decisiones/pdf/2014/MC60-14-ES.pdf>. Acceso en: 21 feb. 2025.

Los beneficiarios de las medidas de protección informaron a la Comisión que aún continuaba la situación apremiante y que los homicidios siguen en total impunidad. Por lo anterior, la Comisión realizó un análisis en los que se tomó en cuenta los requisitos de gravedad, urgencia e irreparabilidad y concluyó que debido al cumplimiento de estos el Estado debía dar cumplimiento a las medidas, debiendo informar dentro de los 15 días contados a partir de la comunicación de la resolución en comento, sobre la adopción de las medidas acordadas y actualizar la información periódicamente.

A pesar de estas medidas, la situación de los beneficiarios continuó de extrema situación de riesgo debido a la continua violencia. En consecuencia, la Corte Interamericana en la Resolución de fecha 25 de marzo de 2017⁴⁰, ordenó al Estado mexicano que continúe la implementación de las medidas de protección que ya fueron dispuestas por la Comisión y, adicionalmente, debe adoptar todas las demás que puedan ser necesarias para proteger la vida e integridad de los miembros de la citada comunidad.

Además, le ordena a México implementar medidas de protección con la intervención de los miembros de la comunidad Choréachi, y presentar un informe completo y pormenorizado sobre las actuaciones realizadas para dar cumplimiento a las medidas provisionales decretadas, el cual deberá incluir un diagnóstico sobre la situación actual de riesgo de dichas comunidades, actualizándose cada tres meses. Así mismo, se solicitó a la representación de los beneficiarios y a la Comisión Interamericana de Derechos Humanos que presenten sus observaciones propias.

En el año 2019, posterior a la recepción de los informes por parte del Estado mexicano y de los beneficiarios de las medidas de protección, la Corte advierte la ineficacia de las medidas implementadas, dado que los hechos de violencia continúan y persiste la situación de riesgo en la Comunidad Choréachi, por lo que llama la atención del Estado respecto el notorio incumplimiento de lo requerido en la Resolución de 2017.

⁴⁰ CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Medidas Provisionales respecto de México en el asunto Comunidad Indígena Choréachi*. Resolución de la Corte Interamericana de Derechos Humanos de 25 de marzo de 2017. Disponible en: https://www.corteidh.or.cr/docs/medidas/choreachi_se_01.docx. Acceso en: 21 feb. 2025.

En razón a esto, la Corte Interamericana emite una nueva Resolución en fecha 10 de junio de 2020 en la que resuelve que el Estado mexicano debe continuar adoptando las medidas necesarias para proteger de manera efectiva los derechos a la vida y a la integridad personal de los integrantes de la comunidad indígena de Choréachi, y pide que implemente, de manera inmediata, todas aquellas otras acciones que se consideren adecuadas para tales fines⁴¹.

De igual forma, se le solicita al Estado Mexicano que las medidas de protección se planifiquen e implementen con la participación de los beneficiarios, dando los medios necesarios para mantenerlos informados respecto del avance de las medidas de ejecución. Finalmente, solicitó a la Comisión Nacional de Derechos Humanos en México (CNDH), que emitiera un informe sobre la situación de la Comunidad Choréachi.

En el informe de la CNDH, se destacó la situación de pobreza en la que viven las comunidades de la Sierra Tarahumara, incluida por supuesto la Choréachi. En este, además, se informa sobre los factores que acrecentaron estas, tales como las injustas reformas agrarias de 1923 y 1992, la exclusión y discriminación de las que han sido objeto, la violencia generada por los grupos de la delincuencia organizada y la ausencia de los servicios públicos e infraestructura en estas comunidades.

El informe cuenta que solicitó a las autoridades mexicanas el establecimiento de una serie de medidas a efecto de garantizar la seguridad y vida de las personas de la Comunidad, entre las que se destacan la solicitud de realizar reuniones entre autoridades locales y federales de derechos humanos con la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, así como el de instalar bases de operaciones de los cuerpos de seguridad en la Sierra Tarahumara, entre otras.

A pesar de esto, la Corte fue informada que la situación de riesgo para los integrantes de la comunidad de Choréachi se mantiene y que el Estado mexicano no ha implementado de forma efectiva las medidas dispuestas desde la Resolución de 2017 y reiteradas en 2020. Por

⁴¹ CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Medidas Provisionales respecto de México en el asunto Comunidad Indígena Choréachi*. Resolución de la Corte Interamericana de Derechos Humanos de 10 de junio de 2020. p. 9. Disponible en: https://www.corteidh.or.cr/docs/medidas/choreachi_se_02.pdf. Acceso en: 21 feb. 2025.

lo que, mediante una nueva resolución, de fecha 23 de septiembre de 2021, la Corte resuelve requerir al Estado mexicano que, a la brevedad posible, convoque a la comisión interinstitucional propuesta por la Comisión Nacional de los Derechos Humanos, integrada por las autoridades federales y locales que determine pertinente, así como las personas beneficiarias o sus representantes, y los demás órganos o instituciones que considere, incluida la propia CNDH, en carácter de entidad observadora y facilitadora del diálogo⁴².

Adicionalmente, la Corte requiere al Estado a adoptar las medidas necesarias para proteger de manera efectiva los derechos a la vida y a la integridad personal de los integrantes de la comunidad indígena de Choréachi, instándolo a implementar, de manera inmediata, todas las acciones necesarias para ese fin, incluyendo criterios de pertinencia cultural.

Finalmente, el día 12 de diciembre de 2023, en sesión de la Corte Interamericana de los Derechos Humanos solicita la ampliación de las medidas provisionales, requiriendo al Estado mexicano para que realice las tareas necesarias para garantizar la seguridad e integridad personal de Isela González Díaz, quien es directora de la organización Alianza Sierra Madre A.C., conocida defensora de la comunidad, en virtud de las amenazas de muerte de las que estaba siendo objeto, relacionadas con su actividad de defensora de los derechos humanos.

La comisión expresó su preocupación respecto esta escalada de violencia hacia las personas defensoras de los derechos humanos, solicitando realizar todas las gestiones adecuadas para que las medidas de protección ordenadas se planifiquen e implementen con la participación de la persona beneficiaria, con la obligación del Estado de informar periódicamente sobre su implementación.

Este caso es de vital importancia no solamente para la comunidad originaria Choréachi sino también para el propio derecho, pues lo presenta como una herramienta de transformación social respecto al reconocimiento y protección de los derechos de los pueblos originarios. Las resoluciones emitidas tanto por la Corte Interame-

ricana de Derechos Humanos como de la Comisión Interamericana sirven como elementos de transformación social, ya que no se limita a una reiteración de principios, sino que imponen obligaciones concretas al Estado mexicano.

Estas resoluciones visibilizan la realidad de la comunidad Choréachi que ha sido históricamente ignorada, marginada y afectada directamente por la violencia y la discriminación propiciada, en parte, por el Estado. Por ello, las resoluciones buscan impulsar a México para sancionar a los responsables por la vulneración de derechos humanos y la reparación integral para el pueblo afectado.

El caso de la comunidad indígena Choréachi es relevante por su conexión intrínseca con los derechos territoriales y culturales de las comunidades indígenas. Las resoluciones de la Corte y la Comisión entienden que la identidad, autonomía y subsistencia de los pueblos originarios precisan de una protección especial de derechos como la propiedad ancestral, la consulta previa y la autodeterminación. Estas pronunciaciones internacionales los consideran derechos humanos universales protegidos por instrumentos internacionales. Además, su relevancia afecta de manera positiva la protección ambiental de los territorios habitados por esta comunidad, pues tienen una relación importante con la conservación de la biodiversidad y el cambio climático.

Lo sucedido con la comunidad Choréachi resalta la responsabilidad estatal en la protección de los derechos de los pueblos indígenas, máxime cuando el país se encuentra en una situación de violencia generalizada debido al narcotráfico, el desplazamiento forzado, la impunidad, la discriminación y la deficiencia de acceso a la justicia. Demostrando la importancia de la interseccionalidad en el caso de estudio, pues la responsabilidad estatal nace de problemáticas originarias de diferentes puntos débiles del Estado Mexicano.

Este caso sienta precedentes respecto a diferentes derechos humanos de gran importancia para las comunidades originarias y su supervivencia. Además, explora la responsabilidad estatal tanto por acción como por omisión respecto a las vulneraciones de derechos de las personas que habitan su estado, estudiando y entendiendo la importancia tanto de la protección como de la comprensión de las necesidades especiales inherentes a sus características culturales.

⁴² CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Medidas Provisionales respecto de México en el asunto Comunidad Indígena Choréachi*. Resolución de la Corte Interamericana de Derechos Humanos de 23 de septiembre de 2021. p. 13. Disponible en: https://www.corteidh.or.cr/docs/medidas/choreachi_se_03.pdf. Acceso en: 21 feb. 2025.

5 Conclusiones

El caso de la comunidad indígena Choréachi muestra la realidad de los constantes desafíos que los pueblos originarios en América Latina enfrentan para poder obtener una efectiva protección y reconocimiento de sus derechos. La comunidad en estudio ha vivido históricamente una situación de vulnerabilidad extrema en la que debe sobrevivir la violencia, el despojo de sus territorios, la falta de acceso a la justicia y la constante negación de reconocimiento.

Este artículo resalta la necesidad de acciones del Estado mexicano y los llamados de diversas entidades internacionales, como la Corte Interamericana de Derechos Humanos y la Comisión Interamericana de Derechos Humanos, a la protección de los derechos humanos vulnerados al pueblo Choréachi. Las resoluciones muestran el compromiso de estas entidades en relación con la protección de los derechos humanos de la comunidad Choréachi, principalmente los derechos a la vida, a la integridad personal, a la propiedad colectiva, a la consulta previa, al acceso a la justicia y al derecho al ambiente sano.

A pesar de la insistencia de la Corte y la Comisión Interamericana, se ha podido observar una persistencia en las vulneraciones a la comunidad lo que plantea dudas no solo sobre la eficacia del Estado mexicano a la hora de la protección de los derechos fundamentales sino también su voluntad para revertir esta situación, pues nos encontramos ante un caso de larga duración. La protección de los derechos de los pueblos indígenas no es solamente una obligación legal sino también una discusión cultural y política, pues la relación intrínseca entre su territorio, los recursos naturales y su cultura son necesarias para garantizar su efectiva supervivencia.

El caso de la comunidad Choréachi nos invita a reflexionar sobre la importancia del reconocimiento de las comunidades indígenas para la protección de sus derechos y su supervivencia. Resalta la necesidad de acciones positivas por parte de los Estados latinoamericanos para proteger efectivamente los pueblos originarios y su cultura, debido a que las estructuras de violencia y desigualdad sistemáticas establecidas en la sociedad los desprotegen y afectan su existencia.

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Legal aid for domestic violence victims in Vietnam: comparative insights from international legislative instruments

Assistência jurídica às vítimas de violência doméstica no Vietnã: perspectivas comparadas a partir de instrumentos legislativos internacionais

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Legal aid for domestic violence victims in Vietnam: comparative insights from international legislative instruments*

Assistência jurídica às vítimas de violência doméstica no Vietnã: perspectivas comparadas a partir de instrumentos legislativos internacionais

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Abstract

Domestic violence remains a pervasive human rights concern that demands integrated legal and social responses. Legal aid plays a critical role in enabling survivors to access justice, yet the effectiveness of such provision varies considerably across jurisdictions. This article examines the extent to which Vietnam's legal aid framework for domestic violence survivors aligns with internationally recognised standards and identifies areas for further development. Adopting a qualitative comparative research design, the study conducts documentary and textual analysis of national legislation, key international instruments – including the Istanbul Convention and UNODC guidance – and relevant regional frameworks issued by AICHR. The findings reveal that Vietnam has made notable progress in establishing a legislative foundation consistent with global principles of accessibility and state responsibility. However, meaningful alignment remains constrained by limited integration of survivor-centred approaches, inconsistent service quality, and uneven implementation across regions. Moreover, gaps persist in specialised training, multi-agency coordination, and outreach to marginalised communities. The article concludes that Vietnam's legal aid system possesses a promising platform for further harmonisation with international standards, yet sustained institutional reform, capacity-building, and culturally responsive practice are required to ensure that legal aid becomes genuinely accessible, effective, and empowering for domestic violence survivors.

Keywords: domestic violence; Istanbul Convention; gender equality; legal aid; policy reform.

Resumo

A violência doméstica permanece como uma questão generalizada de direitos humanos que exige respostas jurídicas e sociais integradas. A assistência jurídica desempenha um papel fundamental ao possibilitar que as vítimas tenham acesso à justiça; contudo, a eficácia dessa prestação varia conside-

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ravelmente entre diferentes ordenamentos jurídicos. O presente artigo examina em que medida o sistema de assistência jurídica do Vietnã para vítimas de violência doméstica está em conformidade com os padrões internacionalmente reconhecidos, bem como identifica áreas que demandam aperfeiçoamento. Adotando um desenho de pesquisa qualitativa comparativa, o estudo realiza análise documental e textual da legislação nacional, de instrumentos internacionais relevantes – incluindo a Convenção de Istambul e as diretrizes do Escritório das Nações Unidas sobre Drogas e Crime –, bem como de marcos regionais pertinentes elaborados pela Comissão Intergovernamental de Direitos Humanos da ASEAN. Os resultados indicam que o Vietnã tem alcançado progressos significativos na consolidação de uma base legislativa alinhada aos princípios globais de acessibilidade e responsabilidade estatal. Entretanto, tal alinhamento ainda é limitado pela insuficiente incorporação de abordagens centradas na vítima, pela inconsistência na qualidade dos serviços prestados e pela implementação desigual entre as diferentes regiões. Ademais, persistem lacunas no que se refere à formação especializada, à coordenação interinstitucional e ao alcance de comunidades marginalizadas. Conclui-se que o sistema de assistência jurídica do Vietnã apresenta uma base promissora para uma maior harmonização com os padrões internacionais; todavia, são necessárias reformas institucionais contínuas, o fortalecimento de capacidades e a adoção de práticas culturalmente sensíveis para assegurar que a assistência jurídica se torne efetivamente acessível, eficaz e emancipadora para as vítimas de violência doméstica.

Palavras-chave: violência doméstica; Convenção de Istambul; igualdade de gênero; assistência jurídica; reforma de políticas públicas.

1 Introduction

Domestic violence persists as a widespread violation of human rights and a critical public health concern, affecting individuals across cultures, socioeconomic groups, and political systems. Increasingly, scholarship recognises domestic violence not as a private familial matter but as a manifestation of systemic gender inequality that necessitates comprehensive legal, social,

and institutional responses.¹ In many Asian societies, including Vietnam, domestic violence remains intertwined with cultural expectations, patriarchal norms, and social stigma, which collectively reinforce silence, discourage help-seeking, and impede pathways to justice for victim-survivors.² Recent evidence suggests that the prevalence and consequences of intimate partner violence in Vietnam cut across demographic groups, with women disproportionately affected and often facing enduring physical, psychological, and socio-economic harms.³ Within this context, access to legal aid constitutes a cornerstone of victim protection and a vital mechanism for advancing gender justice. Legal aid provides survivors with the means to understand their rights, navigate complex legal systems, and pursue protective measures or redress without financial burden – a critical consideration for women experiencing economic dependency or coercive control.⁴ However, access to quality legal support remains uneven. Empirical studies from Vietnam highlight persistent barriers, including limited awareness of entitlements, insufficient numbers of specialised legal aid practitioners, constrained resources, and implementation inconsistencies between urban and rural settings.⁵ These challenges raise important questions

¹ BELKNAP, Joanne; GRANT, Deanne. Domestic violence policy: a world of change. *Feminist Criminology*, v. 16, n. 3, p. 382-395, 2021. DOI 10.1177/1557085120987610.; MARUO, Maria; ARAN-GO, Diana J.; GROSSI, Ana M. D. M.; CONTRERAS-URBINA, Monica. *Addressing gender-based violence to accelerate gender equality: gender thematic policy notes series: issues and practice*. Washington, DC: World Bank, 2023.

² CHEN, Yafan. Domestic violence in Asian communities: a scoping review of available quantitative literature. *Trauma, Violence, & Abuse*, v. 25, n. 5, p. 3814-3826, 2024. DOI 10.1177/15248380241263313.; KWIATKOWSKI, Lynn. The politics of emotion and domestic violence in northern Vietnam. *Feminist Anthropology*, v. 5, n. 1, p. 29-46, 2024. DOI 10.1002/fea2.12142.

³ AHMED, Shakeel. Domestic violence, and women's health: evidence from NFHS-5 survey data. *Deleted Journal*, v. 22, n. 1, 2025. DOI 10.1186/s12982-025-00973-0.; DANG, Truc Ngoc Hoang; LE, Duc Dung. Socioeconomic inequalities in intimate partner violence: evidence from Vietnam. *Journal of Interpersonal Violence*, v. 40, n. 1-2, p. 31-55, Apr. 15, 2024. DOI 10.1177/08862605241245375.

⁴ NGUYEN, Minh; LE, Khanh. Can legislation reduce domestic violence in developing countries? *Sustainability*, v. 14, n. 20, p. 1-15, 2022. DOI 10.3390/su142013300.; RHODE, Deborah L.; EATON, Kayla; PORTO, Amanda. Access to justice through limited legal assistance. *Northwestern Journal of Human Rights*, v. 16, n. 1, p. 1-14, 2018. Available at: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1208&context=njihr>. Access in: Feb. 2, 2025.

⁵ LE, Thi Minh; MORLEY, Christine; HILL, Peter S.; TU BUI, Quyen; DUNNE, Michael P. The evolution of domestic violence prevention and control in Vietnam from 2003 to 2018: a case study of policy development and implementation within the health sys-

regarding the extent to which Vietnam's current legal aid system responds effectively to the needs of domestic violence victim-survivors.

Internationally, a robust normative framework has emerged to guide states in developing holistic and rights-based approaches to domestic violence and legal aid provision. The Council of Europe's Istanbul Convention⁶ stands as the most comprehensive legally binding instrument on preventing and combating violence against women and domestic violence. It advances an integrated model grounded in the "four Ps" – prevention, protection, prosecution, and coordinated policies – while explicitly emphasising timely, accessible, and victim-centred legal assistance.⁷ Complementing this, the United Nations has promulgated a suite of instruments articulating standards for accessible and high-quality legal aid, particularly for vulnerable and marginalised populations. The UNODC Principles and Guidelines on Access to Legal Aid,⁸ the UNODC Model Law,⁹ and the UNODC Handbook on Ensuring Quality of Legal Aid Services¹⁰ highlight the importance of gender-responsive legal aid, specialist training, independence of service providers, and structured monitoring mechanisms. Regionally, the ASEAN Intergovernmental Commission

on Human Rights¹¹ has underscored the need for equitable and culturally sensitive legal aid models that reflect Southeast Asian socio-legal realities.

Vietnam has made noteworthy progress in aligning its legislative framework with these international standards. The Law on Legal Aid¹² and the revised Law on Prevention and Combat against Domestic Violence¹³ formally recognise domestic violence victims as eligible for state-funded legal aid and reflect increasing governmental commitment to addressing gender-based violence. These legislative developments signify a positive shift from ad hoc assistance toward institutionalised and rights-based support. Nevertheless, emerging scholarship and policy analyses indicate that meaningful implementation remains constrained by institutional capacity gaps, insufficient gender-specific training, limited inter-sectoral coordination, and the enduring influence of socio-cultural norms.¹⁴ As a result, the degree to which Vietnam's legal aid system embodies a survivor-centred and rights-based approach remains contested. A comparative research lens is therefore both timely and analytically valuable. Comparative legal scholarship facilitates a deeper understanding of how different normative regimes conceptualise legal aid for domestic violence survivors, the principles they prioritise, and the institutional arrangements through which these principles are operationalised.¹⁵ By interrogating similarities, divergences,

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⁶ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

⁷ KANBUR, Nilay. Istanbul Convention: commitment to preventing gender-based violence. *Journal of Adolescent Health*, v. 69, n. 2, p. 354-355, 2021. DOI 10.1016/j.jadohealth.2021.05.009.

⁸ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UN principles and guidelines on access to legal aid in criminal justice systems*. 2012. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf. Access in: Feb. 2, 2025.

⁹ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC model law on legal aid in criminal justice systems with commentaries*. 2017. Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf. Access in: Feb. 2, 2025.

¹⁰ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC handbook on ensuring quality of legal aid services in criminal justice systems*. 2019. Available at: https://www.unodc.org/documents/justice-and-prison-reform/HB_Ensuring_Quality_Legal_Aid_Services.pdf. Access in: Feb. 2, 2025.

¹¹ ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS. *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.

¹² VIETNAM. The National Assembly of Vietnam. *Law on legal aid* (Law n^o. 11/2017/QH14), promulgated June 20, 2017. Available at: <https://chinhphu.vn/default.aspx?pageid=27160&docid=190303>. Access in: Feb. 2, 2025.

¹³ VIETNAM. The National Assembly of Vietnam. *Law on prevention and combat against domestic violence* (Law n^o. 13/2022/QH15), promulgated November 14, 2022. Available at: <https://datafiles.chinhphu.vn/cpp/files/vbpbq/2023/4/luat13.pdf>. Access in: Feb. 2, 2025.

¹⁴ GANGULI, Priyanka. Legal Responses to domestic violence: efficacy and challenges. *LawFoyer International Journal of Doctrinal Legal Research*, v. 2, n. 3, p. 279-298, 2024. DOI 10.70183/lijdlr.2024.v02.17.; TRANG, Le Thi. Legal framework on family violence prevention and control in Vietnam and Singapore from the perspective of protecting women's rights. *Pakistan Journal of Criminology*, v. 16, n. 4, p. 865-877, 2024. DOI 10.62271/pjc.16.4.865.877.

¹⁵ GANGULI, Priyanka. Legal Responses to domestic violence: efficacy and challenges. *LawFoyer International Journal of Doctrinal Legal Research*, v. 2, n. 3, p. 279-298, 2024. DOI 10.70183/lijdlr.2024.v02.17.; MAMBU, Joupy G. Z.; MONGDONG, Novita Marven. The influence of international human rights instruments on domestic legislation: a comparative study of four countries. *The Easta Jour-*

and areas of normative or practical tension, comparative inquiry can illuminate pathways for legislative and institutional refinement. Importantly, placing Vietnam's legal aid framework in dialogue with leading international instruments may reveal strategic opportunities for policy learning, adaptation, and system strengthening that extend beyond formal legal transposition.

This study examines the degree of alignment between Vietnam's legal aid framework for domestic violence victims and established international standards, while also identifying areas that warrant further development. It focuses on three core dimensions: the conceptualisation and delivery of legal aid for domestic violence survivors within Vietnam's legislative and policy architecture; the standards and institutional mechanisms for legal aid articulated in leading international instruments; and the comparative insights that can inform evidence-based reform of Vietnam's legal aid system.¹⁶ To address these aims, the article adopts a qualitative comparative research design grounded in documentary and textual analysis of national legislation, international legal frameworks, and peer-reviewed academic scholarship. By pursuing this analytical approach, the article contributes to evolving debates on access to justice and gender-responsive legal support through a nuanced, contextually informed, and empirically grounded comparative perspective. It underscores that the effectiveness of legal aid for domestic violence survivors extends beyond the existence of statutory provisions, relying equally on implementation practices, institutional capacity, and sustained political commitment to survivor-centred justice.¹⁷ Situating Vietnam's legal aid framework within a wider global and regional legal lan-

nal Law and Human Rights, v. 1, n. 3, p. 99-107, 2023. DOI 10.58812/eslhr.v1i03.86.

¹⁶ KWIATKOWSKI, Lynn. The politics of emotion and domestic violence in northern Vietnam. *Feminist Anthropology*, v. 5, n. 1, p. 29-46, 2024. DOI 10.1002/fea2.12142.; LE, Thi Minh; MORLEY, Christine; HILL, Peter S.; TU BUI, Quyen; DUNNE, Michael P. The evolution of domestic violence prevention and control in Vietnam from 2003 to 2018: a case study of policy development and implementation within the health system. *International Journal of Mental Health Systems*, v. 13, n. 1, p. 1-16, 2019. DOI 10.1186/s13033-019-0295-6.

¹⁷ AHMED, Shakeel. Domestic violence, and women's health: evidence from NFHS-5 survey data. *Deleted Journal*, v. 22, n. 1, 2025. DOI 10.1186/s12982-025-00973-0.; RHODE, Deborah L.; EATON, Kayla; PORTO, Amanda. Access to justice through limited legal assistance. *Northwestern Journal of Human Rights*, v. 16, n. 1, p. 1-14, 2018. Available at: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1208&context=njihr>. Access in: Feb. 2, 2025.

dscape enables a more comprehensive understanding of both its strengths and its limitations. In doing so, the study enriches scholarly and policy discussions on strengthening legal aid systems to uphold rights, enhance protection, and facilitate more meaningful pathways out of violence. Consequently, this research aims to answer the following questions:

1. How aligned is Vietnam's legal aid framework with international standards for domestic violence survivors?
2. What comparative insights can strengthen Vietnam's legal aid policy and practice for domestic violence survivors?

2 Methods

2.1 Research design

This study employs a qualitative comparative research design grounded in documentary analysis to explore how Vietnam's legal aid framework for domestic violence victims aligns with key international instruments. The approach enables a close examination of legal texts, policy documents, and institutional guidelines, recognising that the meaning and effectiveness of legal aid provisions are shaped as much by their underlying principles as by their written form. The study follows the comparative legal method outlined by Samuel,¹⁸ progressing through four stages: first, a descriptive mapping of relevant legal provisions; second, analysis of their scope, intent, and operational mechanisms; third, comparison across national and international frameworks; and finally, evaluation of convergence, divergence, and areas for potential reform. This design supports a systematic yet context-sensitive inquiry, allowing the research to move beyond simple legal transposition and instead draw out substantive lessons that may guide improvements in policy and practice in Vietnam.

2.2 Data sources

The study draws on three main categories of data to ensure a robust and well-rounded comparative analysis.

¹⁸ SAMUEL, Geoffrey. *An introduction to comparative law theory and method*. Oxford: Hart Publishing, 2014.

First, Vietnamese legal and policy documents form the core national data set. These include the *Law on Legal Aid*¹⁹ and the *Law on Prevention and Combat against Domestic Violence*,²⁰ which together constitute the primary legislative foundations governing state-supported legal assistance for domestic violence victims. Supplementary sources, such as government circulars, ministerial guidelines, and national policy reports, are also examined to capture implementation directions, institutional arrangements, and practical challenges reflected in official discourse. Second, a set of international legislative and normative instruments is reviewed to establish relevant benchmarks for comparison. The Council of Europe's *Istanbul Convention*²¹ provides the most comprehensive legally binding framework on domestic violence and remains a central point of reference for victim-centred legal aid provision. In parallel, three key United Nations Office on Drugs and Crime (UNODC) instruments – the *Principles and Guidelines on Access to Legal Aid*,²² the *Model Law on Legal Aid*,²³ and the *Handbook on Ensuring Quality of Legal Aid Services*²⁴ – offer detailed standards on accessibility, quality assurance, and institutional design. At the regional level, the ASEAN Intergovernmental Commission on Human Rights (AICHR) *Thematic Study on Legal Aid*²⁵ is included to reflect Southeast Asian contextual specificities.

Finally, the analysis is informed by secondary academic literature, including peer-reviewed articles, comparative legal studies, and reports by UN Women, the World Bank, and other expert bodies. These sources help situate the legal frameworks within broader scholarly debates and provide empirical and conceptual insights to support interpretation.

2.3 Data collection

Data were collected through a systematic search of legal texts, scholarly commentaries, academic publications, and official institutional documents to ensure comprehensive coverage of relevant information. The search was conducted between January and September 2025 using academic databases such as Scopus, Web of Science, HeinOnline, and Google Scholar, alongside official government and organisational websites. Key search terms included: *legal aid*, *domestic violence*, *Vietnam*, *access to justice*, *Istanbul Convention*, *UNODC*, and *victim-centred legal services*. Inclusion criteria required that sources: (i) directly addressed legal aid or domestic violence; (ii) were published in English or Vietnamese; and (iii) were legal texts, peer-reviewed studies, or reputable institutional publications issued from 2010 onwards. Exclusion criteria ruled out media articles, unverified online content, and documents lacking clear authorship or institutional legitimacy. This systematic approach ensured that the data set reflected both legal foundations and contemporary scholarly and policy perspectives relevant to the research aims.

2.4 Analytical framework

The analysis is structured around a thematic framework designed to enable a systematic and meaningful comparison between Vietnam's legal aid provisions and international standards. Four thematic categories guide the examination. First, legal definitions and victim eligibility for legal aid are reviewed to assess how each framework conceptualises domestic violence victims and determines entitlement to state-funded support. This theme explores whether eligibility criteria are broad and survivor-centred, or narrowly defined in ways that may restrict access. Second, the scope and types of legal aid

¹⁹ VIETNAM. The National Assembly of Vietnam. *Law on legal aid* (Law n.º. 11/2017/QH14), promulgated June 20, 2017. Available at: <https://chinhphu.vn/default.aspx?pageid=27160&docid=190303>. Access in: Feb. 2, 2025.

²⁰ VIETNAM. The National Assembly of Vietnam. *Law on prevention and combat against domestic violence* (Law n.º. 13/2022/QH15), promulgated November 14, 2022. Available at: <https://datafiles.chinhphu.vn/cpp/files/vbpq/2023/4/luat13.pdf>. Access in: Feb. 2, 2025.

²¹ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

²² UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UN principles and guidelines on access to legal aid in criminal justice systems*. 2012. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf. Access in: Feb. 2, 2025.

²³ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC model law on legal aid in criminal justice systems with commentaries*. 2017. Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf. Access in: Feb. 2, 2025.

²⁴ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC handbook on ensuring quality of legal aid services in criminal justice systems*. 2019. Available at: https://www.unodc.org/documents/justice-and-prison-reform/HB_Ensuring_Quality_Legal_Aid_Services.pdf. Access in: Feb. 2, 2025.

²⁵ ASEAN INTERGOVERNMENTAL COMMISSION ON

HUMAN RIGHTS. *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.

services provided are analysed to identify what forms of assistance are formally guaranteed. This includes legal representation, counselling, procedural guidance, and specialised services tailored to domestic violence cases. Third, standards for quality, accessibility, and victim-centred support are examined to evaluate the extent to which the legal frameworks incorporate principles of timeliness, cultural sensitivity, trauma-informed practice, and professional training for legal aid providers. Finally, the study reviews monitoring, enforcement, and accountability mechanisms to determine how each system ensures compliance, quality assurance, and continual improvement in service delivery. Together, these themes provide a coherent analytical lens that supports both cross-jurisdictional comparison and identification of policy and implementation gaps.

3 Discussion

3.1 Vietnam's evolving legal aid framework for domestic violence survivors: Key strengths and persistent gaps

Vietnam's legal aid framework has evolved considerably over the past two decades, reflecting a growing commitment to strengthening access to justice for individuals experiencing domestic violence. The enactment of the *Law on Legal Aid*²⁶ marked a notable milestone, as it established a dedicated legal foundation for state-funded support to vulnerable groups, including women subjected to domestic abuse. This legislation signalled a shift from ad hoc or charity-based legal assistance towards a rights-based, state-supported model aligned with broader social justice objectives.²⁷ Complementing this, the revised *Law on Prevention and Combat against Domestic Violence*²⁸ further reinforced the legal recognition

of domestic violence victims as eligible for legal aid services, thus enhancing the coherence between protection and support mechanisms within the national legal landscape.²⁹ A key strength of Vietnam's model lies in the formal guarantee of free legal aid for certain priority groups. Domestic violence victims are classified as beneficiaries, which helps reduce financial barriers that often deter women from seeking legal redress, especially where economic dependency or coercive control is present.³⁰ Furthermore, the legal aid system is decentralised, with provincial Legal Aid Centres (LACs) operating under the Ministry of Justice. This structure offers a degree of flexibility, enabling localised service delivery and partnerships with local authorities, mass organisations, and community-based actors.³¹ In practice, decentralisation has facilitated wider geographic coverage and fostered networks of support that can, at least in principle, bring services closer to rural and remote populations.

Additionally, Vietnam has made gradual progress in expanding the scope of legal aid services. Beyond legal representation in court, LACs and authorised legal aid providers offer legal counselling, procedural guidance, and, in some cases, referrals to other social or protective services. Such multidimensional assistance is vital for domestic violence survivors, who often require not only legal advice but also coordinated support that addresses safety, protection, and longer-term recovery needs.³² Over recent years, collaboration with non-governmental organisations and international development partners has also contributed to capacity-building initiatives and pilot programmes that seek to improve service quality and outreach, particularly for women facing intersec-

2, 2025.

²⁹ VIETNAM. The National Assembly of Vietnam. *Law on prevention and combat against domestic violence* (Law n°. 13/2022/QH15), promulgated November 14, 2022. Available at: <https://datafiles.chinhphu.vn/cpp/files/vbpq/2023/4/luat13.pdf>. Access in: Feb. 2, 2025.

³⁰ NGUYEN, Minh; LE, Khanh. Can legislation reduce domestic violence in developing countries? *Sustainability*, v. 14, n. 20, p. 1-15, 2022. DOI 10.3390/su142013300.

³¹ LE, Thi Minh; MORLEY, Christine; HILL, Peter S.; TU BUI, Quyen; DUNNE, Michael P. The evolution of domestic violence prevention and control in Vietnam from 2003 to 2018: a case study of policy development and implementation within the health system. *International Journal of Mental Health Systems*, v. 13, n. 1, p. 1-16, 2019. DOI 10.1186/s13033-019-0295-6.

³² YOUNT, Kathryn M.; ANDERSON, Katherine M.; TRANG, Quach Thu; BERGENFELD, Irina. Preventing sexual violence in Vietnam: qualitative findings from high school, university, and civil society key informants across regions. *BMC Public Health*, v. 23, n. 1, p. 1-17, 2023. DOI 10.1186/s12889-023-15973-5.

²⁶ VIETNAM. The National Assembly of Vietnam. *Law on legal aid* (Law n°. 11/2017/QH14), promulgated June 20, 2017. Available at: <https://chinhphu.vn/default.aspx?pageid=27160&docid=190303>. Access in: Feb. 2, 2025.

²⁷ VIETNAM. The National Assembly of Vietnam. *Law on legal aid* (Law n°. 11/2017/QH14), promulgated June 20, 2017. Available at: <https://chinhphu.vn/default.aspx?pageid=27160&docid=190303>. Access in: Feb. 2, 2025.

²⁸ VIETNAM. The National Assembly of Vietnam. *Law on prevention and combat against domestic violence* (Law n°. 13/2022/QH15), promulgated November 14, 2022. Available at: <https://datafiles.chinhphu.vn/cpp/files/vbpq/2023/4/luat13.pdf>. Access in: Feb.

ting vulnerabilities. Despite these advancements, several persistent gaps limit the effectiveness and accessibility of legal aid for domestic violence victims. Foremost among these is the issue of insufficient and uneven funding, which constrains service expansion, staffing, and long-term capacity development. Resources allocated to provincial Legal Aid Centres vary significantly, resulting in notable disparities in service quality and availability across regions.³³ Urban areas tend to benefit from stronger infrastructure and more experienced personnel, whereas rural, mountainous, and ethnic minority regions often face chronic shortages of legal aid providers and limited institutional capacity. This uneven distribution undermines the principle of equal access to justice and disproportionately affects those already facing social or geographic marginalisation.

Moreover, specialised training and professional development for legal aid practitioners remain underdeveloped. While the legislative framework calls for legal aid delivery, it does not sufficiently require or standardise gender-sensitive, trauma-informed, or survivor-centred training for lawyers and counsellors. As a result, many legal professionals lack the specialised knowledge necessary to engage effectively with domestic violence survivors, who may present complex psychological, cultural, or safety needs.³⁴ This gap can inadvertently lead to secondary victimisation, where survivors feel judged, misunderstood, or retraumatised by the very systems meant to support them. Cultural and linguistic barriers also pose enduring challenges. In ethnic minority communities – where domestic violence is often understood through traditional or patriarchal norms – women may face stigma for seeking external intervention, particularly from legal institutions perceived as unfamiliar or intimidating.³⁵ The limited availability of legal aid providers fluent in minority languages, or trained in culturally responsive practice, further discourages help-seeking and reduces the effectiveness of outreach. Without greater cultural adaptability, legal aid services risk remaining

inaccessible to substantial segments of the population they are intended to serve.

Another critical gap concerns the insufficient integration of trauma-informed services. Domestic violence survivors often require coordinated support that addresses both legal and psychosocial dimensions of harm. However, Vietnam’s legal aid services remain largely legalistic in orientation, with limited systematic connection to shelters, counselling services, and social welfare agencies. Although some local partnerships exist, they rely heavily on external donor support and lack institutional standardisation. Consequently, the quality and comprehensiveness of survivor support remain inconsistent across provinces. Lastly, monitoring and evaluation mechanisms within the legal aid system require strengthening. While reporting structures exist, they do not yet systematically assess service quality, survivor satisfaction, or long-term outcomes. This limits the state’s ability to measure effectiveness, identify weaknesses, and facilitate evidence-based reform. As a whole, Vietnam’s legal aid framework demonstrates a clear legislative commitment and a number of noteworthy structural strengths. Nevertheless, implementation gaps – particularly those linked to resource allocation, professional capacity, cultural responsiveness, and service integration – continue to impede meaningful access for many domestic violence survivors. Addressing these gaps will require strategic investment, sustained institutional reform, and a more nuanced understanding of the barriers that shape survivors’ interactions with the justice system.

3.2 Comparative insights from prominent international instruments on legal aid for domestic violence survivors

International legal and policy instruments provide a rich normative foundation for evaluating national approaches to legal aid for domestic violence victims. Although differing in scope, legal status, and regional orientation, three key instruments – the Council of Europe’s Istanbul Convention, the United Nations Office on Drugs and Crime (UNODC) Model Law and associated guidance, and the ASEAN Intergovernmental Commission on Human Rights (AICHR) Thematic Study³⁶ – offer complementary insights into globally re-

³³ TRANG, Le Thi. Legal framework on family violence prevention and control in Vietnam and Singapore from the perspective of protecting women’s rights. *Pakistan Journal of Criminology*, v. 16, n. 4, p. 865-877, 2024. DOI 10.62271/pjc.16.4.865.877.

³⁴ GANGULI, Priyanka. Legal Responses to domestic violence: efficacy and challenges. *LawFoyer International Journal of Doctrinal Legal Research*, v. 2, n. 3, p. 279-298, 2024. DOI 10.70183/lijdlr.2024.v02.17.

³⁵ KWIATKOWSKI, Lynn. The politics of emotion and domestic violence in northern Vietnam. *Feminist Anthropology*, v. 5, n. 1, p. 29-46, 2024. DOI 10.1002/fea2.12142.

³⁶ ASEAN INTERGOVERNMENTAL COMMISSION ON

cognised standards. Collectively, they illustrate a gradual but significant convergence towards survivor-centred, rights-based, and quality-assured legal aid systems. A comparative engagement with these instruments is instructive for assessing Vietnam's current framework and identifying pathways for further alignment and reform. The Istanbul Convention³⁷ is widely regarded as the most comprehensive and legally binding treaty addressing violence against women and domestic violence. It has set a normative benchmark for states seeking to institutionalise holistic and integrated support mechanisms for survivors.³⁸ Central to its design is the “four Ps” framework – prevention, protection, prosecution, and integrated policies – which establishes domestic violence as not merely a criminal or private justice issue, but a structural and systemic concern over which states bear substantive obligations. In the context of legal aid, the Convention adopts a strongly survivor-centred and rights-based approach. States parties must ensure timely, accessible, and free legal assistance for survivors, recognising that financial, social, and cultural barriers frequently impede access to justice.³⁹ Legal aid is not viewed narrowly as courtroom representation, but instead as part of a continuum of legal information, advice, and specialist services that empower survivors to make informed decisions and navigate justice systems safely.

Moreover, the Convention underscores the necessity of specialised and gender-sensitive services, reflecting the distinct harms experienced by survivors of domes-

tic and gender-based violence. Such services must be staffed by trained professionals capable of responding to trauma, safeguarding confidentiality, and supporting survivors' dignity. Training is not discretionary but a mandatory feature, directed at legal professionals, law enforcement, judicial officers, and support service providers. This emphasis on capacity-building signals a recognition that the quality of legal aid depends not only on legal entitlement but also on the competence and sensitivity with which services are delivered.⁴⁰ The Convention further calls for multi-agency coordination and formalised referral pathways between legal aid providers, shelters, medical institutions, and social services. Consequently, it advances an integrated model that situates legal aid within a broader ecosystem of survivor protection and empowerment. In contrast to the Istanbul Convention's regional treaty status, the UNODC Model Law⁴¹ and associated guidelines adopt a more global and system-wide orientation. Although not legally binding, these instruments are authoritative and influential, particularly in shaping legislative reforms in developing and transitional justice contexts. The *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*⁴² establish foundational standards of accessibility, non-discrimination, and quality assurance. They define legal aid broadly to include legal information, advice, representation, and legal education, reflecting a holistic understanding of access to justice that extends beyond formal legal proceedings. Importantly, the guidelines highlight the concept of legal empowerment, stressing that legal literacy and early access to legal information are integral to enabling individuals to claim and exercise their rights.⁴³

HUMAN RIGHTS (AICHR). *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025; COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025; UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC model law on legal aid in criminal justice systems with commentaries*. 2017. Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf. Access in: Feb. 2, 2025.

³⁷ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

³⁸ KANBUR, Nilay. Istanbul Convention: commitment to preventing gender-based violence. *Journal of Adolescent Health*, v. 69, n. 2, p. 354-355, 2021. DOI 10.1016/j.jadohealth.2021.05.009.

³⁹ KRIZSÁN, Andrea; ROGGBAND, Conny; ZELLER, Maria C. Who is afraid of the Istanbul Convention? Explaining opposition to and support for gender equality. *Comparative Political Studies*, v. 58, n. 10, p. 2161-2201, 2024. DOI 10.1177/00104140241290205.

⁴⁰ NARDOCCI, Chiara. The Istanbul Convention: yes and nos. *ERA Forum*, v. 26, p. 127-147, 2025. DOI 10.1007/s12027-025-00831-1.

⁴¹ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC model law on legal aid in criminal justice systems with commentaries*. 2017. Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf. Access in: Feb. 2, 2025.

⁴² UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UN principles and guidelines on access to legal aid in criminal justice systems*. 2012. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf. Access in: Feb. 2, 2025.

⁴³ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UN principles and guidelines on access to legal aid in criminal justice systems*. 2012. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf. Access in: Feb. 2, 2025.

The UNODC *Model Law on Legal Aid*⁴⁴ builds on these principles by offering a legislative blueprint that states may adapt to their domestic context. It emphasises the institutional independence of legal aid providers, the need for sustainable funding models, and mechanisms to ensure accountability, monitoring, and continuous improvement. The *UNODC Handbook on Ensuring Quality of Legal Aid Services*⁴⁵ further elaborates on indicators of service quality, including provider qualifications, caseload management, complaint mechanisms, and peer review systems. Gender-responsiveness is treated as a core quality standard; legal aid systems are urged to incorporate specialised services for women and survivors of violence, ensure privacy, and provide culturally sensitive, trauma-informed approaches.⁴⁶ Unlike the Istanbul Convention,⁴⁷ whose provisions are firmly anchored in gender equality and women's rights, the UNODC instruments derive from a broader access-to-justice paradigm with particular relevance to criminal justice systems. Nevertheless, their standards on quality, independence, and institutional design are highly pertinent to domestic violence legal aid, which often intersects with both civil and criminal law domains.

The AICHR Thematic Study on Legal Aid⁴⁸ offers an additional layer of insight tailored to the socio-legal realities of Southeast Asia. While less prescriptive than the other instruments, the study captures regional specificities including plural legal systems, strong family-centric norms, and uneven institutional capacity across

ASEAN member States. It underscores the structural disadvantages faced by women, children, migrant workers, and ethnic minorities in accessing legal aid – groups for whom domestic violence often intersects with socioeconomic, linguistic, or immigration-related vulnerabilities.⁴⁹ Accordingly, the AICHR study advocates for contextually grounded and culturally responsive legal aid models that acknowledge and adapt to barriers rooted in tradition, community expectations, and social stigma. Unlike the Istanbul Convention's mandatory standards,⁵⁰ AICHR's recommendations are more developmental and capacity-building oriented.⁵¹ They emphasise the expansion of community-based legal aid, integration with paralegal and civil society networks, and cross-border cooperation – acknowledging that domestic violence in Southeast Asia can involve transnational marriage, labour migration, and cross-jurisdictional protection challenges.⁵² Furthermore, AICHR highlights the importance of incremental implementation, recognising that institutional reform in resource-constrained environments may require phased adaptation rather than immediate full-scale harmonisation with international norms.

Cumulatively, these three instruments illustrate both areas of normative convergence and divergence. At the level of core principles, there is remarkable alignment: all instruments affirm the necessity of survivor-centred, rights-based, accessible, and high-quality legal aid. Each acknowledges legal aid as essential to ensuring effective remedies, reducing re-victimisation, and empowering survivors to leave abusive environments. There is also shared recognition of the importance of specialised training, inter-agency coordination, and the need for systematic monitoring and evaluation. Nevertheless,

⁴⁴ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC model law on legal aid in criminal justice systems with commentaries*. 2017. Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf. Access in: Feb. 2, 2025.

⁴⁵ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC handbook on ensuring quality of legal aid services in criminal justice systems*. 2019. Available at: https://www.unodc.org/documents/justice-and-prison-reform/HB_Ensuring_Quality_Legal_Aid_Services.pdf. Access in: Feb. 2, 2025.

⁴⁶ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC handbook on ensuring quality of legal aid services in criminal justice systems*. 2019. Available at: https://www.unodc.org/documents/justice-and-prison-reform/HB_Ensuring_Quality_Legal_Aid_Services.pdf. Access in: Feb. 2, 2025.

⁴⁷ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

⁴⁸ ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR). *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.

⁴⁹ ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR). *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.

⁵⁰ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

⁵¹ ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR). *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.

⁵² SIDAYANG, Sari; SUMANTA, Maria J.; CALYA, Clarisa K. P.; MOKODENSEHO, Sally. Addressing gender-based violence: comparative analysis of international legal frameworks and practices. *The Easta Journal Law and Human Rights*, v. 1, n. 3, p. 147-157, 2023. DOI 10.58812/eslhr.v1i03.91.

their orientations differ in emphasis and depth. The Istanbul Convention⁵³ is the most explicit in framing domestic violence through a gender-based violence and intersectional feminist lens, foregrounding power imbalances, patriarchy, and structural discrimination. The UNODC instruments,⁵⁴ rooted in criminal justice reforms, prioritise systemic quality, independence, and institutional architecture, offering detailed legislative and administrative guidance. The AICHR study,⁵⁵ meanwhile, provides regionally nuanced insights that foreground cultural, socioeconomic, and cross-border dimensions, and therefore offers complementary relevance for Southeast Asian countries such as Vietnam. Overall, comparative engagement with these three instruments highlights a robust international consensus on the essential elements of effective legal aid for domestic violence survivors, while also offering differentiated insights that reflect diverse legal traditions and regional contexts. This body of guidance establishes a persuasive reference point for evaluating Vietnam's current legal aid framework and identifying opportunities for harmonisation, innovation, and context-sensitive reform.

3.3 Key similarities and differences between Vietnam's legal aid system and international standards

A comparative examination of Vietnam's legal aid framework alongside the Istanbul Convention,⁵⁶ the UNODC instruments,⁵⁷ and the AICHR Thematic Stu-

dy⁵⁸ reveals both areas of convergence and substantive divergence. While Vietnam's legal architecture reflects increasing alignment with internationally recognised principles, notable gaps persist in interpretation, implementation, and system design. Analysing these similarities and differences provides insight into the extent to which Vietnam has internalised global standards, as well as the areas requiring targeted reform to strengthen its legal aid provision for domestic violence survivors. At the level of core normative principles, Vietnam demonstrates significant convergence with the three international instruments. All frameworks recognise legal aid as a fundamental component of access to justice for vulnerable or marginalised groups, particularly domestic violence survivors. Vietnam's *Law on Legal Aid*⁵⁹ and *Law on Prevention and Combat against Domestic Violence*⁶⁰ formally guarantee free legal support for eligible beneficiaries, echoing the commitment found in the Istanbul Convention to remove financial barriers that impede help-seeking.⁶¹ Likewise, the inclusion of legal counselling, representation, and information aligns with the UNODC's broad conceptualisation of legal aid as encompassing legal advice, education, and early intervention.⁶² Moreover, a shared recognition of the need

⁵³ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

⁵⁴ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UN principles and guidelines on access to legal aid in criminal justice systems*. 2012. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf. Access in: Feb. 2, 2025.

⁵⁵ ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR). *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.

⁵⁶ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

⁵⁷ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UN principles and guidelines on access to legal aid in criminal justice systems*. 2012. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf. Access in: Feb. 2, 2025.; UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC).

UNODC model law on legal aid in criminal justice systems with commentaries. 2017. Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf. Access in: Feb. 2, 2025.; UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC handbook on ensuring quality of legal aid services in criminal justice systems*. 2019. Available at: https://www.unodc.org/documents/justice-and-prison-reform/HB_Ensuring_Quality_Legal_Aid_Services.pdf. Access in: Feb. 2, 2025.

⁵⁸ ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR). *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.

⁵⁹ VIETNAM. The National Assembly of Vietnam. *Law on legal aid (Law n.º. 11/2017/QH14)*, promulgated June 20, 2017. Available at: <https://chinhphu.vn/default.aspx?pageid=27160&docid=190303>. Access in: Feb. 2, 2025.

⁶⁰ VIETNAM. The National Assembly of Vietnam. *Law on prevention and combat against domestic violence (Law n.º. 13/2022/QH15)*, promulgated November 14, 2022. Available at: <https://datafiles.chinhphu.vn/cpp/files/vbpbq/2023/4/luat13.pdf>. Access in: Feb. 2, 2025.

⁶¹ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

⁶² UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UN principles and guidelines on access to legal aid in criminal justice systems*. 2012. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf. Access in: Feb. 2, 2025.; UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC).

for gender sensitivity, survivor-centred practices, and inter-agency coordination forms a conceptual bridge between Vietnam’s policy direction and international norms.⁶³

Table 1 - Comparative overview of Vietnam’s legal aid provisions and international standards for domestic violence survivors

Aspect	Vietnam	International standards	Comparative insight
Eligibility	Victim-based but sometimes restrictive	Broad survivor-centred inclusion	Broaden criteria & reduce bureaucratic proof
Services	Legal representation & counselling	Multidisciplinary (legal + psychosocial)	Integrate holistic support
Implementation	Provincial variation	Standardised & monitored	Establish unified national standards
Training	Limited specialised DV training	Mandatory gender-sensitive & trauma-informed training	Expand professional capacity

However, differences emerge in the depth and rigor of these commitments, particularly when comparing Vietnam’s framework with the Istanbul Convention.⁶⁴ The Convention advances a thoroughly gender-based violence analysis, explicitly linking domestic violence to structural inequality, patriarchy, and discrimination. Vietnam’s legislative language, by contrast, remains more neutral and family-centred, framing domestic violence as a social problem rather than a manifestation of gendered power relations. Consequently, while Vietnam’s laws acknowledge victims’ rights, they do not articulate

the feminist and human rights-grounded rationale that underpins the Istanbul Convention.⁶⁵ This conceptual divergence influences downstream implementation: where the Convention mandates specialised, survivor-centred services as legal entitlements, Vietnam’s provisions remain more aspirational and contingent on resource availability. A further point of divergence concerns the scope and comprehensiveness of services. The Istanbul Convention⁶⁶ and the UNODC Model Law⁶⁷ adopt a holistic, integrated approach to legal aid, embedding it within a continuum of psychosocial, protective, and social welfare services. Legal aid is not treated as an isolated intervention but as one strand within a multi-disciplinary ecosystem designed to safeguard survivors’ rights and safety.⁶⁸ Conversely, Vietnam’s model remains predominantly legalistic, with limited integration between legal services and shelters, counselling, or protection services. Although some local partnerships exist, particularly through donor-funded initiatives, they lack system-wide institutionalisation. As a result, survivors often encounter fragmented assistance rather than a seamless referral pathway, in contrast to the coordinated mechanisms envisioned in the international instruments.

Differences also arise in relation to quality assurance and professional training. International standards, especially the UNODC guidelines, emphasise mandatory training, accreditation, supervision, and monitoring of

UNODC *model law on legal aid in criminal justice systems with commentaries*. 2017. Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf. Access in: Feb. 2, 2025.

⁶³ ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR). *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.; UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC handbook on ensuring quality of legal aid services in criminal justice systems*. 2019. Available at: https://www.unodc.org/documents/justice-and-prison-reform/HB_Ensuring_Quality_Legal_Aid_Services.pdf. Access in: Feb. 2, 2025.

⁶⁴ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

⁶⁵ KANBUR, Nilay. Istanbul Convention: commitment to preventing gender-based violence. *Journal of Adolescent Health*, v. 69, n. 2, p. 354-355, 2021. DOI 10.1016/j.jadohealth.2021.05.009.; KRIZSÁN, Andrea; ROGGE BAND, Conny; ZELLER, Maria C. Who is afraid of the Istanbul Convention? Explaining opposition to and support for gender equality. *Comparative Political Studies*, v. 58, n. 10, p. 2161-2201, 2024. DOI 10.1177/00104140241290205.

⁶⁶ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

⁶⁷ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC model law on legal aid in criminal justice systems with commentaries*. 2017. Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf. Access in: Feb. 2, 2025.

⁶⁸ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.; UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC handbook on ensuring quality of legal aid services in criminal justice systems*. 2019. Available at: https://www.unodc.org/documents/justice-and-prison-reform/HB_Ensuring_Quality_Legal_Aid_Services.pdf. Access in: Feb. 2, 2025.

legal aid providers. These measures ensure that practitioners possess the specialised knowledge required to support survivors of violence, including trauma-informed practice, cultural sensitivity, and gender-responsive communication.⁶⁹ Vietnam's legal aid framework, while acknowledging capacity-building needs, does not mandate specialised training for legal aid officers or legal aid collaborators. The absence of compulsory or standardised training results in uneven professional capability across regions. This stands in contrast to the Istanbul Convention's explicit requirements for regular, specialised training of legal and justice sector professionals.⁷⁰ Another notable difference concerns institutional independence and funding models. The UNODC Model Law⁷¹ underscores the importance of structural autonomy to prevent conflicts of interest and to ensure impartial and rights-based service provision. It recommends diversified financing, independent oversight, and transparent accountability mechanisms. Vietnam's legal aid system, however, remains highly state-centred, with provincial Legal Aid Centres reporting directly to the Ministry of Justice and heavily reliant on state budgets. While this centralised model ensures formal accountability and administrative coherence, it can limit innovation, civil society engagement, and independent monitoring. Furthermore, resource constraints contribute to uneven provincial implementation, a recurring concern not unique to Vietnam but less prominent in the European context where the Istanbul Convention operates.

When compared with the AICHR Thematic Study,⁷² Vietnam shares stronger similarities in contextual challenges and incremental reform approaches. The AICHR emphasises that Southeast Asian states confront

cultural, linguistic, and socio-economic barriers that shape legal aid delivery, particularly for women, ethnic minorities, and cross-border populations.⁷³ Vietnam reflects these regional characteristics, including patriarchal family values, stigma around reporting violence, and limited legal literacy in rural communities. The AICHR's emphasis on community-based legal empowerment, paralegal models, and cross-border cooperation resonates more closely with Vietnam's reform trajectory than the more resource-intensive obligations of the Istanbul Convention.⁷⁴ Nevertheless, Vietnam has not yet fully leveraged community-based paralegal networks or integrated civil society actors to the extent recommended by AICHR.⁷⁵ Despite these divergences, the comparative review highlights areas of latent harmonisation potential. Vietnam's legislative foundation is sufficiently aligned with international principles to support a gradual transition towards more comprehensive, survivor-centred practices. The legal architecture exists, but its operationalisation requires strengthening through sustained investment, structural reforms, and enhanced coordination. The most significant opportunities for alignment include: embedding trauma-informed and specialised training as mandatory requirements; formalising multi-agency coordination mechanisms; expanding culturally and linguistically responsive services; and introducing independent quality assurance systems. Briefly, Vietnam shares a foundational alignment with international norms, particularly at the conceptual and legislative levels. The main divergence lies in the depth of implementation, institutional design, and the integration of gender-based violence theory into legal practice. By critically assessing these similarities and differences, it becomes evident that Vietnam's current framework provides a promising platform for further harmonisation. However, realising this potential requires translating normative commitments into practical, system-

⁶⁹ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC handbook on ensuring quality of legal aid services in criminal justice systems*. 2019. Available at: https://www.unodc.org/documents/justice-and-prison-reform/HB_Ensuring_Quality_Legal_Aid_Services.pdf. Access in: Feb. 2, 2025.

⁷⁰ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

⁷¹ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC model law on legal aid in criminal justice systems with commentaries*. 2017. Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf. Access in: Feb. 2, 2025.

⁷² ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR). *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.

⁷³ ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR). *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.

⁷⁴ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

⁷⁵ ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR). *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.

-wide reform grounded in survivor-centred justice and evidence-based policy design.

3.4 Implications for enhancing legal aid policy and practice for domestic violence survivors in Vietnam

The comparative assessment of Vietnam's legal aid framework against international standards carries important implications for both policy and practice. Although Vietnam has established a legislative foundation that broadly aligns with global norms, the effectiveness of legal aid for domestic violence survivors ultimately depends on how well these commitments are translated into operational, survivor-centred, and culturally responsive practice. Strengthening the system therefore requires not only legal reform but also institutional restructuring, capacity development, and a shift in socio-legal attitudes toward domestic violence and access to justice. The following implications outline key areas where Vietnam could advance alignment with international models, enhance service delivery, and better safeguard the rights and agency of survivors. A central implication concerns the need to more fully embed survivor-centred and rights-based principles into Vietnam's legal aid system. While the current legal framework acknowledges the rights of victims, it stops short of conceptualising domestic violence through a structural and gender-based violence lens, as articulated in the Istanbul Convention.⁷⁶ Shifting towards a survivor-centred model requires reorienting legal aid from a predominantly procedural service to one that prioritises survivors' safety, dignity, autonomy, and long-term empowerment. This approach recognises that domestic violence is not solely a legal dispute but a manifestation of power imbalance and coercive control that can produce enduring trauma. Legal aid processes should therefore be adapted to minimise re-traumatisation, avoid victim-blaming, and ensure that survivors' voices guide decision-making at every stage of the legal process.⁷⁷ Policy development must incorporate this conceptual shift, ensuring that survivor agency and well-being are

positioned as core values rather than optional enhancements to service provision.

To support such a reorientation, mandatory specialist training and accreditation for legal aid personnel is essential. At present, professional development remains uneven, and trauma-informed, gender-sensitive training is not compulsory for legal aid providers in Vietnam. This stands in contrast to the Istanbul Convention's explicit requirement for regular and specialised training for legal, judicial, and support professionals working with survivors.⁷⁸ Likewise, the UNODC highlights the importance of competency standards, supervision, and quality assurance in legal aid provision.⁷⁹ Vietnam would benefit from adopting a structured, mandatory training framework that equips legal aid staff, volunteers, and associated actors with the knowledge and skills needed to provide empathetic, culturally aware, and trauma-responsive support. Accreditation mechanisms could be introduced to ensure consistent standards nationwide, combined with periodic refresher training and capacity-building programmes informed by current research and international best practices. Such measures would not only enhance service quality but also promote a professional culture that values empathy, confidentiality, and survivor empowerment. A related implication concerns the institutionalisation of multi-agency and cross-sectoral collaboration. Although pockets of inter-agency coordination exist, Vietnam's legal aid system continues to operate in relative isolation from social welfare, healthcare, and support service networks. International models consistently underline that legal aid must function within a holistic, multisectoral ecosystem to be effective.⁸⁰ Strengthening partnerships between Legal

⁷⁶ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

⁷⁷ NARDOCCI, Chiara. *The Istanbul Convention: yes and nos*. *ERA Forum*, v. 26, p. 127-147, 2025. DOI 10.1007/s12027-025-00831-1.

⁷⁸ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.

⁷⁹ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC model law on legal aid in criminal justice systems with commentaries*. 2017. Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf. Access in: Feb. 2, 2025.

⁸⁰ COUNCIL OF EUROPE. *The Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. 2011. Available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6>. Access in: Feb. 2, 2025.; UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UN principles and guidelines on access to legal aid in criminal justice systems*. 2012. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf. Access in: Feb. 2, 2025.

Aid Centres, the police, shelters, healthcare providers, social workers, and civil society organisations is therefore crucial. Formal referral pathways, memoranda of understanding, and integrated service protocols would help reduce fragmentation, enabling survivors to move seamlessly between legal, psychological, medical, and protective services. The establishment of multi-disciplinary crisis response teams – an increasingly common practice in countries that have adopted survivor-centred models – could be piloted at the provincial level. These teams can offer coordinated case management that prioritises survivor safety and reduces the burden on individuals to navigate institutions independently.

Within this collaborative environment, civil society organisations (CSOs) and community networks should be recognised as essential partners rather than peripheral actors. The AICHR Thematic Study⁸¹ stresses that community-based legal empowerment and paralegal models can bridge the gap between formal legal structures and marginalised populations.⁸² Vietnam could adopt similar approaches by formally integrating CSO-run legal counselling services, women’s unions, and grassroots support groups into the legal aid ecosystem. These actors often hold community trust and can provide culturally sensitive support, particularly in contexts where survivors are reluctant to interact with state authorities. Granting CSOs greater space to provide legal literacy, psychosocial support, and accompaniment services would align Vietnam with regional best practices and expand the reach and legitimacy of legal aid. Another implication relates to enhancing accessibility for rural, ethnic minority, and migrant populations, who face disproportionately high barriers in seeking legal aid. Research shows that legal literacy remains low in remote communities, and survivors often lack information about available services or how to initiate claims.⁸³ Language barriers, cultural norms, and geogra-

phic distance further compound these challenges. Vietnam could adopt several strategies to improve outreach. First, the development of multilingual legal information materials and the recruitment or training of bilingual legal aid providers would help address linguistic barriers. Second, community-based paralegals or legal aid collaborators could be deployed to remote areas, modelled on ASEAN paralegal practices, to disseminate legal information, offer basic advice, and refer cases to formal services. Third, mobile legal aid clinics, already trialled in some provinces, could be expanded to provide periodic in-person services to geographically isolated populations. Digital platforms, where feasible, could complement these interventions, although digital solutions must be sensitive to disparities in internet access.

In addition, institutional reform and resource allocation are fundamental to ensuring that legal aid commitments can be implemented effectively. The UNODC Model Law emphasises the importance of sustainable financing and independent oversight to safeguard service quality.⁸⁴ While centralised state funding has provided a degree of administrative cohesion, it has also limited flexibility and contributed to uneven regional capacity. Vietnam may consider adopting a hybrid funding model that combines government budget allocations with partnerships, grants, and donor-supported initiatives to enhance flexibility and innovation. Independent monitoring bodies or advisory committees could also be established to evaluate performance, handle complaints, and ensure accountability. Strengthening data collection mechanisms would further support evidence-based policy development, enabling authorities to assess service gaps, identify good practices, and tailor reforms to specific regional needs. Finally, legal and policy reform must be accompanied by broader socio-cultural change. Legal aid cannot function effectively in a context where social stigma deters survivors from reporting violence or where patriarchal norms discourage women from seeking justice. Public education campaigns, com-

⁸¹ ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR). *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.

⁸² ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR). *Thematic study on legal aid*. 2019. Available at: <https://aichr.org/wp-content/uploads/2019/09/AICHR-Thematic-Study-on-Legal-Aid-for-web.pdf>. Access in: Feb. 2, 2025.

⁸³ LE, Thi Minh; MORLEY, Christine; HILL, Peter S.; TU BUI, Quyen; DUNNE, Michael P. The evolution of domestic violence prevention and control in Vietnam from 2003 to 2018: a case study of policy development and implementation within the health system. *International Journal of Mental Health Systems*, v. 13, n. 1, p. 1-16,

2019. DOI 10.1186/s13033-019-0295-6; YOUNT, Kathryn M.; ANDERSON, Katherine M.; TRANG, Quach Thu; BERGENFELD, Irina. Preventing sexual violence in Vietnam: qualitative findings from high school, university, and civil society key informants across regions. *BMC Public Health*, v. 23, n. 1, p. 1-17, 2023. DOI 10.1186/s12889-023-15973-5.

⁸⁴ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). *UNODC model law on legal aid in criminal justice systems with commentaries*. 2017. Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf. Access in: Feb. 2, 2025.

munity dialogues, and school-based programmes that challenge harmful gender norms would complement legal reforms by fostering a more enabling environment for survivors. Collaboration with media organisations could further raise awareness about the rights of domestic violence victims and the availability of legal aid services, contributing to shifts in social attitudes over time. Overall, these implications point to a comprehensive reform agenda that spans legislative, institutional, professional, and socio-cultural domains. Although Vietnam has laid an important foundation, its legal aid system must evolve beyond formal entitlement towards a model that fully reflects survivor-centred, rights-based, and context-sensitive principles. Advancing this agenda will require sustained political commitment, coordinated multi-sectoral effort, investment in human and institutional capacity, and a willingness to adopt and adapt lessons from international best practices. If these conditions are met, Vietnam would be well positioned to strengthen the accessibility, quality, and effectiveness of legal aid for domestic violence survivors, contributing to broader goals of gender equality, social justice, and human rights.

4 Conclusion

This study set out to examine the extent to which Vietnam's legal aid framework for domestic violence survivors aligns with internationally recognised standards, and to consider what insights may be drawn from comparative legal analysis to inform future reforms. Through an assessment of Vietnam's legislative provisions alongside the Istanbul Convention, the UNODC Model Law and associated guidelines, and the AICHR Thematic Study, several critical themes and reform imperatives have emerged. Together, they underscore both the progress Vietnam has made in establishing a foundation for access to justice and the substantive work still required to ensure that legal aid becomes meaningfully accessible, survivor-centred, and fully responsive to the complexities of domestic violence. Vietnam's reforms over the past two decades demonstrate a clear normative commitment to strengthening legal aid provision. The *Law on Legal Aid* (2017) and the revised *Law on Prevention and Combat against Domestic Violence* (2022) constitute important milestones that situate legal aid as a state responsibility and formally recognise domestic

violence victims among priority beneficiaries. These developments align with global norms affirming legal aid as a fundamental component of access to justice and a critical safeguard for marginalised populations. Moreover, the decentralised structure of Legal Aid Centres has contributed to geographic outreach and laid groundwork for localised service models. Nevertheless, the comparative analysis has revealed persistent implementation gaps that limit the realisation of legal entitlements in practice. Across the three international instruments reviewed, there is a strong consensus on the core principles that should guide legal aid systems serving domestic violence survivors. These include accessibility, quality assurance, gender-sensitivity, independence, and integrated service delivery. Vietnam shares several of these commitments at a conceptual level, yet divergence becomes evident when examining depth of implementation, system design, and service delivery standards. The Istanbul Convention's robust feminist and rights-based framing contrasts with Vietnam's more neutral, family-centred approach, which does not fully acknowledge domestic violence as a manifestation of gendered power relations. This conceptual departure has practical consequences: whereas the Convention mandates survivor-centred, specialised legal services, Vietnam's framework remains mostly procedural, emphasising legal representation without ensuring trauma-informed, holistic, or culturally adapted support.

Furthermore, although Vietnam's decentralised system provides structural reach, variation in resourcing, professional capacity, and institutional capability across provinces continues to result in uneven access to legal aid. The UNODC Model Law's emphasis on sustainable funding, independent oversight, and provider accreditation offers relevant guidance for addressing these disparities. Similarly, the AICHR Thematic Study provides regionally grounded insights on obstacles that resonate with Vietnam's socio-legal landscape, particularly regarding language barriers, patriarchal norms, low legal literacy, and limited trust in formal justice institutions. Consequently, the comparative review indicates that Vietnam would benefit from adopting a more integrated, multi-agency model that situates legal aid within a wider ecosystem of protective and support services, coupled with capacity-building initiatives targeting both state and non-state providers. The implications outlined in this article suggest a forward-looking reform trajectory centred on operationalising a survivor-centred

model of legal aid. Several key areas merit prioritisation. First, adopting a rights-based conceptualisation of domestic violence – one that explicitly acknowledges structural gender inequality – would bring Vietnam into closer alignment with global normative standards. This shift would also support the development of legal and policy interventions that move beyond procedural access to justice and towards substantive empowerment and long-term safety for survivors. Second, formalising mandatory specialist training and accreditation for legal aid providers would help institutionalise quality standards, reduce secondary victimisation, and strengthen survivor trust in legal institutions. Third, enhancing cross-sectoral coordination through formalised referral pathways, multi-disciplinary teams, and partnerships with civil society organisations would contribute to a more holistic and seamless support experience for survivors.

Moreover, targeted outreach strategies are essential to addressing disparities in access among rural, ethnic minority, and migrant populations. Context-specific approaches – such as community-based legal empowerment, paralegal models, multilingual information campaigns, and mobile legal aid services – would increase reach and relevance. At the systems level, resource allocation, data-driven monitoring, and independent oversight mechanisms should be strengthened to ensure consistent service delivery nationwide and to support evidence-informed policymaking. These reforms, while ambitious, align with emerging global understandings that meaningful access to justice demands more than legal provisions; it requires sustained investment, institutional learning, and a cultural shift towards survivor agency and dignity. In synthesising the comparative findings, this article contributes to scholarly and policy debates on legal aid and gender-responsive justice. It highlights the value of comparative legal inquiry as a tool for diagnosing system gaps, identifying transferable practices, and fostering reflection on how international standards can be adapted to domestic contexts without neglecting cultural specificity. The analysis also reinforces the central point that legal aid is not merely a technical service, but rather a cornerstone of gender equality and human rights. When implemented effectively, legal aid can empower survivors to challenge violence, secure protection, and envision futures free from coercion and trauma. Ultimately, the path ahead for Vietnam involves consolidating legislative progress into sustained

structural transformation. This transformation must be anchored in a survivor-centred ethos, supported by institutional capacity, and embedded within a collaborative ecosystem that recognises the diverse needs of domestic violence survivors. Continued engagement with international frameworks, coupled with context-sensitive reform, will be essential to advancing a more inclusive, equitable, and effective legal aid system. By pursuing this trajectory, Vietnam has the potential not only to strengthen domestic protection mechanisms but also to contribute meaningfully to regional and global conversations on promoting access to justice and eliminating gender-based violence.

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**V. TENSÕES DE RESPONSABILIDADE
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Individual legal responsibility for unlawful orders within police institutions in Indonesia and its relevance to international human rights norms*

Responsabilidade jurídica individual por ordens ilícitas no âmbito das instituições policiais na Indonésia e sua relevância para as normas internacionais de direitos humanos

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Abstract

Police institutions depend on hierarchical command to maintain operational discipline, yet formally valid orders may still be unlawful or incompatible with international human rights standards, placing officers between structural obedience and personal legal responsibility. This article examines whether Indonesia's existing legal framework provides a sufficiently clear and legally secure basis for refusing unlawful orders within hierarchical police institutions. Using a normative-comparative approach, the article analyses Indonesian statutory law, police ethics regulations, and relevant international human rights norms, and compares them with selected regulatory approaches drawn from Continental European, Nordic, German, and Anglo-Saxon models. The study finds that Indonesia suffers from an asymmetric legal design: the law affirms command authority more clearly than it regulates objection, legality review, protection against retaliation, and the allocation of individual responsibility when unlawful orders are issued. Although Police Regulation No. 7 of 2022 recognises refusal and protection at the ethical level, it does not yet provide the statutory certainty, review architecture, and enforceable safeguards required for a coercive state institution operating under international human rights standards. This article argues that Indonesia should adopt a hybrid legality-compliance model in which refusal of unlawful orders is treated not as a disciplinary anomaly, but as an institutional safeguard. Such a model requires four cumulative guarantees: clear objection procedures, legality-review mechanisms not wholly controlled by the immediate chain of command, credible anti-retaliation protection, and a precise allocation of responsibility between the issuer and the subordinate. In this way, the article contributes a normative framework for reconciling command discipline with legality, accountability, and human rights protection in Indonesian policing.

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Keyword: human rights; hierarchical command; Indonesian police institutions; individual legal responsibility; unlawful orders.

Resumo

As instituições policiais dependem de uma cadeia hierárquica de comando para assegurar a disciplina operacional; todavia, ordens formalmente válidas podem revelar-se ilícitas ou incompatíveis com os padrões internacionais de direitos humanos, colocando os agentes entre a obediência estrutural e a responsabilidade jurídica individual. O presente artigo examina se o ordenamento jurídico vigente na Indonésia oferece uma base suficientemente clara e juridicamente segura para a recusa de ordens ilícitas no âmbito de instituições policiais hierarquizadas. Adotando uma abordagem normativo-comparativa, o estudo analisa a legislação estatutária indonésia, os regulamentos de ética policial e as normas internacionais pertinentes de direitos humanos, estabelecendo, ademais, uma comparação com modelos regulatórios selecionados oriundos das tradições europeia continental, nórdica, alemã e anglo-saxônica. Os resultados evidenciam que a Indonésia apresenta um desenho jurídico assimétrico: a legislação afirma com maior clareza a autoridade de comando do que disciplina os mecanismos de objeção, o controle de legalidade, a proteção contra retaliações e a imputação de responsabilidade individual nos casos de emissão de ordens ilícitas. Embora o Regulamento Policial n.º 7 de 2022 reconheça, no plano ético, o direito de recusa e a proteção correspondente, ainda não confere a segurança jurídica, a arquitetura institucional de controle e as garantias executáveis exigidas para uma instituição estatal dotada de poder coercitivo e submetida a padrões internacionais de direitos humanos. O artigo sustenta que a Indonésia deve adotar um modelo híbrido de legalidade–conformidade, no qual a recusa de ordens ilícitas não seja tratada como uma anomalia disciplinar, mas como uma salvaguarda institucional. Tal modelo pressupõe quatro garantias cumulativas: procedimentos claros de objeção, mecanismos de controle de legalidade não integralmente subordinados à cadeia hierárquica imediata, proteção efetiva contra retaliações e uma delimitação precisa da responsabilidade entre o emissor da ordem e o subordinado. Nesses termos, o artigo contribui com um quadro normativo destinado a conciliar disciplina de comando

com legalidade, responsabilização e proteção dos direitos humanos no contexto da atuação policial na Indonésia.

Palavras-chave: direitos humanos; comando hierárquico; instituições policiais indonésias; responsabilidade jurídica individual; ordens ilícitas.

1 Introduction

Command structures within police institutions place obedience to superiors at the centre of professional conduct. In practice, however, such obedience does not always align with the principles of legality and justice. A number of cases demonstrate that orders which appear administratively valid may in fact contain elements that violate the law or human rights. This situation generates ethical and legal dilemmas for officers on the ground, particularly in jurisdictions whose legal systems do not provide adequate protection for objections to orders.¹ Reports by the United Nations Human Rights Council indicate that, across jurisdictions, police officers are often placed in a dilemma when superior orders carry the potential for legal violations or conflict with moral and humanitarian obligations. Such tensions are increasingly apparent in countries that face difficulties in integrating the principle of individual accountability into legal systems that remain predominantly hierarchical.

In Indonesia, the hierarchical structure of policing has not been accompanied by legal mechanisms enabling officers to refuse unlawful orders without the risk of sanctions. This lack of clarity makes it difficult for officers to distinguish between structural obedience and personal legal responsibility. Human Rights Watch has observed that, in several law enforcement operations in Indonesia, serious violations of civil and political rights have involved officers who claimed they were merely following orders, in the absence of any mechanism allowing lawful refusal.² The imbalance between structural obedience and the protection of individual responsibility in Indonesia's positive law creates serious

¹ UNITED NATIONS HUMAN RIGHTS COUNCIL. *Draft Resolution A/HRC/56/L.19/Rev.1*. Geneva: United Nations, 2024. Available at: <https://docs.un.org/en/A/HRC/56/L.19/Rev.1>. Accessed on: 27 February 2026.

² INDONESIA: events of 2020. *Human Rights Watch*, New York, 2021. Available at: <https://www.hrw.org/world-report/2021/country-chapters/indonesia>. Accessed on: 27 February 2026.

obstacles to meeting accountability standards consistent with international norms.

This article also engages with prior discussions published in this journal on the relationship between international human rights norms and domestic institutions. Previous studies have examined how international human rights standards are internalised, resisted, or selectively received within national legal systems, particularly through the responses of domestic state institutions to supranational human rights frameworks.³ Building on that line of inquiry, the present article shifts the focus from the macro-level reception of international human rights norms to the internal operation of legality and accountability within police command structures. Its contribution lies in showing that the problem of compliance with international human rights norms does not arise only in courts or in state-to-system relations, but also within hierarchical law-enforcement institutions when officers are confronted with unlawful orders.⁴ By taking Indonesia as the central case study, this article adds a more specific normative and institutional dimension to the existing debate, namely the legal position of police officers who refuse unlawful orders and the regulatory design required to protect such refusal within a rule-of-law framework.

To address the complexity of the relationship between command structures and individual legal obligations, it is necessary to define the operational concepts that underpin the analysis. In this article, an unlawful order refers to an instruction or mandate from a superior that substantively contradicts positive law or universally recognised human rights principles, including orders that encourage disproportionate force, torture, or arbitrary treatment of civilians. International legal doctrine consistently rejects the validity of defences based on “superior orders” for serious unlawful conduct, as reflected in Article 33 of the Rome Statute of the International Criminal Court, which states that superior orders

do not absolve perpetrators of criminal responsibility for grave crimes such as crimes against humanity.⁵

The principle of individual legal responsibility has become a cornerstone of modern international criminal law, particularly following the jurisprudence of ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which affirmed that individuals are subjects of law and cannot escape liability for grave violations merely by invoking obedience to superior orders.⁶ In this context, international human rights law provides the normative framework that limits the coercive authority of the state and its agents. The right to life, the right to humane treatment, and protection against torture, as guaranteed by Articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR), serve as key benchmarks for assessing the legality of orders given to law enforcement officials.⁷ Accordingly, when officers receive orders that may infringe these rights, questions regarding the limits of responsibility and any duty to refuse become legal issues requiring normative clarity.

This study employs a normative comparative approach to examine how legal systems structure the relationship between hierarchical obedience and individual legal responsibility when police officers are confronted with unlawful orders. The normative dimension focuses on the analysis of legal sources relevant to Indonesia, including statutory law, police ethics regulations, and international human rights norms that limit the exercise of coercive state authority. The comparative dimension is used not to compare legal systems in general, but to identify regulatory designs in selected jurisdictions that have developed operational mechanisms for refusing unlawful orders without dismantling institutional discipline.

This study adopts a normative–comparative approach. The normative aspect focuses on Indonesian legal materials, including statutory law, police ethics rules,

³ SOUZA, Ismael Francisco; LEME, Luciana Rocha; SCHERF, Erick da Luz. Creating bridges between international relations theory and international human rights law: constructivism and the role of Brazil in the inter-American system of human rights. *Revista de Direito Internacional*, Brasília, v. 15, n. 3, p. 179–198, 2019. DOI: 10.5102/rdi.v15i3.5653. Available at: <https://www.publicacoes.uni-ceub.br/rdi/article/view/5653>. Accessed on: 27 February 2026.

⁴ NEAR, Janet P.; MICELI, Marcia P. Effective whistle-blowing. *The Academy of Management Review*, [S. l.], v. 20, n. 3, p. 679–708, 1995. DOI: 10.2307/258791. Available at: <https://www.jstor.org/stable/258791?origin=crossref>. Accessed on: 27 February 2026.

⁵ EUROPEAN UNION. International Criminal Court. *Rome Statute of the International Criminal Court*. Rome, 17 July 1998. Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>. Accessed on: 27 February 2026.

⁶ CASSESE, Antonio. *The Human Dimension of International Law: selected papers of Antonio Cassese*. Oxford: Oxford University Press, 2008, p. 476–498.

⁷ UNITED NATIONS. *International Covenant on Civil and Political Rights*. New York, 16 December 1966. Available at: <https://www.ohchr.org/sites/default/files/ccpr.pdf>. Accessed on: 27 February 2026.

and relevant international human rights norms. The comparative aspect does not undertake a detailed country-by-country comparison. Instead, it compares several regulatory models used in the discussion, namely the Continental European model, the Nordic or Scandinavian model, the German model, and the Anglo-Saxon model, with Canada and Australia as examples in the latter category.⁸

The comparison is organised around four specific indicators. **First**, the study examines whether the legal framework provides clear procedures for objection or refusal when an order is considered unlawful. **Second**, it assesses whether there is an identifiable forum or mechanism for reviewing the legality of the order, whether internal, semi-independent, or external to the immediate chain of command. **Third**, it considers the existence and strength of protection against retaliation, including confidentiality, administrative safeguards, and whistleblower protection. **Fourth**, it analyses how each model positions individual legal responsibility within the chain of command, especially in situations where compliance with orders may expose officers to personal liability under domestic law or international human rights norms.

This methodological design allows the article to move beyond a merely descriptive statement that unlawful orders should not be followed. Instead, it evaluates which legal and institutional features make refusal practically possible and normatively legitimate. In that sense, the normative-comparative approach is used to clarify Indonesia's regulatory gap and to formulate a legal-institutional framework through which police discipline can remain compatible with legality, accountability, and international human rights protection.⁹

The comparison is directed at a limited number of issues that are central to this article: whether there are clear procedures for refusing unlawful orders, whether there are mechanisms for reviewing the legality of orders, whether protection against retaliation is available, and how individual legal responsibility is positioned wi-

thin the chain of command.¹⁰ Through this approach, the article seeks to identify Indonesia's regulatory gap and to assess which comparative elements may be relevant for strengthening legal protection for police officers who refuse unlawful orders.¹¹

Placing individual responsibility within the framework of international human rights law opens space for developing norms that protect refusal of unlawful orders. By bringing national law closer to international standards, command structures can be directed to support legality and accountability.

2 The normative framework of individual responsibility in human rights law and international criminal law

In modern international law, superior orders are no longer understood as a basis that automatically removes personal responsibility. The starting point is the recognition that international law may impose duties directly upon individuals, not only upon States. In this framework, Nürnberg Principle IV states that the fact that a person acted pursuant to the order of a Government or a superior does not relieve that person from responsibility under international law, provided that:¹² "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

This formulation makes clear that obedience within a hierarchical structure remains subject to legal limits. Compliance, therefore, cannot be treated as an absolute defence for conduct that is manifestly contrary to international norms.

¹⁰ ADJEI, William Eduard. The development of individual criminal responsibility under international law: lessons from Nuremberg and Tokyo war crimes trials. *Journal of Legal Studies "Vasile Goldis"*, Arad, v. 25, n. 39, p. 69-97, 2020.

¹¹ VANDEKERCKHOVE, Wim; LEWIS, David. The content of whistleblowing procedures: a critical review of recent official guidelines. *Journal of Business Ethics*, Netherlands, v. 108, n. 2, p. 253-264, 2012. DOI: 10.1007/s10551-011-1089-1. Available at: <https://link.springer.com/article/10.1007/s43576-022-00077-8>. Accessed on: 27 February 2026.

¹² INTERNATIONAL LAW COMMISSION. *Text of the Nürnberg Principles Adopted by the International Law Commission*. 1950, Principle IV. See also Principle I.

⁸ PANDOLFO, Alyssa M.; READER, Tom W.; GILLESPIE, Alex. Safety listening in organizations: an integrated conceptual review. *Organizational Psychology Review*, [S. l.], v. 15, n. 1, p. 93-124, 2025. DOI: 10.1177/20413866241245276. Available at: <https://journals.sagepub.com/doi/10.1177/20413866241245276>. Accessed on: 27 February 2026.

⁹ KINNES, Irvin. Kutnjak Ivković *et al.* Police integrity in South Africa. *International Criminology*, [S. l.] v. 3, n. 1, p. 95, 2023. DOI: <https://doi.org/10.1007/s43576-022-00077-8>.

A more operational limitation appears in Article 33 of the Rome Statute. This provision makes clear that acting pursuant to an order of a Government or a superior, whether military or civilian, does not in itself exclude criminal responsibility. Such an order may only be considered if three cumulative conditions are met: the person was under a legal obligation to obey; the person did not know that the order was unlawful; and the order was not manifestly unlawful.¹³:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - a) The person was under a legal obligation to obey orders of the Government or the superior in question;
 - b) The person did not know that the order was unlawful; and
 - c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

The Rome Statute further provides that orders to commit genocide or crimes against humanity are always manifestly unlawful. In normative terms, this means that command structures are not zones of immunity, but remain subject to legality review. In the policing context, the implication is direct: operational discipline cannot justify compliance with orders whose unlawfulness is already evident from their substance.

The first substantive limit to obedience in this context appears in Article 6(1) of the ICCPR. That provision declares that “*every human being has the inherent right to life and that no one shall be arbitrarily deprived of life*”¹⁴ For police institutions, this norm is especially important because unlawful orders often arise in connection with the use of force, including potentially lethal force. An order that directs unnecessary shooting, excessive violence, or coercive action that arbitrarily endangers life cannot be reduced to an ordinary operational instruction. From the outset, such an order engages the right to life and therefore falls within the sphere of legal scrutiny rather than unquestioned obedience. The broader structure of Article 6 also shows that the Covenant treats the protec-

tion of life as a matter that must be secured by law and not left to discretionary coercion alone.

A second substantive limit is established by Article 7 of the ICCPR, which provides that:¹⁵ “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

This prohibition is absolute. In the policing context, it directly concerns orders involving beatings, coercive interrogation, humiliation, physical or psychological abuse, or other forms of inhuman treatment. Orders of this kind cannot be treated merely as matters of internal discipline. By their very nature, they already lie outside the sphere of lawful obedience and enter the category of instructions that must be legally recognisable as objectionable and, where necessary, refuseable.

Read together, Nürnberg Principle IV, Article 33 of the Rome Statute, Article 6(1) of the ICCPR, and Article 7 of the ICCPR do more than reject blind obedience in abstract terms. They establish a layered legal logic for determining the limits of obedience within hierarchical institutions. Nürnberg Principle IV denies that acting under superior orders automatically removes responsibility where a moral choice was in fact possible, while Article 33 of the Rome Statute converts that idea into a narrower doctrinal rule: superior orders may only be considered within tightly confined conditions and never where unlawfulness is manifest.

Articles 6(1) and 7 of the ICCPR then supply the substantive threshold for identifying that unlawfulness in policing practice. Once an order moves into the sphere of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment, obedience can no longer be treated as presumptively lawful. At that point, the legal problem shifts from institutional discipline to the legality of the order itself. In other words, these norms collectively show that international law does not merely discourage blind obedience; it reallocates the legal burden of command by requiring that hierarchical compliance stop where manifest unlawfulness begins. In the policing context, this means that the chain of command remains legally relevant, but only up to the point at which obedience would expose the subordinate

¹³ INTERNATIONAL CRIMINAL COURT. *Rome Statute of the International Criminal Court*, art. 33.

¹⁴ UNITED NATIONS. International Covenant on Civil and Political Rights, art. 6(1). See also arts. 6(2)–(6)

¹⁵ UNITED NATIONS. International Covenant on Civil and Political Rights, art. 7.

to personal responsibility for executing an order that is incompatible with fundamental human rights.

3 Indonesia's national legal construction on official orders and police accountability

The national legal construction of policing in Indonesia is anchored in **Law No. 2 of 2002 on the Indonesian National Police**, which, at the statutory level, clearly affirms the existence of a hierarchical structure within the police institution. Nevertheless, the central issue examined in this article is not hierarchy itself. The more fundamental problem lies in the fact that positive law affirms command authority more clearly than it regulates the legal consequences arising when an officer is confronted with an **unlawful order**.¹⁶ Accordingly, the Indonesian legal framework should not be understood merely as a space of ethical dilemma for officers in the field, but rather as a matter of **legal design**: the system is sufficiently developed to preserve obedience, yet insufficiently developed to manage the collision between obedience and legality.

This design problem becomes visible when **Article 19(1)** and **Article 25(1)** of the Police Law are read together. **Article 19(1)** provides:¹⁷ “In carrying out their duties and authorities, officials of the Indonesian National Police shall always act on the basis of legal norms and shall observe religious norms, propriety, decency, morality, and uphold human rights.”

Meanwhile, **Article 25(1)** provides:¹⁸ “Each member of the Indonesian National Police shall be assigned a rank that reflects role, function, and capability, and that rank shall serve as the legal basis of authority and responsibility in the performance of duties.”

These two provisions are not, in principle, contradictory. Article 25(1) institutionalises **command authority** through rank as the basis of valid authority, whereas Article 19(1) limits the exercise of that authority by **legal norms, social morality, and human**

rights. However, precisely because the two provisions move in different normative directions, a problem arises when an order that is formally valid within the chain of command turns out to be substantively problematic. At this point, the statute does not yet provide an adequate bridge: it does not explain when an order must be regarded as legally challengeable, how a subordinate may safely raise an objection, who is competent to assess the legality of the order, and how protection is to be granted when refusal of the order triggers institutional retaliation.

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An important development has, however, emerged within the internal ethics regime of the Indonesian National Police. **Police Regulation No. 7 of 2022** no longer treats obedience as an unlimited obligation. **Article 6(2)** explicitly states that:

Every Police Official in the position of a Subordinate shall be obliged to:

- a) carry out the superior's order related to the performance of duties, functions, and authorities, and report to the superior;
- b) refuse a superior's order that is contrary to legal norms, religious norms, and norms of decency; and
- c) report to the superior who issued the order regarding such refusal in order to obtain legal protection from that superior.

This provision is normatively significant because it demonstrates that, within the internal ethical regulation itself, the police institution has acknowledged that there are situations in which a subordinate **is not only permitted, but required, to refuse** a superior's order. In other words, the ethics regime has already begun to

¹⁶ INDONESIA. *Law n^o. 2 of 2002*. Concerning the Indonesian National Police.

¹⁷ INDONESIA. *Law N^o. 2 of 2002*. Concerning the Indonesian National Police, art. 19(1).

¹⁸ INDONESIA. *Law n^o. 2 of 2002*. Concerning the Indonesian National Police, art. 25(1)

move away from the logic of absolute obedience. Yet that recognition does not stand alone. **Article 6(3)**¹⁹ of the same regulation adds: “*The superior issuing the order, as referred to in paragraph (2)(c), shall be obliged to provide protection.*”

In addition, **Article 11(1)(a)** establishes a prohibition at the level of the superior, namely: “Every Police Official in the position of a Superior is prohibited from: a. issuing an order that is contrary to legal norms, religious norms, and norms of decency.”

When read systematically, Police Regulation No. 7 of 2022 actually establishes three layers of internal norms at once: first, subordinates remain obliged to carry out orders related to duties, functions, and authorities; second, subordinates are obliged to refuse orders that are contrary to legal norms, religious norms, and norms of decency; third, superiors who issue orders are under an obligation to provide protection, while at the same time being prohibited from issuing orders contrary to those norms. Normatively, this constitutes an important development because it shows that the internal law of the police no longer entirely equates refusal of orders with disciplinary misconduct. On the contrary, legality is beginning to be positioned as part of the institution’s internal professional standards.²⁰

Even so, the force of this regulatory development remains limited. The principal problem lies in the fact that protection for subordinates who refuse unlawful orders is still placed primarily within an **internal ethics regime**, rather than within **positive law at the statutory level** that would regulate in detail rights, procedures, objection forums, protective measures, and remedial mechanisms. This distinction is crucial. Ethical rules may establish standards of conduct, but they do not necessarily provide the same degree of legal certainty as statutes in matters of formal procedure, administrative remedies, guarantees against retaliation, and the possibility of review by a relatively independent forum. In other words, Police Regulation No. 7 of 2022 has improved the normative language of refusal, but it has

not yet fully transformed refusal into a **procedurally secure legal act**.

This weakness becomes even more evident at the operational level. Although the ethics regulation requires refusal and reporting, the Indonesian legal system still lacks a sufficiently detailed procedural architecture concerning how such refusal must be recorded, how quickly the legality of the order must be reviewed, whether that review must involve an authority relatively independent from the chain of command, what interim protection applies to the subordinate who refuses, and what remedies are available if that subordinate suffers career pressure, exclusion, or other forms of retaliation. As a consequence, the protection promised at the ethical level risks remaining dependent on internal discretion and power relations within the very institution that may have generated the problematic order in the first place.

What remains incomplete, therefore, is not merely the normative recognition that subordinates may or must refuse unlawful orders, but the procedural and protective bridge that would convert that recognition into a legally secure institutional pathway. In comparative perspective, systems that manage the tension between command and legality more effectively do not stop at declaring that unlawful orders must not be executed. They accompany that declaration with documented objection procedures, legality-review forums not wholly monopolised by the immediate chain of command, and anti-retaliation guarantees that prevent refusal from becoming a career-ending act. Indonesia has only partially moved in that direction.

Article 19 of the policing statute and the ethics regime under Police Regulation No. 7 of 2022 already point toward legality-oriented policing, but they do not yet construct a fully reviewable mechanism that answers, in operational terms, when an order crosses the threshold of unlawfulness, how the objection must be recorded, who is competent to assess legality, and what interim protection applies once refusal has been made. As long as this bridge remains incomplete, legal uncertainty will continue to be displaced downward to the executing officer, while the accountability system remains more effective at preserving hierarchy than at correcting unlawful command. In practical terms, the result is a structural asymmetry: the law is clearer in validating authority than in protecting lawful dissent, so that the subordinate

¹⁹ INDONESIA. Regulation of the Indonesian National Police n°. 7 of 2022 concerning the Code of Ethics of the Police Profession and the Police Ethics Commission, art. 6(2)–(3).

²⁰ WESTMARLAND, Louise. Police ethics and integrity: breaking the blue code of silence. *Policing and Society*, [S. l.], v. 15, n. 2, p. 145–165, 2005. DOI: 10.1080/10439460500071721. Available at: <https://www.tandfonline.com/doi/abs/10.1080/10439460500071721>. Accessed on: 27 February 2026.

bears the immediate risk of sanction for disobedience while the superior's problematic instruction is less readily exposed to relatively independent scrutiny. For that reason, refusal of unlawful orders in Indonesia should not be framed as a marginal exception to discipline, but as a core element of institutional accountability requiring statutory clarification, procedural formalisation, and credible protection against retaliation.

4 Comparative models accommodating refusal of unlawful orders in police systems

In the context of hierarchical police institutions, the issue of unlawful orders cannot be understood merely as an abstract conflict between the duty to obey superiors and the duty to comply with the law. The more fundamental issue lies in how a legal system transforms the principle that “unlawful orders must not be executed” into a mechanism that can actually operate within institutional practice. In other words, the central problem is not simply whether a system recognizes the prohibition of unlawful orders, but whether it provides procedures that enable police officers to refuse, review, document, and report such orders without immediately being treated as disciplinary offenders. In institutions built upon a chain of command, the absence of such procedural design renders normative prohibition practically ineffective, so that law ultimately yields to the logic of organizational obedience.

On that basis, comparative law is used in this article not to construct a formal typology of legal systems, but as an analytical tool for identifying which regulatory designs make refusal of unlawful orders practically workable within police institutions. This approach is important because systems that equally recognize the supremacy of law may differ significantly in the way they regulate the relationship between legality, discipline, and individual responsibility. Some systems emphasize documented objection procedures; others stress the traceability of public-official responsibility; while others build protection through constitutional legitimacy or relatively independent reporting channels. Accordingly, the comparison in this section is directed at four elements most relevant to the Indonesian context: the existence of objection procedures, the availability of

legality-review mechanisms, the presence of protection against retaliation, and the way individual legal responsibility is positioned within the chain of command.²¹ These four elements are selected because it is precisely at these points that Indonesia's normative gap becomes most visible: the command structure is affirmed, yet safe refusal procedures, legality-review channels, and legal protection for officers who refuse unlawful orders remain inadequately regulated.²²

The first point of reference is the Continental European procedural approach. The importance of this approach lies in its effort to move the issue of legality from the sphere of individual morality into the domain of institutional procedure. Its clearest normative expression appears in the *European Code of Police Ethics*, which requires police personnel to verify the legality of their actions, to refuse orders that are manifestly unlawful, and to report such orders without fear of sanction.²³ In this approach, refusal is not understood as an act of spontaneous insubordination, but as part of an administrative process that can be documented and verified. Its significance for Indonesia lies in the lesson that legality is better protected when objections to orders are not left to oral or informal exchanges, but are channelled through documented administrative procedures. In this way, refusal acquires an institutional form that distinguishes it from mere insubordination.

The second point of reference can be found in Nordic or Scandinavian administrative traditions, which place transparency, bureaucratic professionalism, and public accountability at the core of public administration. The comparative value of this approach does not primarily lie in the existence of a single statutory rule on refusal of unlawful orders, but in a broader adminis-

²¹ ZAKARIA, Norlida Zakirai *et al.* Integrity and policing: an analysis of individual traits and organizational characteristics. *International Journal of Academic Research in Business and Social Sciences*, [S. l.], v. 13, n. 3, p. 630-635, 2023. DOI: 10.6007/IJARBS/v13-i3/15243. Available at: <https://hrmars.com/IJARBS/article/view/15243/Integrity-and-Policing-An-Analysis-of-Individual-Traits-and-Organizational-Characteristics>. Accessed on: 27 February 2026.

²² RUDDELL, Rick; TROTT, Kelsey. Perceptions of trust in the police: a cross-national comparison. *International Journal of Comparative and Applied Criminal Justice*, [S. l.], v. 47, n. 4, p. 381-396, 2023. DOI: 10.1080/01924036.2022.2071308. Available at: <https://www.tandfonline.com/doi/full/10.1080/01924036.2022.2071308>. Accessed on: 27 February 2026.

²³ EUROPEAN UNION. Council of Europe. *The European Code of Police Ethics: recommendation rec(2001)10 and explanatory memorandum*. Strasbourg: Council of Europe Publishing, 2002, p. 17-18.

trative logic that requires the actions of public officials to be traceable, accountable, and connected to official responsibility. Comparative scholarship on Denmark, Finland, and Sweden shows that the responsibility of public officials is embedded in developed accountability structures, rather than left to informal discretion or personal loyalty alone.²⁴ In relation to Indonesia, this approach underscores that protection for officers who refuse unlawful orders cannot be built solely upon the ethical expectation that officers should “do the right thing.” What is required are procedures that transform refusal into a traceable administrative act, so that individual legal responsibility does not stand alone, but is supported by clear institutional mechanisms.

The third point of reference is the German approach, which places greater weight on the higher normative status of legality in the exercise of public authority. In this model, the issue of refusing unlawful orders is not linked merely to professional integrity, but also to the constitutional subjection of executive power to law and justice. The *Basic Law for the Federal Republic of Germany* places public authority within a constitutional framework that limits state action, while its civil service tradition also recognizes the right and duty to remonstrate against unlawful instructions.²⁵ The main strength of this model lies in the fact that the legal basis of refusal does not stop at internal organizational rules, but is elevated to the level of higher-order norms. The lesson for Indonesia is particularly important: as long as protection for refusal depends mainly on internal ethical regulations, its legal position will remain fragile and easily reduced to a disciplinary matter. Therefore, if refusal of unlawful orders is to obtain genuine legitimacy, it must rest on a normative basis stronger than mere organizational preference.

The fourth point of reference is the Anglo-Saxon oversight approach, especially as reflected in public-

-interest disclosure regimes in Canada and Australia. In this model, the effectiveness of refusal depends not only on individual courage, but also on the existence of institutional channels that allow reporting outside the full control of the immediate superior. Its core features are protected reporting routes, confidentiality guarantees, and anti-retaliation protections, so that officers are not forced to choose between silence and open confrontation with the superior who issued the problematic order.²⁶ Here, the central concern is not only the right to refuse, but also the extent to which the system provides a safe “way out” when the source of the problem originates within the command environment itself. For Indonesia, the main lesson of this model is that legality review must not be monopolized by the same chain of command that may have produced the contested order. Without reporting and review channels that are at least relatively independent, refusal will remain a personal risk rather than a protected institutional mechanism.

Taken together, these four points of reference show that the effectiveness of refusing unlawful orders never depends on a single norm alone, but rather on a combination of legal and institutional design. The Continental European approach emphasizes the importance of documented objection procedures; the Nordic approach highlights the significance of traceable public-official accountability; the German approach strengthens the normative legitimacy of refusal through constitutional grounding; and the Anglo-Saxon approach foregrounds protected reporting and relatively independent oversight. For Indonesia, these approaches need not be understood as competing models or as frameworks to be adopted wholesale. Their comparative value lies precisely in the possibility of formulating a hybrid framework that combines clear objection procedures, legality-review channels not fully subordinated to internal hierarchy, anti-retaliation protection, and a stronger normative basis for individual legal responsibility. Through such a framework, obedience to command is no longer placed in rigid opposition to legality, but is regulated in such a way that both can be reconciled within the framework of the rule of law and the protection of human rights.

Comparative law in this context should not be used merely to classify legal traditions, but to identify whi-

²⁴ LÆGREID, Per. Nordic administrative traditions. In: NEDERGAARD, Peter; WIVEL, Anders (eds.). *The Routledge Handbook of Scandinavian Politics*. London: Routledge, 2017. p. 80–91; BØNSING, Sten; MÄNTYLÄ, Niina; WENANDER, Henrik. Status and criminal liability of civil servants in modern public administration: a comparative study of Denmark, Finland, and Sweden. *European Public Law*, Alphen aan den Rijn, v. 29, n. 1, p. 115–134, 2023.

²⁵ GERMANY. *Basic Law for the Federal Republic of Germany (Grundgesetz)*, arts. 1(1) and 20(3); TUORA-SCHWIERSKOTT, Ewa. The civil service corps in the Federal Republic of Germany and the right of remonstrance as the right to refuse to carry out an official order by a state official. *Discourse of Law and Administration*, [S. l.], v. 1, p. 145–154, 2024.

²⁶ CANADA. *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46; AUSTRALIA. *Public Interest Disclosure Act 2013* (Cth).

ch regulatory designs make refusal of unlawful orders operational within hierarchical police institutions. The relevant comparative question is therefore not simply whether unlawful orders are prohibited, but how legal systems translate that prohibition into institutional mechanisms that can function in practice without dissolving command discipline. For the purposes of this discussion, the comparison is organised around four indicators that are directly relevant to the Indonesian problem: the existence of objection or refusal procedures, the availability of legality-review mechanisms, protection against retaliation, and the position of individual legal responsibility within the chain of command. These indicators are important because they reveal whether a legal system merely declares that unlawful orders should not be followed, or whether it actually provides a safe and reviewable pathway for officers confronted with such orders.

The first indicator concerns whether the legal framework provides clear procedures for objection or refusal. This issue is fundamental because, in a hierarchical institution, refusal is unlikely to function as a legal safeguard if it remains dependent on oral disagreement or personal courage alone. In Continental European approaches, legality is proceduralised by requiring officers to assess the legality of orders and to refuse those that are manifestly unlawful, as reflected in the European Code of Police Ethics and related administrative practices.²⁷ The comparative strength of this approach lies in the creation of an “administrative trace”: refusal is not framed as spontaneous defiance, but as part of a documented legality process. Nordic administrative traditions reinforce this logic by placing public-official accountability and traceability at the centre of administrative conduct, so that objection is tied to documentation, transparency, and formal reporting rather than informal resistance.²⁸ The lesson for Indonesia is that recognition of refusal is not enough unless the law transforms it into a traceable procedural act capable of distinguishing lawful objection from mere insubordination.

The second indicator concerns the availability of a forum or mechanism for reviewing the legality of the

order. Refusal becomes legally meaningful only if the question of legality can be assessed by an institutional mechanism rather than left entirely to the subjective risk of the subordinate. In the German approach, the significance of legality review lies in the stronger normative position of higher-order legality, supported by constitutional commitments that limit public authority and reinforce the legitimacy of objection to unlawful instructions. By contrast, Anglo-Saxon approaches tend to place greater emphasis on protected reporting and review channels connected to oversight bodies, thereby reducing the monopoly of the immediate chain of command over the legality assessment.²⁹ The main comparative insight here is that legality review cannot remain wholly internal to the same hierarchy that produced the contested order. For Indonesia, this means that a refusal mechanism will remain fragile so long as legality is assessed only within the ordinary command relationship, without access to a relatively independent review pathway.

The third indicator concerns the existence and strength of protection against retaliation. This issue is decisive because the legal right or duty to refuse may remain purely symbolic if officers face administrative sanctions, exclusion, marginalisation, or career damage after raising an objection. Comparative models linked to whistleblower protection are particularly instructive in this respect. Anglo-Saxon oversight regimes, especially those associated with protected public-interest disclosure, show that reporting mechanisms become credible only where confidentiality, anti-retaliation guarantees, and remedial measures are institutionally available. Continental and German approaches also demonstrate, in different ways, that objection gains practical force only when the officer is not left personally exposed after invoking legality. The comparative implication for Indonesia is clear: refusal of unlawful orders cannot function as a realistic safeguard unless the legal framework provides protection that is credible in organisational terms, not merely declaratory in ethical language.

The fourth indicator concerns how each system positions individual legal responsibility within the chain of command. This is where the deeper legal significance of comparison becomes visible. The issue is not

²⁷ EUROPEAN UNION. Council of Europe. *The European Code of Police Ethics: recommendation rec(2001)10 and explanatory memorandum*. Strasbourg: Council of Europe Publishing, 2002.

²⁸ LÆGREID, Per. Nordic administrative traditions. In: NEDERGAARD, Peter; WIVEL, Anders (eds.). *The routledge handbook of Scandinavian politics*. London: Routledge, 2017. p. 80–9.

²⁹ CANADA. Public Servants Disclosure Protection Act, S.C. 2005, c. 46; AUSTRALIA. Public Interest Disclosure Act 2013 (Cth).

whether hierarchy continues to matter—it does—but whether hierarchy is treated as a structure of coordination or as a blanket basis for shifting responsibility downward. Nordic models are useful here because they strengthen the idea that public officials remain individually accountable as subjects of law even when acting within administrative institutions. German and Continental approaches similarly show that legality review and documented objection are not intended to weaken discipline, but to prevent hierarchy from becoming a shield for unlawfulness. The most important analytical gain for the Indonesian discussion is therefore this: comparative experience demonstrates that command structures and individual accountability are not mutually exclusive. They can coexist, provided the legal system clearly defines when obedience remains lawful and when continued compliance begins to expose the subordinate to personal legal responsibility.

Taken together, these comparisons show that no single model is sufficient on its own. The practical value of comparative law lies not in transplanting one legal tradition wholesale, but in identifying the minimum institutional elements that make refusal of unlawful orders effective. Continental European approaches contribute documented objection procedures; Nordic approaches reinforce traceable individual accountability; German law provides stronger normative legitimacy for objection; and Anglo-Saxon oversight models emphasise protected reporting and relatively independent review. For Indonesia, the most relevant lesson is therefore not the adoption of one complete foreign model, but the construction of a hybrid framework in which refusal of unlawful orders is treated as part of institutional accountability architecture rather than as a disciplinary anomaly. Such a framework would require, at a minimum, formal objection procedures, legality-review channels not wholly controlled by the immediate chain of command, and effective protection against retaliation.

6 A normative–institutional framework for Indonesia aligned with International Human Rights standards

Before coming to the formulation of a solution, it is necessary to first emphasize that the main problem

facing Indonesia is not the existence of the command structure itself. In police institutions, command is an element that cannot be functionally removed, as it relates to the coordination of actions, speed of response, distribution of tasks, and the integration of operations. Without a command structure, institutions that are given coercive authority by the state risk losing direction, consistency, and the ability to act effectively. Therefore, from an institutional point of view, command is not an anomaly, but a basic prerequisite for the functioning of the police organization. The problem arises not in the fact of the existence of command, but in the fact that command in a state of law never stands alone; It has always been limited by legality, human rights, and accountability.

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From the perspective of accountability theory, this shows that Indonesia's problem is actually a problem of **asymmetrical legal design**. On the one hand, the law has provided a fairly solid foundation for authority, hierarchy, and distribution of authority. On the other hand, the law has not built an equally powerful tool for assessing, postponing, or rejecting the exercise of authority when the substance of an order collides with the law. This asymmetry leads to the risk of practically moving to subordinates at the point of execution. The superior still enjoys the position as a legitimate source of command, while the subordinate bears two risks at once: if obedient, he or she has the potential to assume responsibility for the execution of the unlawful order; If he refuses, he could potentially be considered undisciplined, disloyal, or disrupt the chain of command. In

other words, without a clear design, the law does not actually resolve the clash between command and legality, but instead shifts the burden of its resolution to the individual level. This is why the issue of unlawful orders cannot be reduced to a matter of personal morality or ethical courage, because the root of the problem lies in a normative structure that has not provided a safe and reviewable institutional pathway.

The hybrid model offered in this article should not be understood as a mere set of reform elements that can be selected separately, but rather as a **legal architecture that works in layers and sequences**. In it, procedures, review, protection, and allocation of responsibilities are not stand-alone elements, but mutually supportive stages. The procedure provides an initial form for the objection; the review changed the objection from a mere one-sided claim to a matter of legality that could be assessed; safeguards ensure that the use of procedures and access to reviews do not turn into personal risk; Meanwhile, the allocation of responsibility determines the final legal consequences for the giver and the executor. If one of these elements is detached from the other, then the entire model becomes uneven. A no-review procedure only results in a record with no certainty; unprotected reviews only result in forums that do not dare to be used; Protection without allocation of liability only delays the problem without resolving who should bear the legal consequences. Therefore, these four levels must be read as a whole series in building a rejection of unlawful orders as an internal mechanism of the state of law, not as a deviation from discipline.

At the procedural level, the refusal must be changed from an informal action to a **documented legal action**. The basic reason lies in the hierarchical character of the police organization: in such an institution, objections that are only expressed verbally are easily reduced to personal disagreements, emotional attitudes, or even disobedience. The law therefore needs to create a form that makes objections recognizable as institutionally valid actions. Comparative experience shows that objections only acquire legal weight when they leave an **administrative trace**, because it is the trace that transforms the refusal from an interpersonal action into a legal event that can be reexamined. Therefore, Indonesian law needs to require that objections to potentially unlawful orders be expressed in a verifiable form in writing, electronic, or other official form and recorded in the institutional register.

In urgent circumstances, verbal refusal should still be possible, but formal documentation should be followed immediately. The significance of this stage lies not in the administrative formalism alone, but in the **shift in legal status**: once the objection is documented, the problem no longer depends entirely on the personal relationship between superiors and subordinates, but rather enters the space of legality that can be accounted for. Illustratively, if a superior orders the visibly excessive use of force against a suspect who has not resisted, then it is not enough for the subordinate to just say “I disagree”; He must have a channel to express the recorded objections, so that from then on the issue changed from a loyalty issue to a legality issue.

At the review level, documented objections should obtain a **legality assessment forum** that is not entirely subject to a direct chain of command. This is where the main difference between a hybrid model and a system that relies solely on ordinary ethical compliance. Without a review forum, documentation is only an archive, not a corrective mechanism. Refusal will still be seen as a unilateral action of subordinates if there is no competent authority to assess whether the content of the order indeed exceeds the legal limit. Therefore, the hybrid model requires the presence of an officer or review unit that institutionally remains within the body of the organization, but is not under the full control of the same superiors who issued the order in question.

This need is very important because the principle of the rule of law does not allow the hierarchy to be the **sole judge of its own legality**. Relatively independent review creates a bridge between the obligation to obey the command and the obligation to obey the law. In this framework, the question under review is no longer whether the subordinates are loyal, but rather whether the order is legally maintainable. To illustrate, if a subordinate has recorded an objection to an order to compel a confession through physical or psychological pressure, then there should be an officer or unit who can immediately check the legality of the order, decide whether the order is valid, and issue a reasoned determination. In this way, legality is no longer determined only by who gives the order, but by whether the content of the order is justifiable within the legal framework.³⁰

³⁰ CUBITT, Timothy. *Evidence-Based Detection, Management and Prevention of Police Misconduct*. Cham: Springer Nature Switzerland AG, 2026. E-book. DOI: <https://doi.org/10.1007/978-3-032-14070-8>.

At the level of protection, the hybrid model asserts that denial will never work in real terms if the law does not turn it into an **organizationally safe** action. This is one of the most important points, because in hierarchical institutions, the most effective threats are often not formal punishments, but rather subtle but destructive forms of retaliation: punishing mutations, exclusion from professional networks, labeling as disloyal members, withholding promotions, or long-term reputational damage.

Therefore, protection should not stop at an abstract statement that the subordinate is “protected,” but should be governed by operational guarantees: confidentiality of identity, prohibition of mutation or reassignment of a retaliatory nature, prohibition of direct or indirect retaliation, reversal of the burden of proof in cases of adverse treatment after rejection, and access to remedies such as rehabilitation, reinstatement, or sanctions against the retaliatory superior.

The most important lesson from the comparison is that effective protection is not protection that only exists on paper, but rather protection that is strong enough to make members dare to use the available procedures. For example, if a member rejects an order that is considered to be clearly against the law, and then a few weeks later he is suddenly transferred to a non-strategic position or loses a promotion opportunity, then the law should provide a mechanism that views the relationship between the refusal and professional loss as an alleged retaliation that must be tested, not as an ordinary managerial policy.³¹ Without this element, procedures and reviews would only be formally available, but would never live in practice.

At the level of responsibility allocation, the law must close the room for two equally dangerous distortions: first, the notion that command removes individual responsibility; second, the practice of imposing all risk on the executor on the ground. The hybrid model therefore demands a more precise distribution of responsibilities. The law-giver must be positioned as the **primary bearer of legal responsibility**, because he is the source of the decision that drives the action. However, at

the same time, subordinates cannot be released under all circumstances.

He can still be held liable if he knowingly carries out an order whose unlawful nature is manifest, or if he continues to comply after the legality of the order has been questioned and clarified. What should be excluded is precisely the situation when the subordinate acts in good faith in using the objection or reporting procedure; In such circumstances, a refusal should not be treated as a breach of discipline and should not be used as a reason for professional loss. The significance of this stage is profound, because it is here that the law determines whether the command structure is understood as a coordination system that remains subject to accountability, or rather as a tool to unilaterally channel responsibility downwards.

Illustratively, if a superior orders the falsification of evidence and the subordinate carries out the order consciously, then the superior bears the main responsibility, but the subordinate is also not free from liability because he has participated in carrying out actions that are clearly against the law. On the other hand, if the subordinate refuses, documents his refusal, and reports it through the available channels, then the law must position him not as a dissident, but as a subject who is actually carrying out his legal obligations.

From these four levels, it appears that the hybrid model is not simply a compromise between discipline and rights, but rather a **reconstruction of the relationship between command, legality, and accountability**. In this model, the command is retained as an instrument of coordination, but it is no longer allowed to operate indefinitely. Legality is given a procedural form, procedures are given a review forum, review is given a guarantee of protection, and protection is ultimately linked to a clear distribution of responsibilities. Precisely why this model is more suitable for Indonesia: it does not destroy the command structure, but it also does not allow it to operate as if it were legitimate in itself. Through this series, the rejection of unlawful orders is positioned not as a disruption to discipline, but as an internal mechanism that allows coercive organizations to continue to operate within the boundaries of the rule of law.

The proposed hybrid model may be simplified into four core elements: procedure, review, protection, and responsibility. These elements operate together to en-

³¹ CABRAL, Sandro; LAZZARINI, Sérgio G. The “guarding the guardians” problem: an analysis of the organizational performance of an Internal Affairs Division. *Journal of Public Administration Research and Theory*, Oxford, v. 25, n. 3, p. 797-829, 2015. DOI: <https://doi.org/10.1093/jopart/muu001>.

sure that refusal of unlawful orders functions not as a disciplinary anomaly, but as an institutional safeguard.

Table 1 - The Hybrid Model for Refusal of Unlawful Orders

Element	Key Function	Minimum Requirement
Procedure	Makes refusal formal	Objection must be recorded and registered
Review	Assesses legality	Order must be reviewed by a designated authority
Protection	Prevents retaliation	Confidentiality and anti-retaliation safeguards
Responsibility	Clarifies liability	Clear division of liability between issuer and subordinate

As shown in Table 1, refusal becomes effective only when it is formally recorded, legally reviewed, safely protected, and linked to a clear allocation of responsibility.

Illustratively, this model works as follows. When a superior issues an order that is allegedly contrary to the law—for example, excessive use of force against a person who is no longer resisting or instructions to force confession through physical pressure—the subordinate must have a **procedural avenue** to express an objection on record. The objection must then go through a **review path** that is not fully controlled by the same superior, so the main question shifts from “whether the subordinate is loyal” to “whether the contents of the order are lawful.” During the review, subordinates must be under **protection** from punitive mutations, stigma of disloyalty, or career retaliation.³² Once legality has been assessed, the law must regulate **the allocation of responsibility**: the commander bears primary responsibility for the unlawful order, while the subordinate remains responsible if he consciously carries out a manifestly unlawful order or continues to obey after his unlawfulness is cleared. In this structure, the command

is not abolished, but is forced to work within the limits of supervisable legality.

On that basis, the application of the hybrid model in Indonesia must be understood as a correction of two mistakes at once. First, correction of the mistaken principle that legality is sufficiently assumed to be present in the command. Second, the correction of technical errors that human rights protection can be guaranteed only by ethical norms without an operational design that can be used. Because international human rights standards demand not only substantive prohibitions, but also effective enforcement and remedy laws, Indonesia’s reforms must go beyond internal ethical arrangements and move to the legislative level. It is at this point that the hybrid model gains its justification: not because it is more complicated, but because it is only through a combination of normative definitions, formal procedures, relatively independent review, anti-retaliatory protection, and clear distribution of responsibilities, that the rejection of unlawful orders can truly function as an internal mechanism of the rule of law in accordance with international human rights standards.

7 Conclusion

This article argues that the central problem in Indonesia lies not in hierarchical command itself, but in the absence of a legal design capable of reconciling command with legality when the two come into conflict. Indonesian police law still affirms command authority more clearly than it regulates objection, legality review, protection against retaliation, and the allocation of responsibility when formally valid orders are substantively unlawful. As a result, legal uncertainty is shifted downward to subordinates, who face personal liability if they obey and institutional sanction if they refuse.

The comparative analysis also shows that no single foreign model should be transplanted wholesale. Instead, the Indonesian framework requires a hybrid legality–compliance model that combines the minimum safeguards identified across comparative approaches: clear objection procedures, legality-review mechanisms not wholly controlled by the immediate chain of command, credible protection against retaliation, and a precise allocation of responsibility between the issuer and the subordinate. The article’s contribution lies in

³² TAYLOR, Olivia Elizabeth Vere *et al.* Police whistleblowing: a systematic review of the likelihood (and the barriers and facilitators) of the willingness of police officers to report the misconduct of fellow officers. *Journal of Criminal Justice*, [S. l.], v. 91, p. 9-, 2024. DOI: 10.1016/j.jcrimjus.2024.102170. Available at: <https://www.sciencedirect.com/science/article/pii/S0047235224000199>. Accessed on: 27 February 2026.

demonstrating that command discipline and legal accountability are not mutually exclusive, but can be institutionally reconciled when legality operates as a real limit on command. In this sense, reform must move beyond internal ethics and be elevated to the statutory level, so that refusal of unlawful orders is formally recognised, reviewable, protected, and legally structured within a rule-of-law framework.

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