

**THE NORTH-SOUTH DIMENSION OF HEALTH IN THE  
INTERNATIONAL LAW OF ENVIRONMENT AND  
SUSTAINABLE DEVELOPMENT**

by

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

LAW

THE UNIVERSITY OF BRITISH COLUMBIA

August, 2005

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## ABSTRACT

As a basic pillar of any society, human health represents the ultimate value to be pursued by the global community on its path to sustainable development. Since 1992, however, when the United Nations Conference on Environment and Development ("the Earth Summit") took place in Rio de Janeiro, the multilateral agenda on environment and development seems to be primarily interested in accommodating the economic needs of the North. In spite of an apparent concern with human health, the supporting rationale for the negotiation of legal solutions in both fields appears to privilege other concerns, particularly those related to the protection of well-established markets and the creation of new ones. This is not a problem unique to law, but rather reflects a phenomenon addressed by scholars in other fields, showing that indeed there is still a missing link between the economic, environmental and social dimensions of sustainable development.

In this thesis, support is sought in the work of Antonio Gramsci in order to demonstrate that international norms have been produced as a means of reaffirming a pattern of domination by the North over the South. The failure to incorporate a broader "concept of health" in key legal regimes, which is analyzed here in terms of Gramsci's ideas of *superstructure* and *caesarism*, provides evidence that sustainable development remains unlikely to be achieved. This thesis argues that the manner in which health has been approached in legal discussions about environment and development is usually vague, limited or misleading. If this continues, any efforts to achieve sustainable development will prove to be ineffective, immoral and with possibly irreversible consequences for humankind.

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## ACRONYMS

CSD	Commission on Sustainable Development
FAO	Food and Agriculture Organization
FCTC	Framework Convention on Tobacco Control
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
ICRC	Interim Chemical Review Committee
IEL	International Environmental Law
IGO	Inter-governmental Organizations
IHR	International Health Regulations
IPCS	International Programme on Chemical Safety
ISDL	International Sustainable Development Law
MEA	Multilateral Environmental Agreements
NGO	Non-governmental Organizations
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
PIC	Prior Informed Consent
SDL	Sustainable Development Law
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Program
UNEP	United Nations Environment Programme
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
WEHAB	Water, Energy, Health, Agriculture and Biodiversity
WHO	World Health Organization
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

## ACKNOWLEDGEMENTS

I am glad to acknowledge the contribution of a number of people for this accomplishment. Three of them will always deserve my gratitude and admiration, both due to their outstanding scholarship in their area of academic expertise and because of their generosity and understanding of what knowledge is all about. They are Richard Paisley, Karin Mickelson and Natasha Affolder, professors at the University of British Columbia Faculty of Law.



To Hilton Watkins,  
outstanding professional and  
admirable human being.

## **CHAPTER ONE**

### **HEGEMONY GRAMSCI-STYLE: REVEALING WHY THE CONCEPT OF HEALTH HAS BEEN “MISUNDERSTOOD” BY THE INTERNATIONAL LAWS OF ENVIRONMENT AND SUSTAINABLE DEVELOPMENT**

#### **Introduction**

It is interesting how curiosity operates in our lives. At first, I had the impression that curiosity was something that would naturally disappear as the secrets behind it were being gradually revealed. Later I realized that curiosity lasts longer. Instead of disappearing as we get the answer we expect, it becomes more sophisticated as our perception of the world changes.

One of the most puzzling issues that I have struggled with since an early age is the gap between rich and poor. Being born in the 1960s in Brazil, this gap was part of the reality of daily life. It was something revealed in every corner of the country, particularly in the Northeast region, where thousands of people starved and struggled with diseases like leprosy. In contrast, as part of a fortunate minority, I was also aware of a different world, one where, as I found out later, the problem was not the lack of food, but rather its over-consumption. A world in which the garbage was made up of old TVs, cars and a number of other “fascinating gadgets”. It was a world whose values and needs were also being revealed through the movies and TV shows.

Now, many years later, the same curiosity about the divide between these two worlds remains. It is not as naïve as it used to be, but rather full of complexities and

nuances. It is more complex because now it is imperative that I get answers that explain *why* the gap exists. It is more nuanced because now my eagerness is to find out *where* and *how* it persists.

As a public health professional and as an international lawyer who worked for the Brazilian Ministry of Health for thirteen years, I have a long standing interest in the way in which “health” has been approached in international negotiations, particularly those about “environment” and “sustainable development”. Being in charge of these themes at different levels over the years, I could participate in a number of discussions both within the country and abroad. Most of them left me with an intriguing feeling that “health” – as one of the most important values to be pursued by humanity - has been contradictorily placed at the very bottom of the list of priorities of the international community. The reality revealed during those years was that “the concept of health” has been used in the multilateral realm to reproduce the same old dichotomy of rich and poor that used to puzzle me years ago.

Reviewing the current debate involving health, environment and sustainable development, it is easy to notice how attempts to treat all three subjects in a more holistic way have been limited. Scholarly debate, in spite of the alleged neutrality of academic thought, seems to reflect the historical “misunderstanding” involving the role of health and its relation with the other two fields. Academic discussions have addressed aspects of international law and policy of “health”, “environment”, and “sustainable development” separately. Very little attention has been given to how international negotiations of “environment” and “sustainable development”, particular those resulting in binding instruments would really look like through the eyes of “health”.

The rationale for my concerns about this “misunderstanding” could be well summarized in the following intriguing questions: (i) If according to the *Brundtland Report*<sup>1</sup> - later confirmed at the 1992 Earth Summit<sup>2</sup> - human beings are at the centre of sustainable development and health is said to be one of the pillars of sustainable development, why has it been treated by the international community in such a secondary way?; (ii) If multilateral environmental agreements (MEAs) such as those regulating international trade of hazardous chemicals,<sup>3</sup> the transboundary movement of hazardous wastes,<sup>4</sup> and persistent organic pollutants<sup>5</sup> usually include in their preamble an urgent need to “protect human health”, why is health as vulnerable as if no conventional effort has ever been made?; (iii) What is behind the idea that a convention is created to protect human health but in practice it is not really concerned with it?<sup>6</sup>; (iv) Why is health associated in major declarations, such as that produced in Johannesburg in 2002,<sup>7</sup> with

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<sup>1</sup> UN GAOR, 42<sup>nd</sup> Sess., UN Doc. A/42/427 (1987) [The Brundtland Report].

<sup>2</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, vol. I, Resolutions Adopted at the Conference (United Nations publication, Sales No. E.93.I.8 and Corrigendum) [Rio Declaration].

<sup>3</sup> *Rotterdam Convention on the Prior Informed Consent for Certain Hazardous Chemicals and Pesticides*, 11 September 1998 (entered into force in 2004) [Rotterdam Convention] or [PIC Convention].

<sup>4</sup> *Basel Convention on the Transboundary Movement of hazardous Waste and Their Disposal*, 22 March 1989 (entered into force May 2002) [Basel Convention].

<sup>5</sup> *Stockholm Convention on Persistent Organic Pollutants*, 23 May 2001 (entered into force in 2004) [POPs Convention].

<sup>6</sup> See generally Ted L. McDorman, “The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade: Some Legal Notes” (2004) 13:2 *Reciel* at 187 [McDorman]. The author points out potential conflicts between political and scientific decisions in regard to the inclusion of new hazardous chemicals on the list of substances and products subject to the PIC procedure. He illustrates this constraint by describing how the negotiations being held under the current regime have dealt with the chrysotile form of asbestos, in which case political decisions seemed to conflict with the recommendations made by scientific experts of the Convention’s Chemical Review Committee.

<sup>7</sup> UN, *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002* (United Nations publication, Sales No. E.03.II.A.1 and Corrigendum, 2003) [Johannesburg Declaration and Plan of Implementation].

the idea of expensive technologies and services, most of which are dominated by the developed world ?

On the one hand, part of the answers could be found in the fact that “environmental” negotiations were often headed by public officials working for ministries of environment in different countries (together with correspondent diplomatic personnel). Without interaction with other groups, input from other related bodies, including those associated with health, became almost non-existent. The preparatory process of the Johannesburg Summit in 2002 can clearly illustrate that.<sup>8</sup>

My observations over the years have led me to two conclusions. First, that the “misunderstanding” has to do with the fact that international negotiations have been more concerned about the economic aspects of “environment” and “development” than about other social aspects of both fields. Second, that it could be connected to my early concerns about the gap between rich and poor. But how ?

The solution for my dilemma was to find answers in “classic” sources. The answer was in Antonio Gramsci (1891-1937), an Italian communist and philosopher, whose interests in domination and hegemony seemed to perfectly fit my original concerns. His work would be able to relate the notion of maintenance of the *status quo* (the IEL and SDL as a tool for domination) with the idea of articulation of an inaccurate notion of reality (the manipulation of “the concept of health”).

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<sup>8</sup> Being a member of the Brazilian delegation to the Second Preparatory Meeting to the 2002 World Summit on Sustainable Development, held from January 28<sup>th</sup> to February 8<sup>th</sup>, 2002, at the United Nations headquarters in New York, the author acknowledges that the Brazilian delegation was one of the few that had public health experts to discuss health-related and health-specific issues arising in the working documents negotiated during the meeting.

Gramsci's approach to concepts like *hegemony*, *superstructures* and *caesarism* can be useful to provide insights about the "law's ability to induce submission to a dominant worldview [Ideologies]."<sup>9</sup> This is due to the fact that the law, including its international variation, has the ability to "appear as an expression of a broadly based consent, manifested in the acceptance of ideas and supported by material resources and institutions, which is initially established by social forces occupying a leading role within a state, but then projected outwards on a world scale".<sup>10</sup>

Gramsci's concepts seem to be key for understanding where and how particular notions and concepts are manipulated.<sup>11</sup> Also, they can be articulated as an "eye-opener" for the South in its struggle to seek effective results from international negotiations. My assumption was that if environment and health were to be protected and sustainable development promoted, then it would be reasonable to expect that they could be achieved without bringing with them threats associated with poverty, diseases and hunger.

This discussion is not new. It can be observed in other attempts to reveal conflicts between different social groups. The notion of *Environmental Justice*, for example, originating in grassroots gender and race-based movements in the United States in the 1970s had already suggested the idea of *domination* of disadvantaged communities by a fortunate white middle-class. Despite reflecting a phenomenon that was happening at

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<sup>9</sup> Douglas Litowitz, "Gramsci, Hegemony, and the Law" (2000) *Brigham Young University Law Review* 515-551 at 516 [Litowitz].

<sup>10</sup> *Ibid.* at 516.

<sup>11</sup> I differentiate the terms "notions" and "concepts" and sometimes "ideas" or the "perception of health" as a way to recognize that being part of a groups of instruments labeled "environmental" or "developmental" some treaties or declarations may not directly define health or bring a "concept of health" in it. By articulating the notion/idea or perception of health, I also understand that a less rigid approach to the vocabulary "health" indeed enables the association of the term with a range of possibilities, compound elements and definitions.

national level as a response to the failure of the mainstream policy makers to address issues of social concerns for minority communities, the concept of environmental justice could also be expanded to my current critiques about international law.<sup>12</sup> The actors would be different, although keeping pretty much the same characteristics.<sup>13</sup> Transferring it to the multilateral arena, the only difference would be that domination would not be associated with the struggle of a minority group. Instead, it would reach the universe of about 70% of all countries in the world.<sup>14</sup>

### **Gramsci's notion of "hegemony": Explaining the fallacy of health**

Gramsci's theoretical background has its origins in Marx. However, it does not mean that he simply adopted and repeated the same arguments of Marx, whose main

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<sup>12</sup> Ruchi Anand, *International Environmental Justice: A North-South Dimension* (Hampshire and Burlington: Ashgate Publishing Limited, 2004) at 15 [Anand]. The author articulates that "[q]uite similar to national politics of environmental justice in the US, an analysis of the inequalities in the international arena has led to questions and concerns of procedural justice implying fairness of decision-making processes, and distributive justice, focusing on norms for equitable resources distribution in terms of costs and benefits". He also notes that "[t]he way in which international environmental laws have been arrived at have been subject to many criticism for not being procedurally fair [and thus] (...) there has been opposition to many international global agreements and efforts because they do not adequately reflect the interests of countries of the South" (at 15-17).

<sup>13</sup> See also Bunyan Bryant, "History and Issues of the Environmental Justice Movement" in Gerald R. Visgilio & Diana M. Whitelaw, eds., *Our Backyard: a quest for environmental justice* (Oxford: Rowman & Littlefield Publishers, 2003) 3 [Bryant]. If the relationship between health and environmental justice could be summarized, Bryant's definition would be useful: "[E]nvironmental Justice is served when people can realize their highest potential without experiencing 'isms' (such as racism). Environmental justice is supported by decent paying and safe jobs, quality schools and recreation, decent housing and *adequate health care* [emphasis added], democratic decision making and personal empowerment, and communities free of violence, drugs, and poverty".

<sup>14</sup> Compare Edwardo Rhodes, *Environmental Justice in America: A New Paradigm* (Bloomington, IN: Indiana University Press, 2003) at 206. Rhodes notes that some critics of the environmental justice movement, a more encompassing approach to the notion of "environment" as opposed to the original notion of "environmentalism", argue that "(...) to succeed in all that remains to be accomplished [mostly in reference to conservation of the natural ecosystem], the environmental movement could not afford to be sidetracked by what they perceived as essentially non-governmental issues of social policy".

focus was on the “materialist conception of history”.<sup>15</sup> Instead, Gramsci further developed Marx’s discussions about the struggle of the masses due to capitalism, giving a broader dimension to the meaning of *domination* and *hegemony*.<sup>16</sup>

The fact that Gramsci himself experienced the practicalities of a hegemonic power – as he was put to prison in 1927 – seems to have been enough motivation for him to go beyond Marx. Being a victim of political power, his imperative was not limited to proving that the *status quo* of a dominant class was likely to be perpetuated by ideological manipulation, as abstractly proposed by his predecessor. Gramsci’s challenge was to show that domination is something that happens in a more complex way in the real world. It involves other aspects and actors of daily life – like the church, the media and intellectuals. It does not belong exclusively to secluded political parties. It is exercised everyday at different levels within the borders of a society and beyond it, through the *construction of alliances* with the enemy and through the “education”<sup>17</sup> of the masses. Rather than a simple result of the old idea of class struggle,<sup>18</sup> Gramsci reveals that

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<sup>15</sup> According to the Marxist theory, the “materialist conception of history” explains the development and changes in human history through the viewpoint of economic, technological development. Gramsci often associates this materialist approach to the notion of “economism”, which indicates a theoretical separation of the economic dimension from a social and political ensemble. He uses the term as a way to criticize Marx’s “primitive infantilism”, whose analysis turned out to be limited to the explanation of power relations in society through its sole economic causes. Alternatively, Gramsci articulates the concept of “superstructures”, adding other political and cultural variables to theoretical discussions about ideology, class and hegemonic power.

<sup>16</sup> Gramsci’s writings can be divided in two categories: pre-prison writings (1916-1926) and the *Prison Notebooks* (1929-1935). This latter, where the concept of *hegemony* seemed to have been further refined, contains several references to communist predecessors, including Marx, Stalin and Lenin, in the form of codes. This approach was adopted as an attempt to prevent censorship and as a consequence has been the object of intellectual struggle by translators and scholars dedicated to the life of the Italian philosopher.

<sup>17</sup> “Education” in the context adopted by Gramsci does not only reflect formal academic education. It is strictly related to the notion of *direction*. It happens even in the simplest acts of life: reading a newspaper, watching TV, etc.

<sup>18</sup> I refer to the arguments articulated by Karl Marx in his *Capital*.



*hegemony* of a few over the rest is achieved through subtle relations between the “leading class” and the “poor peasantry”.<sup>19</sup>

By applying Gramsci’s notion of *hegemony* to the universe of health, I am not automatically assuming that the “old-fashioned” arguments about *imperialism* and *ideological domination* – as originally proposed in Marx’s *Capital* - do not fit my concerns involving the gap between North and South. Actually, I take Marx’s general premises for granted. Nothing really new would be added to the North-South discussion if this academic effort pointed out only that the gap between rich and poor has increased significantly since the 1980’s with the spread of the neoliberal paradigm. Quoting Gramsci, it would be a “primitive infantilism”<sup>20</sup> if all this work only demonstrated that Thatcher and Reagan’s fallacy associating development with free markets and restricted governmental regulation only benefited the North.

When support is sought in Gramsci to demonstrate how the concept of health is being adopted within the current multilateral negotiations in key areas of environmental and sustainable development law, I go beyond the notion of *domination through ideology*. I try to illustrate: (i) *where* the problem of manipulation in North-South relations take place; (ii) *how* this pattern is likely to be perpetuated if a critical approach to the current system is not demanded by the South, and; (iii) *why* it is crucial that the North recognizes the problem and constructively take an alternative course for the sake of us all.

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<sup>19</sup> See generally David Forgacs, ed., *The Antonio Gramsci Reader: selected writings 1916-1935* (New York University Press, 2000) [Forgacs].

<sup>20</sup> Quintin Hoare & Geoffrey Nowell-Smith, *Selections from Prison Notebooks* (New York: International Publishers, 1971) cited in David Forgacs, ed., *The Antonio Gramsci Reader: selected writings 1916-1935* (New York University Press, 2000) [SPN].

Either within the dynamics of the United Nations or in the context of how ideas are reproduced in civil society, gains and losses in the negotiations between developed and developing countries must be carefully assessed. As Gramsci says, what may seem to be a gain at first sight may well reflect just “conjunctural developments” strategically used by the “leading class” to make more allies or to give a certain touch of fairness in order to achieve something else. It is precisely a variation of the “stick and carrots” approach. If on one hand developed nations create the international political “ambiance” and set the rules in a way that they benefit their economic goals, on the other, they are also aware of the moment when some practices must be strategically loosen.<sup>21</sup>

In his *Prison Notebooks*<sup>22</sup> Gramsci introduces a number of new concepts that are useful for this academic endeavour. Even though his model was built in response to the realities of a fascist regime in Italy, it can be applied to the concerns that I raise about health and the relations between North and South.

Gramsci’s notions of “hegemony,” “superstructure” and “caesarism” seems to have all the elements that would explain the current dilemmas involving North and South.

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<sup>21</sup> See also Noam Chomsky, *Hegemony or Survival* (New York: Metropolitan Books, 2003). It is interesting how the author expresses to a certain extent the idea that I articulate here. When describing one of a series of *manouvres* and strategies of Bush’ Administration in its attempt to situate the politics of *War on Terror* currently predominating in the United States, he makes the following statement under the section “International Ignorance”: “(...) But to reassure ourselves that the powerful are motivated by ‘elevated ideal’ and ‘altruism’ in the quest of stability and righteousness’, we have adopted the stance called ‘international ignorance’ by a critic of the terrible atrocities in Central America in the 1980s backed by the political leadership that is again at the helm in Washington. Adopting that stance, not only can we tidy up the past, conceding the inevitable flaws that accompany even the best intentions, but more recently, since the advent of the new norm of humanitarian intervention, we can even go on to portray US foreign policy as having entered a ‘noble phase’ with a ‘saintly glow’ (at 43-44).

<sup>22</sup> SPN, *supra* note 20 at 192-193.

They prove that the well-know image of the Lady of Justice<sup>23</sup> has not been able to be really blind in the international arena. In the contrary, the scale she holds has been historically erred in the benefit of the North. She has been biased in many areas, including those involving the negotiation of "a common solution" for the control of hazardous chemicals, trade of toxic waste, organic pollutants, as well as in major agreements that have been celebrated as the *panacea* for the sustainable development of the world.

A more detailed analysis of how the "concept of health" has been applied in the current multilateralism is one of the possible ways to illustrate that. The problem is that as empirical as it may be, the "concept of health" has been used to justify the *animus negotiandi* of major international agreements.<sup>24</sup> Paradoxically, it also has been adopted as a convenient tool for wealth accumulation in the North, with very limited benefit to the South. A simple overview of the *modus operandi* and the results of the negotiations between developed and developing countries in their struggle to build a common legal framework shows that indeed Gramsci was right. *Procedural* and *substantive* flaws are present throughout a number of multilateral environmental agreements and sustainable development covenants signed and ratified to save the planet and to reduce the gap

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<sup>23</sup> Representations of the Lady of Justice in the Western tradition occur in many places and at many times. She sometimes wears a blindfold, more so in Europe, but more often she appears without one. She usually carries a sword and scales. Almost always draped in flowing robes, mature but not old, no longer commonly known as Themis, she symbolizes the fair and equal administration of the law, without corruption, avarice, prejudice, or favor.

<sup>24</sup> Special consideration is given to treaties and declarations that have been negotiated since the Earth Summit in Rio, in 1992. In the following chapters, I discuss how the "concept of health" has been manipulated by the North. My focus of attention will be the "brown" and the "green" agendas, entailing the multilateral negotiations of three binding agreements and three milestone declarations. The author, either directly as part of official delegations or indirectly through the coordination and emission of subsidiary sector reports, participated in several of the negotiations articulated in the chapters that follows.

between rich and poor. Gramsci's philosophy proves that in reality, particularly when it comes to their impact on the "protection and promoting health", these instruments are actually making the gap wider and deeper.

By *procedural flaws* I refer to well-known weaknesses that have been historically attributed to the discipline of international law as a whole – difficulties in enforcement, limited range, among others. I also refer to a series of inconsistencies and constraints within the multilateral system, particularly the United Nations, as the most relevant forum where North and South set mutual commitments. Lack of *inter-agency co-ordination*, *failure to have a harmonized approach to concepts commonly dealt by different bodies* (including "the concept of health") and *vulnerability to the pressure of interest groups* are just some of these concerns.

By *substantive flaws*, on the other hand, I mean a whole universe of problems involving the manipulation of the "concept of health" in the international arena. From simple conceptual "mistakes" to a number of "misunderstandings" behind the scenes of major negotiations. This category of flaws illustrates how international law has lacked neutrality. As the core of this work, I show how these flaws have facilitated the practice of domination by the North over the South. I show that despite the creation of a "common agenda" based on a "common rationale", rich and poor nations have different objectives and priorities, and this is why "the concept of health" has been given different treatment by different regimes.

With Gramsci's support, it is with no surprise that one can see how the "concept of health" has been carefully carved in order to fit the economic ambitions of the

developed world. The point is not that wealth accumulation in itself is right or wrong. The point is the circumstances under which wealth has been accumulated by the North, often through exploitation of the South.<sup>25</sup>

History itself illustrates how turbulent relations between these two worlds can be. Gold and diamonds taken from European colonies in Latin America in the seventeenth century and trade of African slaves are just a few example of an early type of exploitation. Despite its shocking and unacceptable nature, this kind of physical straightforward exploitation is not the one that fuels my arguments in this work. Instead, it is the type of exploitation occurring through the blessing of law, science, academic scholarship and through the consent of the common citizen that interests me the most. The one that is usually agreed upon under the veil that covers the heads of international diplomats when they are gathered in New York or Geneva to propose solutions for the “global village” and to promote a “sustainable world”. I refer to all kinds of solutions, both the “hard” and the “soft” one, the binding and the non-binding one.

The words of Litowitz clearly illustrate this argument of hegemonic power being exercised through the international law. While proposing that the current legal system is hegemonic in a Gramscian sense, Litowitz makes the following statement:

The law induces passive compliance in large measure through its function as constitutive of social ontology-it provides rules for the proper construction of authorized institutions and approved activities (...); [i]t is a hegemonic *code* [emphasis in original] that replicates

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<sup>25</sup> Ivan Head, *On a Hinge of History: The Mutual Vulnerability of South and North* (Toronto: University of Toronto Press, 1991) at 11 [Head]. When reflecting on how the North has forgotten to acknowledge the role played by the South in human development, Head remembers the decimal system originated in India and that Francis Bacon's three major inventions of mankind (printing, gunpowder and the compass) all came from the South.

the social ontology in much the same way that a genetic code replicates a biological organism.<sup>26</sup>

In effect, the current scholarship about Gramsci clarifies that *domination* can be of two types. The first one is “commonly associated with coercive state action by the courts, the police, the army, and the national guard”.<sup>27</sup> The second type of control is more subtle, invisible and consensual. It is *direction* rather than domination in strict sense. As noted by Litowitz, this second type of domination is Gramsci’s notion of *hegemony*. It can be described as follows:

It involves subduing and co-opting dissenting voices through subtle dissemination of the dominant group’s perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of the common sense. In a hegemonic regime an unjust social arrangement is internalized and endlessly reinforced in schools, churches, institutions, scholarly exchanges, museums, and popular culture.<sup>28</sup>

In order to put Gramsci’s notion of hegemony in practice, the dominant has to create a broad power base, and it does so by making *strategic alliances* not only at the political level within the state’s government, but also at the level of different communities and structures of society.

Bieler and Morton<sup>29</sup> go even further in their analysis and propose that in a historical context, hegemony can be noticed in three distinct fields: (i) in social relations of production; (ii) in how states are formed; and (iii) in how a “world order” is set. The first refers to hegemony being created within a particular society, “encompassing the

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<sup>26</sup> Litowitz, *supra* note 9 at 517.

<sup>27</sup> Litowitz, *supra* note 9 at 519.

<sup>28</sup> *Ibid.*

<sup>29</sup> See generally Andreas Bieler & Adam David Morton, “A critical theory route to hegemony, world order and historical change: neo-Gramscian perspectives in International Relations” *Capital & Class* 85-107 [Bieler and Morton].

totality of social relations in a material, institutional and discursive forms that engender particular forces".<sup>30</sup> The idea of domination in this case has also been addressed by other theorists such as Foucault.<sup>31</sup> The second field relates to the way in which the construction of various forms of state and the social context of political struggle have been shaped.<sup>32</sup> At this level, hegemony involves relations among social groups and between them and the state.<sup>33</sup> The third and last field articulated by Bieler and Morton refers to how hegemony has been exercised in order to set a "world order". Hegemony at the world order's level, as proposed by Gramsci, can be put into practice through the dissemination of a hegemonic power relation previously built within a state or a group of them to the rest of the world. This is not done so through the means of force or war. It spreads disguised in more subtle forms, taking concrete shapes "such as the Rotary Club, or the Roman Catholic Church that had an 'international' character whilst rooted within the state".<sup>34</sup>

According to the third type of *hegemony*, commonly articulated concepts such as "globalization", for example, are strategically drawn in order to be perceived and accepted as the truth. Concepts such as "health" and "risk" can be strategically

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<sup>30</sup> Bieler and Morton, *supra* note 29 at 87.

<sup>31</sup> See generally Michel Foucault, *Discipline and Punish: the birth of the prison* (New York: Vintage Books, 1995) [Foucault]. The differential note, particularly between Gramsci and Foucault is based on the inclusion of a certain need for constant "surveillance" by the dominant in the latter's notion of power, that seems to be unsolved in Gramsci's proposition.

<sup>32</sup> Bieler and Morton, *supra* note 29 at 82.

<sup>33</sup> *Ibid.* It is noteworthy that Bieler & Morton point out that "[f]or Gramsci, the state was not simply understood as an institution limited to the 'government of the functionaries' or the 'top political leaders and personalities with direct governmental responsibilities'. The state presents itself in a different way beyond the political society of public figures and top leaders so that 'the state is the entire complex of practical and theoretical activities with which the ruling class not only justifies and maintains its dominance, but manages to win the active consent of those over whom it rules' (Gramsci 1971:178, 244)" (at 82).

<sup>34</sup> *Ibid.* at 93.

manipulated if they represent any threat to the interests of a particular group. In the real world, such tailored concepts and ideas can also be incorporated to the text of laws, assuming the shape of declarations, covenants, protocols, treaties, plans of implementations and so on.<sup>35</sup>

Gramsci's theory of *hegemony* requires that for a ruling worldview [ideology] to be established, it must follow the mechanisms of, *naturalization*, *rationalization*, and *universalization*.<sup>36</sup> In the international law these mechanisms can be illustrated when the political agenda is set and throughout the treaty-making process. When these "mechanisms" are applied to my arguments about how the "concept of health" has been articulated, it becomes clear that hegemony has indeed germinated in that realm. A more detailed analysis of how health has been depicted in the PIC Convention<sup>37</sup> and in the Basel Convention<sup>38</sup> demonstrates that these instruments have very little to add to national efforts to protect and promote health through the minimization/elimination of risks and prevention of diseases in the concrete world. This will be demonstrated in the chapter to follow.

*Naturalism* is reflected when, for example, international diplomacy assumes that "risk assessment" instead of "precaution" is to be adopted as the paradigm in a

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<sup>35</sup> See also Jonathan Krueger & Henrik Selin, "Governance for Sound Chemicals Management: The Need for a More Comprehensive Global Strategy" (2002) 8 *Global Governance* 323 at 323 [Krueger and Selin]. When discussing the current treaty-making exercise, the authors state that "[t]he convention-protocol approach can result in a long drawn-out negotiation process, that its dynamics often encourage the creation of lowest-common-denominator agreements, and that the content and structure of the initial convention-often designed to satisfy primarily political pressures-can later obstruct the design of environmentally effective protocols." (at 328).

<sup>36</sup> Litowitz, *supra* note 9 at 525.

<sup>37</sup> Rotterdam Convention, *supra* note 3.

<sup>38</sup> Basel Convention, *supra* note 4.



convention like the Rotterdam Convention.<sup>39</sup> As noted by Litowitz, at one point, assumptions are taken for granted to the point where “culture” is confused with “nature” at every turn. In this example, it becomes almost irrelevant to consider that “risk assessment” techniques involve a certain level of exposure to the risk being tested. It does not matter if a human individual or a group of them is the subject to be exposed. I will present other examples involving this idea of naturalism in the following chapters, when the brown and the green agendas are analyzed in more details.

The mechanism of *rationalization* as proposed by Gramsci relies on the fact that “every ruling group gives rise to a class of *intellectuals* who perpetuate the existing way of life at the level of theory”.<sup>40</sup> By intellectuals, Gramsci not only referred to academic scholars. His notion of “intellectuals” is broader.<sup>41</sup> It includes everyone who “share[s] the task of mental activity, of organizing, deliberating and leading, both politically and within the sphere of economic production.”<sup>42</sup> Not coincidentally, the second half of the last century created a number of scholarly work addressing the benefits of neo-liberal policies and globalization.

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<sup>39</sup> See also Carl F. Cranor, *Regulating Toxic Substances: a philosophy of Science and the Law* (New York; Oxford: Oxford University Press, 1993). When articulating the rationale for regulation toxic substance, the author makes a comparison between the regulatory approach (forward-looking) as opposed to the approach of tort law (corrective justice). He argues that the rationale for regulating toxic substances can find its origins in arguments of fairness and distributive justice. The following statements exemplifies his point: “A major consideration of justice, or perhaps fairness, is that the party who realizes benefits from imposing especially hazardous risks on other should take precautions to see to it that the risks do not materialize. This is analogue of the tort rule that the cost of an activity should be borne proportionally by those who benefit and benefit most from it. If in the regulatory context this principle would require that those who stand to benefit most from an activity should be required to take precautions themselves, then there is a reason for imposing regulations on them which require them to take the appropriate preventive precautions according to this principle” (at 97).

<sup>40</sup> Litowitz, *supra* note 9 at 526.

<sup>41</sup> See generally Forgacs, *supra* note 19 at 425.

<sup>42</sup> Litowitz, *supra* note 9 at 526. The author points out that Gramsci uses the term “intellectual” in the broadest possible sense to include lawyers, professors, politicians, scientists, and journalists.

Finally, *universalism* is a mechanism applied by the “dominant group to portray its parochial interests and obsessions as the common interests of all people”.<sup>43</sup> Indeed, it can be expressed through a wide range of possibilities, including newspapers, TV commercials, and movies. It can be expressed by means of the law, “[that] performs a non repressive function of leadership and direction by suggesting a mode of life as “legal”, as “approved by the state”. Needless to say that the same argument can be extended to the universe of international law.

### **The notion of “Caesarism” and the fragilities of the multilateral system**

Gramsci’s introduced the concept of *caesarism* as a way to explain the role of a third party in solving the differences between two other parties to a conflict. Despite his allusion to the Roman Emperor, the concept could have been perfectly named after Napoleon (thus creating “Napoleonism”) or any other iconic leader of our history.

The idea behind the vocabulary is that it almost intuitive. It demonstrates how hegemony can be also reproduced by a third entity above “the fundamental forces”.<sup>44</sup> In Gramsci’s own words:

Caesarism can be said to express a situation in which the forces in conflict balance each other in a catastrophic manner; that is to say, they balance each other in such a way that the continuation of the conflict can only terminate in their reciprocal destruction. When the progressive force A struggles with the regressive force B, not only may A defeat B or B defeat A, but it may happen that neither A nor B defeats the other – that they bleed each other mutually and than a third force C intervenes from outside, subjugating what is left of both A and B.

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<sup>43</sup> Litowitz, *supra* note 9 at 530.

<sup>44</sup> Forgacs, *supra* note 19 at 273.

From this passage it is not difficult to realize, for example, that this was the same rationale surrounding the decision to create the United Nation (UN) in June 26<sup>th</sup> 1946 after the Second World War (in spite of its declared objective to promote co-operation and mutual collaboration among nations).<sup>45</sup>

By creating a third “force C”, the developed and developing world had to step forward in the sense that both had to “give up” a certain “amount” of sovereignty for the “benefit” of all. In Gramscian term, when this happened “a great personality [was] entrusted with the task of ‘arbitration’(..)”.<sup>46</sup>

The problem is that Gramsci himself had already predicted that the third party is not exactly that amorphous. It is not “above” the interest of the parties. In practice it will favour one or the other.<sup>47</sup> And he continues in order to say that:

Caesarism is progressive when its intervention helps the progressive forces to triumph, albeit with its victory tempered by certain compromises and limitation. It is regressive when its interventions help the regressive force to triumph – in this case too with certain compromises and limitation.

Then, if Gramsci was right (and the chapters to follow will demonstrate that indeed he was right), it is not an absurd to assume that the United Nation itself, just like the hypothetical third party C, can err to one side or the other. It can reflect the forces of the North or the forces of the South (or rather the absence of them in regard to the latter).

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<sup>45</sup> I refer to the *Charter of the United Nations*, specially its Chapter I, Article 1 (3). Available online: UN < <http://www.un.org/aboutun/charter/> >. One of the objectives of the UN, as stated in the Charter is: “[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

<sup>46</sup> Forgacs, *supra* note 19 at 269-272.

<sup>47</sup> See generally Forgacs, *supra* note 19.

As a matter of fact, as of June 2005, 191 nations had the status of Member States within UN system. Among these, about 70% are made up by developing countries, as opposed to the remaining minority made up by countries of the North. The question that almost instinctively follows this numbers is then: why, despite this figures, do agreements and other covenants negotiated within the UN still fail to address the historical complaints of the South? Why does the multilateral system seem to be applying the treaty-making exercise to benefit the 30% of Member States of the North instead of the 70% of Member States of the South? Would Gramsci have a solution for that ? My answer was 'yes'.

### **Structure and Superstructure: overcoming Marx**

As described before, the Marxist idea of domination was strictly associated with the binomial economy-ideology. This was his notion of "structure". According to Marx, any variation within the universe of one would have an effect on the other one. Thus, the idea of domination would materialize instantaneously when a certain ideology (as a reflect of different classes) took power.

Gramsci criticized this argument and proposes a more encompassing way of analyzing if domination really happens. His critiques of Marx relied on the fact that assessing the structure *per se* "like an instantaneous photographic image"<sup>48</sup> is not enough to establish that domination is happening or not. The only way to verify domination is through a historical analysis of how the structure behaves in history, with the support of *superstructures*.

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<sup>48</sup> Forgacs, *supra* note 19 at 191.

According to Gramsci, this is due to two major flaws in Marx's theory. First, that politics is a reflection of tendencies in the structures. It means that taken as a static image of a particular point in history, it fails to support the argument that domination is happening or not at that moment. As tendencies, a political act can be realized or not. It can be a simple mistake by the dominant group that can take a completely different direction a few minutes or days later. Moreover, as Gramsci argues, it can also illustrate a certain political act carefully tailors to overcome a particular moment of "crisis", when the dominant may have to establish *alliances* with the dominated.

Applying this model to the present developments of the "Doha Declaration on Public Health", I start to question the reasoning behind the decision of the pharmaceutical giants in the North to allow the developing world to manufacture patented drugs. Was it because the pressure by civil society was based on something unbearably true ? Was it because the "crisis" became evident with the world watching tens of thousands of people die of AIDS in Africa every year? Or was it because by this "act of compassion" the pharmaceutical industry perceived other opportunities in the market of "generic drugs" ?

The fact is that regardless what the reason might have been, it reflected the criticism of academics, non-governmental organizations, the media and other actors of the real world, who have spread the word and created the necessary condition to change a previous hegemonic situation. This is what Gramsci calls the "superstructure".

### **The North-South dimension of International Law: Articulating an idea of Counter-Hegemony**

The nineteenth century and the beginning of the twentieth century produced the "classic thoughts" in the political science field. They *described* the logics of capitalism, a

politico-ideological system originated as a result of technological advances and industrialization, materialized by Ford and others. The second half of the twentieth century, in turn, produced the notion of globalization and together with it a number of scholarly *reactions* to it. This engagement happened in several fields, trespassing the borders of political science, achieving other fields. International law was one of them, trying to seek answers and regulate the socio-economic and environmental relations arising from the “irreversible phenomenon”.

Taken as a single set of rules, treaties and other covenants signed after the 1992 Earth Summit could be perceived at a first glance as an attempt by the multilateral system to address environmental and health concerns resulting from modernity. This is because humankind has been able to dominate technology and to establish widespread relations within national boundaries and beyond them. A number of factors have contributed to this interaction, ranging from an increased reliance on better and faster means of transportation to an enhanced ability to access information and even trade through the internet, so-called e-commerce.

In the dawn of the 21<sup>st</sup> century, international relations are incontestably driven and affected by myths associated with globalization. Reflecting a world moved by economic disputes, they are often wrapped in a number of conflicts and dilemmas.<sup>49</sup> The creation of

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<sup>49</sup> See generally Ethan B. Kapstein, “Does globalization have an ethical problem ” 248-278 [Kapstein].

the World Trade Organization (WTO) in 1995 represents an official attempt to regulate this complex world.<sup>50</sup>

Tensions between North and South have become more evident in this complex world, creating the grounds for a crescent inquietude by different segments of society and a universe of arguments to be explored by researchers in both worlds. A small group of them concentrated its efforts on exposing the “capitalist economic crisis”<sup>51</sup> and the unbalanced burden it created between rich and poor in their attempt to find a solution for it. This justifies the emergence of an academic critical mass from the 1970s articulating, for instance the concept of the “South-North dimension” of international Relations.<sup>52</sup>

Approaches to the North-South dilemma have since then taken a variety of shapes in political science and legal scholarship. The common grounds and maybe the core object of concern is an inquietude arising from the fact that “globalization or trade opening creates groups of uncompensated “losers”, [and then] its *alleged contributions* [emphasis added] to welfare may be challenged on normative grounds”.<sup>53</sup>

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<sup>50</sup> GATT, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (Marrakesh, 14 April 1994), 33 I.L.M. 1125 (1994) [The Marrakesh Agreement]. Essentially, the WTO is a place where member governments go, to try to sort out the trade problems they face with each other. The first step is to talk. The WTO was born out of negotiations, and everything the WTO does is the result of negotiations. The bulk of the WTO's current work comes from the 1986-94 negotiations called the Uruguay Round and earlier negotiations under the General Agreement on Tariffs and Trade (GATT). The WTO is currently the host to new negotiations, under the “Doha Development Agenda” launched in 2001. Where countries have faced trade barriers and wanted them lowered, the negotiations have helped to liberalize trade. Further information on the WTO is available online: World Trade Organization <<http://www.wto.int>>.

<sup>51</sup> See generally Bieler and Morton, *supra* note 29.

<sup>52</sup> I make particular reference to Head, *supra* note 25.

<sup>53</sup> See generally Kapstein, *supra* note 49 at 248.

In Gramscian terms, *hegemony* in this regard arises from the recognition that the international system has incorporated those “alleged contribution” of liberalism to the current international law. As previously mentioned, the premise has been that the dynamics of free trade is to be incorporated or taken into account by all globally agreed instruments. These ones, in turn, should also be protected from the “threats” posed by the protection of other values such as human health and a sound environment.

Current discussions about the tensions involving North and South have focused on the fact that the international system has privileged the needs of developed nations instead of other concerns such as poverty alleviation and health, most of which typically relevant for the developing world. It arises as a form of “counter-hegemony”, given its clear relation with Gramsci’s arguments on the cultural and intellectual engines of domination. The bottom line is that developed and developing nations struggle to coexist in the international arena. Equality of states remains as a theoretical corollary of international law, whose challenge is more than ever to accommodate different perception and needs.

This struggle is neither new nor it is likely to be easily solved in the foreseen future. As noted by Mickelson,<sup>54</sup> international lawyers, as important stakeholders in the North-South discussion, still have to follow a long way until they are able to understand the real meaning behind this issue. Gramsci, in turn, would say that this lack of

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<sup>54</sup> See generally Karin Mickelson, “South, North, International Environmental Law, and International Environmental Lawyers” (2000) 11 *Yearbook of International Environmental Law*. Mickelson states that “international environmental law *as a discipline* [emphasis in original] has failed to respond to Third World concerns in a meaningful fashion [Mickelson].



understanding does not happen by chance. Instead, it reflects hegemony, the “mechanism of rationalization” of intellectuals.<sup>55</sup>

Indeed, the dimension of the problems between North and South is far more complex than one can imagine.<sup>56</sup> Some say that it is a new disguised way by which the South claims more financial assistance from the North. In treaties, the recognition of differences between North and South has taken concrete form through the principle of *common but differentiated responsibilities*.

The discussion of the North-South dimension of health – my major subject of concern - shows that the multilateral system still struggles to understand that protecting and promoting health will result in benefits for the world as a whole. The opposite direction, in which limited attention is given to pursuing Fidler’s “global public good of health”<sup>57</sup> will ultimately affect North and South.

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<sup>55</sup> See generally Forgacs, *supra* note 19.

<sup>56</sup> See also Lawrence E Susskind, *Environmental Diplomacy: negotiating more effective global agreements* (New York: Oxford University Press, 1994) [Susskind]. In chapter 2 - “The Weaknesses of the Existing Environmental Treaty-Making System”, the author provides an interesting set of categories for classifying different debates regarding the success of international environmental negotiations. The first is between *pragmatism* (environmentalists this settings almost any effort, no matter how modest, is a important step in the right direction) and *idealists* (“they worry about treaties that sound good but yield few tangible improvements in environmental quality” - at 12-13). The second debate pits *optimist* versus *pessimists* (they are diametrically opposed on both the prospects and the range of global agreements that are possible). The third is between *reformers* and *conservatives* (they disagree about the desirability of restructuring the United Nations and the system of multilateral institutions that has evolved since the mid-1949s.). The author also discusses the North-South conflict and the “injustice of cultural hegemony [that] (...) under girds the development assistance and technology transfer debates. The South wants the North to acknowledge the unfairness of this indirect form of domination. These debates mask the real source of conflict, which is a fundamental difference in how the nations of the North and the South think about progress” (at 19).

<sup>57</sup> David P. Fidler, “International Law” in Richard D. Smith *et al.*, *Global public goods for health: Health economic and public health perspectives* (Oxford; New York: Oxford University Press, 2003) 177-195 [Fidler].

In the chapters that follows I will draw on the notions of *hegemony*, *superstructure* and *caesarism* as they are proposed by Gramsci. I will relate these concepts to demonstrate how the concept of health has been treated by the disciplines of International Environmental Law and Sustainable Development Law.

As I mentioned earlier in this chapter, my intention is to illustrate how “misunderstandings” are created and reproduced as a subtle phenomenon.<sup>58</sup> A phenomenon that has been addressed in a number of different ways and has carried different labels in the academic world. The one that enables a “dominant set of institutions and principles”<sup>59</sup> to perpetuate its power and to dominate the rest: hegemony Gramsci-style.

In an attempt to show where the problem begins I start *Chapter Two* with the introduction of the “concept of health”. By doing that, I intend to: (i) clarify the meaning of the term, and (ii) establish its relation with the notion of “environment” and “sustainable development”. My idea is that the boundaries among these concepts are clearly defined, so that it is easier to identify later on *what* is indeed being manipulated.

After setting these conceptual foundations, I articulate in *Chapter Three* the idea of ‘hegemony Gramsci-style’, showing *where* the manipulation of “the concept of health” is currently happening in the IEL and ISDL. The negotiations of the following multilateral instruments are then discussed: (i) the “Basel Convention” (transboundary

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<sup>58</sup> See generally Litowitz, *supra* note 9.

<sup>59</sup> *Ibid.* at 541.

movement of hazardous waste); (ii) the “Rotterdam Convention” (hazardous chemicals); (iii) the “Rio Declaration”, and (iv) the “Johannesburg Declaration”.

Finally, I complete this work in *Chapter Four*, when I draw on my conclusions and try to articulate alternatives for the issue of *hegemony* Gramsci-style.

## CHAPTER TWO

### HEALTH, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: CONCEPTS AND INTERSECTIONS

#### Introduction

The main objective of this chapter is to introduce the “concept of health” and some of its nuances. By doing so, I intend: (i) to show the range of possible approaches to and definitions of the term, and; (ii) to demonstrate how “health” relates to the notions of “environment” and “sustainable development”. Clarifying *what* each of these terms mean, as well as *how* they are interconnected is crucial for understanding *where* domination and hegemony appear when health is negotiated in the real world.

As a complex term with several connotations, the “concept of health” has the ability to encompass a significant range of different elements and ideas. For this reason alone, it is possible that in the international arena one concept or another is chosen among several others and adopted by policy-makers and legislators, according to their political will and orientation. This flexibility has influenced health-specific policies all over the world in different periods. If at one point the concept can reflect the values of a welfare state, for instance, in another moment it can entail a whole different set of elements (e.g., the concept as proclaimed in a neo-liberal reality). It has determined what policies cover, the responsibilities of governments in this field, as well as the role played by care providers and the general population in pursuing health. The aftermath is that this lack of a single and all-encompassing “concept of health” enables the concept to be articulated in

several ways. Taken separately, each of them reflects a set of different values, depending on the context in which they arise.

In the legal realm, however, this flexibility can lead to unexpected and undesirable situations. Lack of precision allows the rise of different interpretations, resulting in serious legal consequences. Substantive rights are difficult to define as well as to apply to concrete cases. Vagueness also prevents the applicability of legal provisions, since it makes it difficult to identify what should be enforced. As opposed to other areas such as policy, flexibility in law has the ability to result in procedural obstacles that make it virtually impossible to seek redress, among other problems. In the international arena, where hundreds of treaties are negotiated every year, flexibility has resulted in the creation of multi-tier system, with lack of a harmonious and systematic approach. The practical result is that the “concept of health” has included the notion of “anti-health” when health is translated into procedures to be applied in the real world. The sections that follow introduce this conceptual challenge.

### **The Universe of Health**

Just like most people living in the Western hemisphere in the 21<sup>st</sup> century, it is very likely that we have an intuitive notion about the meaning of terms such as *health* and *public health*. If suddenly asked on the street what we think about these concepts, it appears that at least two different ideas would prevail. First, one directly associated with the image of a sound and active person, an optimistic perception associating health with the lack of illnesses. Second, it is very likely that we came up with the idea of a stereotypical doctor beside a convalescent patient lying in bed with a thermometer in his

or her mouth. A variation of this second idea, as a matter of fact, would be the image of a hospital with long line-ups of patients anxiously waiting to be examined by the same stereotypical doctor, usually dressed in white.

The difference between these two ideas and their variations is that the former perceive health as an *individual* value, whereas the variation brings out a certain notion of *collectiveness*. One aspect is common to the second and its variant idea: health is deeply associated with the notion of healing abnormalities in the body, usually expressed by signs and physical symptoms. This is a common notion of health in the Western world, which has been often referred to as the *biomedical* or *traditional biomedicine* perception of health. An example of this notion of health is illustrated by Armstrong, when he compares the values commonly pursued by the traditional medicine *vis-a-vis* other approaches to healing body and mind in a more holistic way. In his words, “[b]iomedicine continues to hold out hope that eventually psychiatric disorders will be explained in terms of cerebral pathological lesions”<sup>60</sup> (rather than through the recognition of other non-medical possibilities such as psychology or life-coaching).<sup>61</sup>

A much harder task than just having an abstract idea of health, though, is to precisely define it in such a way that it includes a number of other values - such as *wellbeing* and *human development*, and at the same time remains meaningful and applicable in real life. In fact, this has been one of the challenges faced by scholars and public health practitioners all over the world, not only to come up with a single definition

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<sup>60</sup> David, Armstrong, *Outline of Sociology as applied to Medicine*, 5th ed. (London: Butterworth Heinemann, 2003) at 1.

<sup>61</sup> See also Anne-Marie Barry & Chris Yuill, *Understanding Health: A Sociological Introduction* (London: Sage Publications, 2002) 40-53 [Barry and Yuill].

of health *per se*, but rather as a necessary step towards planning, setting policies, and allocating financial resources in this fascinating field.

At the dawn of the 21<sup>st</sup> century, however, little success has been made in establishing a global and uncontested concept either for health or public health. In the contrary, different actors have been able to come up with a wide range of possible ideas about the nature and the scope of these two entities. As a result, what was considered in the past to be the universe of health has become rather a very complex galaxy, approached and interpreted in a number of different ways. If on one hand health can be defined as a very well-defined and limited set of procedures, as proposed by those defending the traditional biomedical notion of health, on the other it can be articulated as a broader philosophical concept, under which other concepts such as *human rights*, *equity* and *poverty* can be also discussed.<sup>62</sup> This dichotomy takes an even more outstanding dimension if other variables associated with the notion of collectiveness are taken into consideration and the same discussion is applied to “the concept of public health”.

Indeed, as noted by Baggott, a definition for public health can be approached in different forms. It can reflect *concurrent ideological viewpoints* – health as perceived by neoliberals, social democrats or a socialist government, for example. From a historical perspective, the concept can vary as different governmental policies are adopted. Depending on external trends or pressures, the “concept of health” adopted by a particular country can be tailored in order to become more or less encompassing. In this case, conceptual flexibility can be associated with the need to set limits for financial

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<sup>62</sup> See generally Mark A. Rothstein, “Public Health Law, Society, and Ethics: Rethinking the Meaning of Public Health” (2002) 30 J.L. Med. & Ethics 144 [Rothstein].

allocation to fund public health expenditures. In the real world, the conceptual range surrounding the “concept of health” and what it should or not encompass can be used, for example, to justify why funds are to be directed to building a new bridge or investing in telecommunication rather than enhancing preventive measures in health.

Other notions of health try to find exclusive support in what *technical and scientific expertise* define as being public health.<sup>63</sup> A *utilitarian* view over this multitude of possible definitions, on the other hand, assumes that each notion is usually drawn and proposed by their defenders in order to justify and serve to particular purposes or interests. In particular, this has been the approach adopted by the international system when it tries to build on the interconnections involving the concepts of “health”, “environment” and “sustainable development”. Observed in the perspective of North-South, the utilitarian view of health can be used to show conflicts within the international law when it comes to pursuing an effective and global notion of health.<sup>64</sup>

Taken as a value to be pursued and guaranteed for all individuals and societies, health can also be raised to the level of a *fundamental human right*.<sup>65</sup> In this perspective, it is a natural entitlement inherent to humankind. For this reason, no plausible argument

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<sup>63</sup> Rob Baggott, *Public Health: Policy and Politics* (Houndmills, G.B.: MacMillan Press, 2000) at 1-14 [Baggott].

<sup>64</sup> See generally, Obijiofor Aginam, “Global Village, Divided World: South-North Gap and Global Health Challenges at Century’s Dawn” (2000) 7 *Ind. J. Global Leg. Stud.* 603 (Lexis) [Aginam].

<sup>65</sup> Society for International Development, “Declaration of Alma-Ata International Conference on Primary Health Care” 2004 *Development* 47-2. The Declaration is available online: WHO <[http://www.who.dk/AboutWHO/Policy/20010827\\_1](http://www.who.dk/AboutWHO/Policy/20010827_1)> [Alma-Ata Declaration]. The Alma-Ata Declaration was negotiated and adopted in 1978 under the auspices of the WHO. Article I sets forth the following: “The Conference strongly reaffirms that health, which is a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity, is a *fundamental human right* [emphasis added] and that the attainment of the highest possible level of health is a most important world-wide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector”.



could be built as a means to justify the adoption of measures to prevent individuals and societies from pursuing it.<sup>66</sup> But even if taken as a human right, perhaps one of the broadest perceptions for the term, constraints would remain as to defining it in the concrete world. This is because a significant effort would have to be made in order to set the limits of such right and to establish what indeed should be pursued. In other words, what would it include? Is it to be able to have access to originally protected medical technology and drugs thus defeating other types of rights? Could an alleged "human right to health" be claimed to be hierarchically more important than the right to protect intellectual property?

These questions are difficult to answer. The only certainty about this particular notion of health is that defining its universe would be a complex task, mostly based on *moral* and *ethical justifications*. In this case, the "concept of health" would have to rely on subjective elements, rather than on scientific evidences or easily measurable parameters. Being broader in scope, "health as a human right" would be unlikely to be contextualized in the same way as the *biomedical* perception. This is because it reflects much more than the binomial health-lack of disease (and measurable symptoms) typical of the latter. Determining its limits has become an impressive task.<sup>67</sup> The practical effect of this constraint, e.g. to delineate the elements which constitute *health as a human right*, would result in a never-ending challenge to translate this notion into reality. Moreover, without this effort it would be impossible to know what exactly should be enforced or not

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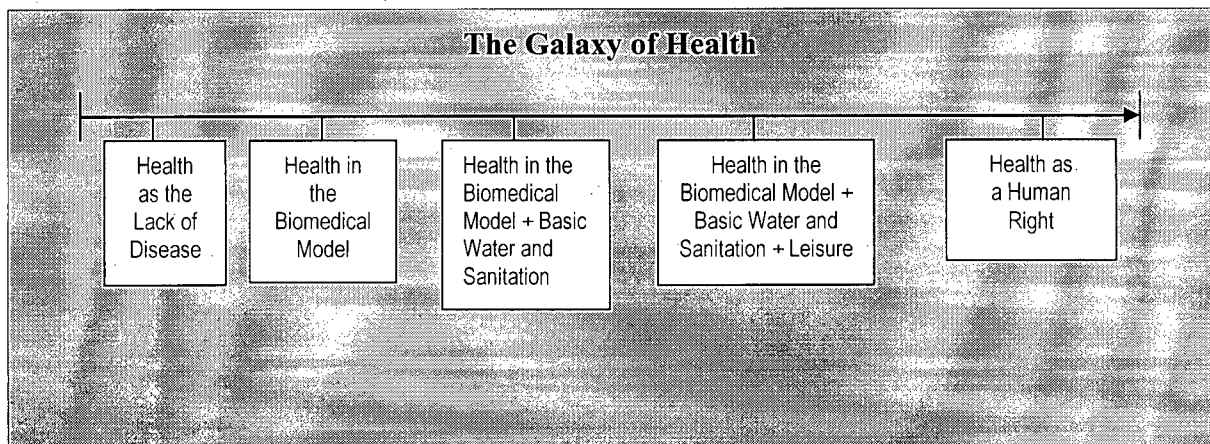
<sup>66</sup> See generally Paul Farmer & Nicole Gastineau, "Legal and Human Rights Intervention for Health: Rethinking Health and Human Rights: Time for a Paradigm Shift" (2002) 30 *J.L. Med & Ethics* 655.

<sup>67</sup> I refer to the effort of civil society, through NGOs, for example to put forward the idea that the South should be waived from paying expensive royalties to the pharmaceutical industry *vis a vis* the protection of intellectual property rights, namely patents.

in the pursuit for health. The rights and duties of each individual and societies they belong to would be significantly nebulous and hard to be translated into real and measurable benefits. This is the reason why it would be unlikely that a single and complete “concept of health” as a *human health* is globally agreed and adopted in legally binding treaties.<sup>68</sup>

It is clear therefore that the complex galaxy to which the “concept of health” belongs includes concepts ranging from the most simplistic idea of health, to the *biomedical* notion and *health as a human right*. The number of possible concepts ranges, as varies the possibilities of adoption from a very narrow to a broader universe of values and elements defined as being inherent to health. If the galaxy of possible definitions for health could be linearly articulated, it would be illustrated as follows:

Figure 1: Linear Representation of Possible Definitions for Health



<sup>68</sup> Notwithstanding this constraint, the 1946 constitution of the WHO, highlights a set of political intentions regarding health. Article I reads as follows: “(..) [T]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”. The document is available online: WHO <[http://policy.who.int/cgi-bin/om\\_isapi.dll?hitsperheading=on&infobase=basicdoc&jump=Constitution&softpage=Document42#JUMPDEST\\_Constitution](http://policy.who.int/cgi-bin/om_isapi.dll?hitsperheading=on&infobase=basicdoc&jump=Constitution&softpage=Document42#JUMPDEST_Constitution)>

A consequence of this model is that, if taken separately, it would be difficult to deem any of these possible “concepts of health” as right or wrong. In the contrary, in order to make such assumption, other parameters would have to be taken into consideration. The ideological context in which one or another is chosen to serve as the paradigm of a particular political strategy would have then to be evaluated. A more detailed look at the possibilities involving the “concepts of health” as illustrated in Figure 1 can be useful to clarify this point.

As noted by Rothstein<sup>69</sup>, there is currently a growing trend to incorporate a number of external factors to the definition of public health. Elements or health determinants such as war, violence, poverty, economic development, income distribution, use of natural resources, diet, lifestyle, health-care infrastructure, overpopulation and civil rights, just to mention a few, have been included by some commentators as part of a more encompassing inventory of public health concerns. According to this model, the more elements or determinants are included, the broader the “concept of health” becomes. Applying Rothstein’s concept to Figure 1, it noteworthy that his critiques refers to the pressure that has been put by certain groups to enlarge the “concept of health”. In this sense, a broader concept would incorporate a significant share of the line located

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<sup>69</sup> Rothstein, *supra* note 62 at 1. The author argues that: “[T]he human rights definition of public health also raises practical problems...[W]hat political system or public health budget will support far-ranging interventions by those charged with protecting public health? What seemingly quixotic activities have on the ability of public health professionals to combat traditional public health problems, such as infectious diseases and poor sanitation, as well as new problems such as bioterrorism?...[I]ndividuals trained in public health should not give up the noble struggle to ensure that every person has a minimum standard of living to support a healthy life. But this battle must be fought together with people from all disciplines and all walks of life and without using self-defeating strategy of annexing human rights into the public health domain.”

along the right-hand side of the point where the notion of health is solely that adopted by the traditional biomedical model, e.g. the one advocated by Rothstein. Following Rothstein's arguments, those against the consolidation of a wider definition for health (those for whom the concept of health should be situated somewhere on the left-hand side or at the point where health is adopted in the biomedical model) argue that the inclusion of external elements among the responsibilities of health would create an excessive burden that "does little if anything to eliminate the problems of poor health".<sup>70</sup>

In contrast, commentators advocating for a broader definition of health would be able to counter Rothstein's argument by using his own examples. As a matter of fact, Rothstein includes bioterrorism, for example, as a legitimate concern for public health. However, considering the almost open-ended universe of elements that could be incorporate (or not) to the "concept of health" along the line in Figure 1, one could argue that bioterrorism itself is irrelevant for health. One could argue that other elements or determinants, such as access to safe and affordable medicines or education, among others, are more important to health and thus should be incorporated to the inventory of health concerns.

At this point, it is important to note that a choice to incorporate more or fewer elements into the concept, rather than imposing them in a static and limited way, is based on *political, ideological* or *ethical* reasons. New factors or determinants of health have been incorporated over time to the discipline of public health not because science alone has determined a causal relationship between them and an expected health condition, but

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<sup>70</sup> Rothstein, *supra* note 62 at 2.

mainly because a *political decision*<sup>71</sup> has been made to incorporate them as part of the universe of health concerns. It is also true that several variables, ethical decisions and power relations have a significant share of responsibility in influencing these decisions, either at local, national or international levels. The environmental justice movement started in the 1970s is an example of how *decision-making* operates. When deciding where and how urban and industrial wastes were to be disposed within a particular jurisdiction, governments struggled in their attempt to enact acceptable by-laws on the theme. In the United States, at one point disadvantaged communities both urban and rural claimed that they were more likely to suffer from waste dumping than more fortunate neighbors. They claimed that governmental rules and regulations governing the relationship between health and dumping of hazardous wastes should incorporate *social parameters* and that they were related to *ethical decisions*.<sup>72</sup>

At the academic and professional level the discussion about the universe of health has not been less controversial. The rejection of *public health* as a broader multi-professional discipline, for example, has been emphatically criticized by some

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<sup>71</sup> See also Douglas E. MacLean, "Comparing Values in Environmental Policies: Moral Issues and Moral Arguments" (Washington, D.C.: National Academy Press, 1990) at 83-106 [MacLean].

<sup>72</sup> See generally Bryant, *supra* note 13. The author differentiates the concepts of *environmental racism*, *environmental equity* and *environmental justice*. According the main difference among these terms is the fact that "Environmental Justice is served when people can realize their highest potential without experiencing 'isms' (such as racism). Environmental justice is supported by decent paying and safe jobs, quality schools and recreation, decent housing and adequate health care, democratic decision making and personal empowerment, and communities free of violence, drugs, and poverty" (at 4). Bryant places the history of environmental justice in the context of the civil and social rights movement in the US after the decade of 1960s. He also presents the main conferences and research findings and debates on the issue during the 1990s. The legislative dimension of environmental justice is discussed. He concludes his historical approach by presenting the concept of "climate justice", which started being introduced to the international arena through the work of activists during UN meetings. As a consequence of climate injustice, he states that "[t]he poor will also have to pay a higher percentage of their income for the basics in life. The poor will pay a higher percentage of their income on health care as tropical diseases move farther North. If such migration across geopolitical boundaries occurs, it will cause regional conflicts and world disequilibrium" (at 18).

commentators. When it comes to addressing who should or should not be allowed to work in that field, this debate flows directly from the academic arena to the reality of professional licensing and accrediting. On one hand, non-medical public health practitioners have been considered “outsiders” of the domain of the discipline. This perception has also encountered some resistance, since it gives rise to the recognition that it is deeply based on arguments articulated to support professional protectionism. In this sense, limiting the universe of public health would ultimately benefit a restricted group of medical professionals, e.g. physicians, nurses and a few others. It would not matter if such limitation results in undesirable consequences to the ability of getting deeper into other causes of ill health going beyond the traditional boundaries of biomedical or traditional health.

On the other hand, progressive scholars and militants in the field advocate that public health professionals and other key actors cannot be exclusively formed by those whose education has been only rooted in biomedical sciences. Instead, they claim that that practice should be exercised by a wider range of professionals, such as health economists, health lawyers, social assistants, community leaders, just to mention a few.<sup>73</sup> As a health lawyer, I support the argument that public health must be addressed on a multidisciplinary basis. As a value, it is more efficiently pursued through a collaborative approach of different professionals, each contributing their own expertise.

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<sup>73</sup> See generally Marie-Claire C. Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, & Prospects* (Oxford; New York: Oxford University Press, 2004) at 325 [Segger and Khalfan].

In a historic viewpoint, the matters of concern for public health have changed in a dynamic way, either due to empirical observation<sup>74</sup>, scientific and technological evolution or as a result of different political and ideological forces imposed overtime at national and international level.<sup>75</sup> Maybe as a reaction to the notion of health based on a purely biomedical model centered on healing illnesses only, the discipline of public health has incorporated other responsibilities over the second half of the 20<sup>th</sup> century. Concerns with human environment, nutrition, food safety, for example, have taken part in the framework of a multidisciplinary approach to the discipline.

### **The World Health Organization: A philosophical “concept of health”**

At an institutional level, this broader notion has been adopted by several countries, particularly after the Second World War. The World Health Organization (WHO), the multilateral organization where concerns in this field have been historically discussed, agreed upon, and recommendations have been made, has contributed to these efforts. As Lippmann<sup>76</sup> points out, the idea of health adopted by the WHO is perhaps the most widely accepted today, regardless of its idealistic scope, and despite the fact that this acceptance may not have been translated into action. In the eyes of the Organization, health is a state of complete physical, mental, and social wellbeing. By adopting this “concept of health”, the WHO has no longer restricted the idea of public health to the sole

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<sup>74</sup> Judy Orme *et al.*, *Public Health for the 21st Century: New perspectives on policy participation and practice* (Maidenhead, England: Open University Press, 2003) at 6 [Orme].

<sup>75</sup> I refer to a number of different approach to public health which have been adopted under the protection of the World Health Organization (WHO), regarding a wide range of health-related concerns, such as tobacco control, mother and infant health, occupational health, emerging and reemerging diseases, among other. More information on topics being considered under the notion of public health is available online: World Health Organization <<http://www.who.int/topics/en/>>.

<sup>76</sup> Morton Lippmann *et al.*, *Environmental Health Science: Recognition, Evaluation, and Control of Chemical and Physical Health Hazards* (New York: Oxford University Press, 2003) at 48 [Lippmann].

prediction of disease outbreaks or epidemics through the assessment of mortality and morbidity rates.<sup>77</sup> By including the importance of “social wellbeing”, for the WHO emphasized the relation between sound health and people’s interaction within the environment in which they live. It was within this spirit that the world community, through the leadership of the WHO, negotiated and agreed on the *Declaration of Alma-Ata International Conference on Primary Health Care*,<sup>78</sup> whose articles I and III read as follows:

I - The Conference strongly reaffirms that health, which is a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity, is a fundamental human right and that the attainment of the highest possible level of health is a most important world-wide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector. (..)

III – (..) The promotion and protection of the health of the people is essential to sustained economic and social development and contributes to a better quality of life and to world peace.

“The concept of health” proclaimed at the international Conference consolidated two major characteristics and challenges for attaining “Health for All” in the world. First, in order to achieve better levels of health, it is necessary that different sectors of governmental policies and different fields of technical and professional knowledge are involved. This reinforces the idea previously discussed that health, particularly its collective dimension (e.g. public health) is to be approached in a multi-disciplinary way,

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<sup>77</sup> In epidemiology, morbidity rate is a ratio that measures the incidence and prevalence of a specific disease within the framework of a given time period (typically, but not necessarily, one year). It compares the number of people who are afflicted with that disease per unit of population and it is usually expressed as a number of people afflicted per 1,000, 10,000, or 100,000 people; Mortality rate is defined as the annual number of deaths per 1000 people. Further information on epidemiologic terms can be found at the United States Centers for Disease Control and Prevention, online: <[http://www.cdc.gov/reproductivehealth/epi\\_gloss2.htm](http://www.cdc.gov/reproductivehealth/epi_gloss2.htm) - M>.

<sup>78</sup> Alma-Ata Declaration, *supra* note 65.



therefore in the opposite direction proclaimed by Rothstein.<sup>79</sup> Second, that rather than finding solutions for ill health, the best paradigm is to rely on a *preventive model*, through health protection and promotion. Simplistic and naïve as it might seem, this shift in paradigm as agreed upon in Alma-Ata in 1978 represents a milestone in the history of public health.

Regardless of how far the “concept of health” ranges along the line in Figure I above, either encompassing the physico-chemical, biomedical or social dimensions of health, four elements should provide the basis for pursuing better health after Alma-Ata. They are: (i) the *promotion* of healthy practices, (ii) the *prevention* of risks; (iii) the *protection* of health, and (iv) the *treatment* of diseases or injuries.

Baggott<sup>80</sup>, when quoting the notion of public health brought by Smith and Jacobson, discusses these elements and reinforces that the “concept of health” would involve “[t]he promotion of health, the prevention of diseases, the treatment of illness, the care of those who are disabled, and the continuous development of the technical and social means for the pursuit of these objectives.”<sup>81</sup> Each of these elements will collectively contribute to the achievement of acceptable levels of health, to be pursued by handling a variety of different tools. The limits of each one in regard to their shared participation in this task will vary according to the political and ideological inclination and the subsequent “concept of health” adopted, as articulated before. The consequences of adopting more or less of one or another of these elements will have substantial impact

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<sup>79</sup> See generally Rothstein, *supra* note 62.

<sup>80</sup> Baggott, *supra* note 63.

<sup>81</sup> *Ibid.* at 1.

on the notion of "human sustainability" that I articulate later in this chapter. As a matter of fact, this is where most of my concerns are situated, specially in regard to how the international system has handled these elements in its effort to formulate legal solution in the environment and sustainable development fields. In Chapter Three ahead, I will demonstrate how the Alma-Ata elements have been addressed in some of the key conventions and declarations multilaterally agreed.

### **Global Health: Towards a new "concept of health"**

A preliminary review of the current scholarship about international health may lead to an assumption of a simplistic idea that the solution for a series of problems challenging the global community would be solved by the adjustment of the current system itself. Despite the recognition that such changes need to be made, particularly in regard to the need for modernizing the current legal instruments in this realm, further issues will have to be given attention by the international community. This is due to the fact that constraints usually attributed to the discipline of International Health Law, for example, as an independent field of legal scholarship, are to a great extent constraints primarily faced by the discipline of Public International Law as a whole.<sup>82</sup> Several aspects currently discussed by scholars working in this field such as *compliance*, *enforcement*, *liability* and *redress*, just to mention a few, are not concerns that challenge international health lawyers exclusively, but rather the vast majority of internationalists.

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<sup>82</sup> I argue that the current international health law suffers from two major conceptual constraints that have been pointed out as major flaws of Public International Law. First, the possibility of individual states of not adopting certain provisions multilaterally negotiated due to legal solutions such as "reservation", usually adopted based on the notion of states' sovereignty. Second, the lack of effective enforcement mechanisms without which even the most perfect legal provision would remain effective in an abstract world, being subject to a number of external, discretionary and arbitrary influences.

Bearing these constraints in mind, together with the need to prevent all kinds of diseases and epidemics, the concept of *Global Health* arises. It has been currently articulated as a differentiated theory that would provide the rationale to overcome the original problem inherited from international law. Other attempts have been made to justify the *sui generis* nature of health and how legal solutions should be sought. As a result of these experiences, scholars came up with the notion of “international health” and “international health law”. Forrest, for example, articulates that the discipline’s concern with “disease-causing microorganisms” is what differentiates it from others areas of international legal scholarship, such as that concerned with the environment. As a concept, international health alone provided the required rationale for the creation of the WHO in the first half of last century and the few multilateral treaties it produced. Its basic justification was found in the popular saying (at least among public health professionals) that “disease vectors and hosts do not respect borders”.

Legal scholars have referred to two examples of legal instruments whose negotiations were built on this concept: (i) the *WHO Framework Convention on Tobacco Control* (FCTC)<sup>83</sup> and on the current review process of the *International Health Regulation* (IHR)<sup>84</sup>, the only binding international agreement multilaterally negotiated to address public health concerns associated with the spread of infectious diseases.<sup>85</sup>

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<sup>83</sup> The FCTC requires countries to impose restrictions on tobacco advertising, sponsorship and promotion; establish new packaging and labeling of tobacco products; establish clean indoor air controls; and strengthen legislation to clamp down on illicit traffic of tobacco, among other measures. More information on the FCTC is available online: WHO <<http://www.who.int/features/2003/08/en/>>.

<sup>84</sup> According to the WHO, “the purpose of the International Health Regulations is to ensure the maximum security against the international spread of diseases with minimum interference with world traffic. Its origins date back to the mid-19th century when cholera epidemics overran Europe between 1830 and 1847. These epidemics were catalysts for intensive infectious disease diplomacy and multilateral cooperation in public health, starting with the first International Sanitary Conference in

The new attribute that differentiates the old “concept of international health” from the current notion of Global Health is the focus of the latter on human beings rather than on the logical focus on diseases, regardless of gender, ethnicity or nationality. The need of individual states to seek allies as a means to pursue the “global public good of health”, as pertinently proposed by Fidler,<sup>86</sup> is what differentiates the nature of this branch of international law.

As Fidler assents, the rationale for the achievements of a “global public good of health” (GPGH) relies on the potential role that has not yet been played by the previous international health. It evolves with the objective to consolidate Alma-Ata’s element of health protection and promotion in a global scale. He argues that that discipline has historically faced serious limitations and thus he advocates for an enhanced understanding and application of International Health Law as a key tool to be handled not only by the *international* but *global* community<sup>87</sup>, in order to promote life for all.

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Paris in 1851. Between 1851 and the end of the century, eight conventions on the spread of infectious diseases across national boundaries were negotiated. The beginning of the 20th century saw multilateral institutions established to enforce these conventions, including the precursor of the present Pan American Health Organization (PAHO). In 1948, the WHO constitution came into force and in 1951 WHO Member States adopted the International Sanitary Regulations, which were renamed the International Health Regulations in 1969. The regulations were modified in 1973 and 1981.” The IHR were originally intended to help monitor and control six serious infectious diseases: cholera, plague, yellow fever, smallpox, relapsing fever and typhus. Until May 2005, only cholera, plague and yellow fever were notifiable diseases. In May 2005, a revised version of the IHR was adopted by the UN. It is expected to enter into force in 2007. More information about the IHR and its revision process is available online: WHO <<http://www.who.int/csr/ihr/en/>>.

<sup>85</sup> See generally Johan Giesecke, “International health regulations and epidemic control” in Richard D. Smith *et al.*, *Global public goods for health: Health economic and public health perspectives* (Oxford; New York: Oxford University Press, 2003) 197-211 [Giesecke].

<sup>86</sup> Fidler, *supra* note 57.

<sup>87</sup> *Ibid.* at 181. Fidler makes a clear distinction between the notion of international community and global community. The former would hold individual states as the exclusive relevant actor “in the use of international law in the production of GPGs [global public goods]. The latter, which is considered by Fidler to be the current trend in the realm of treaty-making, broadens the spectrum of the former in order to include the participation of other non-states actors the “production and implementation processes” related to the attainment of public good, including that of public health.

Practical and normative aspects are highlighted by that author when he articulates a GPGH theory, which also recognizes that “[w]hether at the national or international level, public goods require governmental intervention because private actors have insufficient incentives or resources to produce the goods”.<sup>88</sup> In other words, even advocating for the recognition of the positive outcomes pertaining the involvement of multi-stakeholders in the process of treaty-making in international health, Fidler also acknowledges that national governments remain with the main task to promote the “global public good”, as well as “global public goods for health”, using his own words.<sup>89</sup>

In regard to the FCTC and the alleged positive contributions it has brought to the consolidation of a modern dimension for International Health Law, Fidler recognizes that the protection of human health “is an objective that states, IGOs [Inter-governmental Organizations] and NGOs have embedded in many areas of international law”.<sup>90</sup> And he continues in order to state that “[a] significant proportion of *international environmental law* exists, for example, *to protect human health*” [emphasis added].<sup>91</sup>

As for the IHR, it has been the object of study of a number of commentators, who have pointed out the instrument’s own weaknesses and the timid approach by WHO in addressing health concerns through the enactment of international treaties. Fidler argues

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<sup>88</sup> *Ibid.* at 181.

<sup>89</sup> See generally Fidler, *supra* note 57.

<sup>90</sup> Fidler, *supra* note 57 at 184.

<sup>91</sup> *Ibid.* Fidler also points out that in the 1990s, the “WHO began to show more awareness of other international legal regimes, such as international trade law and the World Trade Organization (WTO), that affect its public health mission.” (at 184). Fidler’s propositions corroborates the core idea that has been articulated in this thesis, at least in regard to the recognition that the multilateral instruments previously discussed indeed reflect concerns not only with “environment in strict sense”, but also health.

that there has been a certain lack of creativity by scholars that has not been able to overcome the debate in which international law is often deemed not enforceable, as opposed to domestic law. If Fidler's assumption could be expanded in order to encompass the relation between enforcement and the powers attributed to the WHO to adopt treaties and binding regulations on any matter of international public health concern, the result would show that WHO has provided unsatisfactory legal solutions in this realm. As a reaction to this argument, a revised version of the IHR was adopted by the WHO World Health Assembly in May 2005. It expands the object of concern of the multilateral instrument and provides an outstanding opportunity for countries to enhance their co-operation ties in relevant scientific and technological fields. In this context, some scholars argue that in spite of the need to overcome the current limitations of "international health", other relevant procedural constraints associated with the multilateral bureaucracy must also be given proper attention.<sup>92</sup> In other words, they argue that global health can only be truly achieved if the current notion of health included other elements and if it was dealt with in a more harmonic way by the international community. The next two sections discuss two of these elements – environment and sustainable development, relating them with the notion of global health.

### **Health and Environment: Intersections and Misunderstandings**

Finding a consensual definition for "environment" is not a much easier task than coming across a concept for "health". As a matter of fact, there is no unanimously

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<sup>92</sup> See also Allyn L. Taylor, "Governing the Globalization of Public Health" (2004) 32 *J.L. Med. & Ethics* 500 at 2 [Taylor]. The author argues that "little scholarly consideration has been paid to how twenty-first century global health lawmaking should be managed from an international institutional basis".

accepted definition that includes all possible interactions of actors, values and elements in a single concept. History has shown that there have been several attempts to approach an all encompassing definition. Most of them resulted in concepts that were articulated to suit specific purposes in philosophical, political and legal debates. As a result, the term “environment” has been applied to a universe of different contexts.

In a more *strict sense*,<sup>93</sup> the concept has served, for instance, to define a particular geographical area or an ecosystem within which endangered species should be protected, air pollution controlled and so on.<sup>94</sup> In other cases, “environment” has been used to mobilize public opinion, with fairly strong elements of compassion and moral values. TV advertisements, campaigns and poster depicting the human cruelty over cute furry animals have been used for years by conservationists as effective tools to promote conservation worldwide. In a *broader sense*<sup>95</sup> though, the concept of environment expands in order to reach the object of study of other disciplines, such as economics,

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<sup>93</sup> For the purpose of this paper, the term “environment in strict sense” means the environment as perceived by the interaction of different ecosystems, fauna, flora, air, water, animal species; “environment in a broader sense”, on the other hand, is adopted in a way that it includes human beings as well as socioeconomic and cultural determinants, which may be the cause and/or effect of interaction of man kind with the “environment in strict sense”.

<sup>94</sup> See also Gordon J. MacDonald, “Environment: Evolution of a Concept” (2003) 12:2 Journal on Environment & Development 151 [MacDonald]. As noted by MacDonald, the “concept of environment” has gone through different stages. In the 1950s, it was deeply associated to *preservationism* rather than *environmentalism*, mainly because the American elite “favored preserving natural resources so the upper classes could enjoy them though hunting and fishing. Worries about the impact of the industrial pollution on health of workers, and nature were far from their thoughts” (at 152).

<sup>95</sup> See also Klaus Bosselmann & David Grinlinton, eds., *Environmental Law for a Sustainable Society*, Monograph Series vol 1. (New Zealand: The New Zealand Centre for Environmental Law, 2002) at 2 [Bosselmann and Grinlinton]. When articulating the predominance of a restrictive “concept of environment” in national and international law and politics, Bosselmann argues: [W]hy is it, then, that three decades after the discovery of its crucial importance to human existence the ‘environment’ is still at the periphery of law and policy ? The answer lies in a concept of the ‘environment’ that still dominates economic and political decision-making. The environment is largely perceived as an objective, static category (“natural resources”) that can be fully measured in scientific and economic terms. This perception merely reflects a specific view on the instrumental value of the environment.

sociology and law. In this case, besides Earth's natural resources themselves, "environment" interacts with other social values. It incorporates elements such as fairness and justice, distributional aspects of the environmental burden and the effects of poor environment on people's life quality and health. The term becomes more complex as it adds a number of sociological determinants to its universe of concern.<sup>96</sup>

According to the World Bank, one of the main active institutions of Bretton Woods, whose main challenge is to finance international development in poor countries, environment is defined as "[T]he complex set of physical, geographic, biological, social, cultural and political conditions that surround an individual or organism and that ultimately determines its form and nature of its survival".<sup>97</sup> As broad as it may be, this concept brings up important elements to the definitional problem. It incorporates even the simplest and most common aspects of our lives as part of that universe, making it a clear example of *environment in a broad sense*.

In the legal field, the problem of defining "environment" has challenged legislators, regulatory bodies and scholars. Divergent opinions arise everyday, as concrete solutions are required to be found in order to protect both categories of environment – strict and broad. The reason for this struggle relies on (i) the need to define the limits up

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<sup>96</sup> It is also interesting to note that this discussion about what environment really includes and its relation to the humankind goes back to time immemorial. Religious groups, for example, tend to perceive environment as it is described in the Bible. Activists in this field even advocate for the adoption of a Christian Environmental Ethic based on the words of the Genesis articulated with a number of strict moral principles. The notion of environment in this context is given a touch of magic and is represented by an uncontested assumption that "[I]n the beginning God created the heaven and the earth...[T]he sea is his, and he made it...[T]he earth is the Lord's, and the fullness thereof." Men and environment are therefore part of separate universes. As proposed by the doctrine, the former was given Earth as his "home", from which he was supposed to seek means to survive.

<sup>97</sup> International Bank for Reconstruction and Development, *Glossary*, online: The World Bank <<http://youthink.worldbank.org/glossary.php> - e>.



to which environmental policies should be guided and financial resources allocated, and (ii) the need to give shape and organize the rules and regulations that have been enacted nationally and internationally to tackle the universe of different environmental concerns. Defining a concept for "environment" then would go hand in hand with the practical exercise of environmental law, making it more coherent, systematic and fair. Some commentators advocate that addressing both aspects are crucial for making political and technical efforts effective. The problem of finding the right "concept of environment" persists and has been object of discussions in the academic and non-academic areas. Similarly to the struggle of defining "health", these attempts pose an extra challenge to lawyers and environmental policy-makers both at national and international level. Concepts such as *environmental justice* and scholarly discussions about the *North-South dimension of Environmental Law* are examples of contributions and reflections about what it really means to protect the "common good". Arising as alternatives approaches on which policies and legal arrangements could be based, these movements draw on the misunderstandings surrounding the concept of environment that has been put into practice by different social groups.

### **Health as a Value in Environmental Policies: Moving towards Environment in a Broader Sense**

As proposed by MacLean, the problem of defining a single notion of environment could be explained by a closer analysis of the problems in response to which different concepts arise. MacLean, when drawing on constraints associated with environmental policies, points out three kinds of problems: *political*, *technical* and problems involving *decision-making* in this field. The first relates to the notion that environmental law and policy are created not only to protect the environment, but also "(..) to protect political

interests".<sup>98</sup> The second is due to excessive emphasis given to decision-making based in science only (when a country's regulatory authority or the international community decide not to ban or to phase out a pesticide or any other chemical due to the lack of scientific evidence of its hazardous characteristics, for example). The third problem has to do with the rationale in which different elements or values are given priority or not in environmental policies. At this point in particular, MacLean refers to a persistent misunderstanding leading "policy makers [to] decide when [and where] to put more resources"<sup>99</sup> by measuring the benefit-cost of a number of different values. His critiques in this regard, however, reflect the old idea behind the popular saying according to which, there is no way to "compare oranges and apples".

These arguments can be applied to the notion of "environment in a broader sense" (which social values are part of). When "the concept of health" is not integrally incorporated to the "concept of environment" adopted in environmental law and policy, the reason for that can also rely on either or all the problems described by MacLean. Environmental policies and laws may be conducted in such a way that they reflect the "reasoning" about the "benefit-cost analysis" (often based on scientific evidences) of preventing health risks (either caused by the depletion in the ozone layer, waste disposal etc) to future generations *versus* prioritizing the economic development of the present generation. Benefits are weighed and compared. As a result, it is possible that a particular

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<sup>98</sup> MacLean, *supra* note 71 at 83. MacLean goes even farther in his arguments, and states that "[T]hose charged with the responsibility to protect the environment must follow procedures that were designed in part to protect political interests; they must fight off relentless pressure while remaining accountable to politicians; and they must enact policies with an eye to withstanding the litigation that will surely follow."

<sup>99</sup> See generally MacLean, *supra* note 71. The author explains that environmental decisions typically require the comparison of different benefits "(e.g., the preservation of human life, *health* [emphasis added], clean air and water, wilderness, endangered species, money, and consumer products)" (at 84).

environmental treaty, just to take an example falling into the international realm, includes the *preventive*, *protective* and *promotional* approach to the health behind it. It can also adopt some of them or completely neglect its relation with the theme. This same treaty can similarly favour trade, for example, instead of adopting restrictions based on alleged hazards that cannot be scientifically proven. It can be negotiated in a way that its concerns with health are not strong enough to justify the amount of money that the international community would be willing to spend (or would be interested in doing so) in order to protect the present or future generation.

MacLean also points out that seen as a matter of allocating priorities (third problem), the problem of privileging one approach over the other is that environmental protection and the protection of human health is based on a wrong assumption. Back to the old proverb of the oranges and apples, they are cannot be compared or evaluated on the basis of science and economics. How does one measure “the value of human life”?<sup>100</sup> Rather, decisions as to how much of people’s health and welfare should be protected and addressed cannot be even compared. Since they involve *moral* and *philosophical* dilemmas, the “methods of reasoning” about them cannot be that of science and economics, currently adopted by policy and lawmakers.

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<sup>100</sup> MacLean, *supra* note 71 at 85.

## Health as a Pillar of Human Sustainability

The currently predominant concept of sustainable development was popularized by the 1987 Brundtland Report.<sup>101</sup> The document is considered a landmark in the history of International Law. In spite of initial critiques,<sup>102</sup> it is currently cheered because it expanded previous definitions by merging two elements of concern, first, the need to protect the global environment and its natural resources (“environment in *strict sense*”),<sup>103</sup> secondly, the need to decrease the gap between rich and poor reflected in different economic realities and levels of technological development.

The evolution of the concept has followed a dynamic pattern, now incorporating elements of *social justice*, *economic development* and *environmental protection* – the so-called pillars of sustainable development. From the UN resolutions of 1962 and 1968 urging the multilateral community to address constraints strictly related to economic development and environmental protection to the 2002 World Summit on Sustainable

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<sup>101</sup> The Brundtland Report, *supra* note 1. According to the milestone report, sustainable development is: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.

<sup>102</sup> Bosselmann and Grilinton, *supra* note 1 at 84. As Bosselmann and Grilinton point out, the currently most accepted idea of sustainable development, with all its anthropocentric values incorporated, was highly criticized by environmentalists in the occasion of the Earth’s Summit in Rio, in 1992. The opponents to the binomial approach - men and environment, associated the proposed idea of sustainable development with the notion of *weak sustainability*, as opposed to *strong sustainability*, which was deeply connected with the idea of conservation of the global ecosystem.

<sup>103</sup> Segger and Khalfan, *supra* note 73. The first ideas of sustainable development were articulated within debates strictly related to environmental protection, usually associated with quantitative and qualitative parameters for the exploitation of the global “common goods”. As Segger and Khalfan suggest, this utilitarian and anthropocentric perception of the term was useful to promote conservation measures. They also recognize that “[t]he last twenty-five years have nevertheless witnessed the emergence of sustainable development as an important concept in global efforts to balance economic, social and environmental policies and laws.” (at 15).

Development, a wide range of elements and values have been incorporated to the term.<sup>104</sup> Poverty and hunger in the South and unsustainable patterns of consumption and production in the North are just a few examples of values that have been added to the current discussion about what “sustainable development” is all about.<sup>105</sup>

By 2005, the boundaries of “sustainable development” have been reasonably defined, constituting an independent universe of issues of scholarly debate and concern. As a political orientation, the concept has been included in governmental policies, as well as adopted by corporations as an important value to be pursued. Assessing the degree to which it has been incorporated into daily practices by governments and the private sector, though, has been a challenge. In the dawn of the 21<sup>st</sup> century, as a legal discipline, “sustainable development law” also struggles with the same old legal dilemmas, such as enforcement, liability and redress. As a social phenomenon, it has also gradually spread throughout society, particularly in the developed world, affecting consumers’ choice and inciting reactions in civil society. Being part of a privileged and better-educated minority, environmental groups in the North have succeeded in translating the concept into a tangible element of the real world. In the perspective of the South, efforts have been made by scholars and practitioners to promote the adoption of alternative notions of

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<sup>104</sup> See also Frederique Ferrand, “Le developpement soutenable est-il une notion de droit international public ?” in Michael Bothe & Peter H. Sand eds., *Environmental Policy: from regulation to economic instruments* (The Hague: Martinus Nijhoff, 2003) 245.

<sup>105</sup> J.B. Ruhl, “The seven degrees of relevance: why should real word environmental attorneys care now about sustainable development policy ?” (1998) 8 Duke Env L & Pol’y F 273. As a matter of fact, a variety of approaches and scholarly discussions have flourished from the Rio Earth Summit, as a means to translate the ideas brought to the worlds’ attention in 1992 into practical measures. One can depict from Ruhl that scholars acting in the environmental law field in 1998 were struggling to define the boundaries between the proposed concept of sustainable development and the disciplines of law. In his own words, the “[a]morphous, ubiquitous concept offers almost limitless potential for the theoretical musings, scholarly publications, heated debate, and all else that make up academia.” The universe of sustainable development was perceived as part of the world of policy rather than that of the statutes, cases and hard law.

development. They claim that in order to be effective in the South, “the concept of sustainable development” has to incorporate major problems such as *poverty* and *poor health*. It has to be primarily associated with the social pillar, rather than with the environmental one. Notwithstanding the interconnectivity of all three pillars and the importance of each of them, social constraints are perceived to have priority. Breaking the vicious cycle surrounding poverty and health<sup>106</sup> constitutes the core elements of development and sustainability as perceived by the South.

Chapter Three below will illustrate how the international system, specially governmental multilateral negotiations have adopted this universe of concepts and notions of health. It will also demonstrate how international law and policy have taken advantage of the variety of approaches to the seemingly inoffensive and simple “concept of health” in order to reproduce the viewpoints of the North. It will articulate Gramsci’s notion of hegemony by illustrating which of these concepts and how they have been adopted in the global fight for a preserved, developed and sustainable world for the generations to come.

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<sup>106</sup> See also Barry and Yuill, *supra* note 61 at 74-91.

## CHAPTER THREE

### THE LAWS OF DOMINATION: ARTICULATING THE CONCEPT OF HEALTH FOR THE REPRODUCTION OF HEGEMONIC POWER BY THE NORTH

#### Introduction

In this chapter I discuss *how* the “concept of health” has been approached by different regimes of international law. I intend to demonstrate how the conceptual possibilities previously introduced in Chapter Two have been adopted in the multilateral arena in order to reproduce Gramsci’s notions of *hegemony* and *domination*. First, I look at how health has been articulated by international diplomacy in order to justify interventions in areas such hazardous chemicals and waste and persistent pollutants (the “brown agenda”). Then I shift my attention to the way in which the concept has been adopted in negotiations about sustainable development (the “green agenda”). In recognition of economic development as a major pillar and issue to be addressed by political and legal debates on the role of North and South in the global pursuit of development, I also situate the concept of health adopted in the current discussions about international trade.

In the sections that follow, I also reflect on how the concept adopted by these regimes reflects Gramsci’s notions of *superstructure* and *caesarism*, thus serving to perpetuate *domination* and *hegemonic power*.

## **The Concept of Health as a tool for domination in the “Brown Agenda”**

As Kingsbury notes,<sup>107</sup> the relationship between environmental protection and international trade have been recognized for decades. By the second half of the twentieth century, the impact of international trade on the environment and on people's health had already been noted. Either due to the pressure by environmentalists or by other advocacy groups, national governments were forced to incorporate the subject into their political agendas. In the 1980s, the dominant paradigm of development was income generation. The logic of wealth accumulation in the North and impoverishment in the South was also a well-known consequence of liberal policies. The consolidation of a global capitalist system based on free trade among countries was gradually seen throughout the globe. From the defeat of communism and centralism in the late 1980s to the consolidation of the rules of the General Agreement on Tariffs and Trade (GATT) under the World Trade Organization (WTO)<sup>108</sup>, the idea of development was directly associated with countries' ability to export goods.

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<sup>107</sup> Benedict Kingsbury, "Environment and Trade: the GATT/WTO regime in the international legal system" in Alan Boyle, *Environmental Regulation and Economic Growth* (Oxford: Clarendon Press, 1994).

<sup>108</sup> The multilateral community agreed to establish the World Trade Organization (WTO) after a series of eight negotiating rounds culminating in 1994 in the Uruguay Round. Its main functions are to serve as a forum for trade negotiations; to handle trade disputes; to monitor national trade policies; to provide technical assistance and training for developing countries; and to cooperate with other international organizations. As defined by the WTO, "[t]he agreement establishing the WTO calls for a single institutional framework encompassing the GATT, as modified by the Uruguay Round, all agreements and arrangements concluded under its auspices and the complete results of the Uruguay Round. Its structure is headed by a Ministerial Conference meeting at least once every two years. A General Council oversees the operation of the agreement and ministerial decisions on a regular basis. This General Council acts as a Dispute Settlement Body and a Trade Policy Review Mechanism, which concern themselves with the full range of trade issues covered by the WTO, and has also established subsidiary bodies such as a Goods Council, a Services Council and a TRIPs Council. The WTO framework ensures a 'single undertaking approach' to the results of the Uruguay Round — thus, membership in the WTO entails accepting all the results of the Round without exception". More information about the WTO is available online at <[http://www.wto.int/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.int/english/thewto_e/whatis_e/whatis_e.htm)>.



As a result, the urgent need for foreign investment, the lack of acceptable standards in a number of sectors and a fragile regulatory framework have led the South to become extremely vulnerable to the pressure of corporations in the North. Disparities became more evident when unexpected results arising from this vulnerability started to affect the population in developing countries in the form of tragedy and death.<sup>109</sup>

As a way to minimize the South's vulnerability to the constraints of the free market, the international community decided to negotiate a legal framework that forces countries to take control measures regarding the trade of hazardous chemicals and wastes, among others. Legal provisions were adopted in order to establish substantive parameters to define where the problems were, the risks involved, and procedural matters to minimize them. Measures related to notification, information and consultation in the international trade of noxious substances and hazardous waste were mandated. Major conventions were negotiated within the UN, such as the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal,<sup>110</sup> and the Rotterdam Convention on the Prior Consent for the International Trade of Hazardous Chemicals, among others.

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<sup>109</sup> Gunther Handl & Robert E. Lutz, *Transferring Hazardous Technologies and Substances: the International Legal Challenge* (London: Graham and Trotman, 1989) at 3 [Handl and Lutz]. As noted by the authors, the world faced a number of tragedies directly associated with the import and export of hazardous or toxic substances and technology. They were usually connected to the need of the South to supply their technological needs in order to catch up the production imperative that would ultimately lead to economic development. As they note, the negative effects of an open-market-oriented world [later translated into the notion of globalization] accounted for the intoxication of several people in Seveso, Italy in 1976 due to contamination by trichlorophenol gas, used as an input for the production of cleaners and germicides and a 'defoliant employed by the American armed forces during the Vietnam war'. A number of other not less tragic events, such as the leak of toxic methyl isocyanate in Bhopal, India in 1984, 'caus[ed] the death of 1,600 people and injuring 200,000 people'. Radiation leak in Chernobyl, former U.S.S.R. in 1996, is also illustrated as an example of potential risks to health and environment that have been posed by the global trade of substances and technologies, particularly in transactions involving North and South.

<sup>110</sup> Basel Convention, *supra* note 4.

Notwithstanding these multilateral efforts, these agreements have turned out to have a number of flaws, some of which impact human health. Moreover, they reflect success and failure: success in the sense that interest groups seem to have succeeded in putting forward their trade-related priorities, and failure in the sense that negotiators have failed to reflect the elemental differences between North and South, leaving for the latter a set of legal instruments that threaten health and reproduce domination by the North.

### **Health and the Power of Free Trade: Revealing the Superstructure Behind the International Regime for the Control of Hazardous Chemicals and Wastes**

Generally considered, the discipline of IEL consolidated after the decade of 1980s touched the universe of health in a limited way. The term and its variants have been adopted in a manner that provides the necessary justification for the multilateral community to propose legal solutions for environmental issues. Little has been effectively done in regard to health itself and often the proposed solutions have turned out to have negative health impacts<sup>111</sup>. IEL has also consolidated a very narrow “concept of health”. This can be demonstrated when one verifies that the provisions of a number of treaties making reference to health and environment usually address only aspects of the latter. Moreover, the dimension of “environment” itself, usually associated with an urgent need for protection and conservation,<sup>112</sup> seems not to have evolved in a way to

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<sup>111</sup> This can be easily illustrated by a persistent reference to “the protection of human health” in the preambles of treaties and political declarations that make up the discipline.

<sup>112</sup> See also David Schlosberg, *Environmental Justice and the New Pluralism: the challenge of difference for environmentalism* (Oxford: Oxford University Press, 1999) at 20 [Schlosberg]. The author states that both the study and the practice of environmental movements have been counterproductive because they see the movement as a single one, rather than diverse and based on various background. As he points out, scholarship in this field has been restricted to the history of preservation and conservationism, rather than setting their focus on issues such as class, race, the role of women in the movement, and the relationship with the working and urban poor. Schlosberg also acknowledges that a separate movement evolved in the cities, most of them unconnected to wilderness and natural resources but very connected with the effects of industrialization (water and sewage, solid wastes, noise, and health problems, the poor, minority groups,

accommodate the human dimension of environment and other social nuances. This has been the pattern followed by several multilateral environmental agreements after the 1980s, including those aimed at enhancing the international control of hazardous chemical and wastes.

According to Hofrichter<sup>113</sup>, the modern world has adopted social arrangements that encourage and excuse the deterioration of the environment and human health. They permeate society in different fields, and proclaim economic and technological development as undefeatable solutions for development. For this reason Hofrichter emphasizes the internalization of a “toxic culture” by global society, that ultimately reflects the way by which political decisions are made and legal frameworks are set.<sup>114</sup>

The problem is that Hofrichter’s idea of “toxic culture” also applies to the current legal efforts to control hazardous chemicals, wastes and persistent organic pollutants, the “brown agenda”. As noted by one commentator, “[b]y the early 1980s, it had become clear to leaders in public health and environmental protection that there were a myriad of risks to public health and welfare from the various chemicals and physical agents released as a result of anthropogenic activities”.<sup>115</sup>

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among other). Schlosberg argues that a number of scholars working in this field still advocates for the ‘narrow’ version of environmentalism, which itself would be enough to justify “external” social problems.

<sup>113</sup> Richard Hofrichter, *Reclaiming the Environmental Debate: The Politics of Health in a Toxic Culture* (Cambridge, Massachusetts: The MIT Press, 2000) [Hofrichter].

<sup>114</sup> *Ibid.* at 1. Hofrichter goes on and propose that [T]oxic culture is also a metaphor for the way language, concepts, rituals, valuation processes, and policies frame the debate over major issues, *ignoring the political conflict and relations of power that influence human and community health* [emphasis added].

<sup>115</sup> Lippmann, *supra* note 76 at 396.

The Basel Convention – originally adopted on March 22<sup>nd</sup>, 1989, and later amended on September 22<sup>nd</sup>, 1995, was established as a means to regulate cross-border shipments of waste. It “attempt[ed] to regulate waste movements by imposing restrictions because, as emphasized in the preamble, restrictions reduce trans-frontier movements, and provide[d] incentives for sound waste management”.<sup>116</sup> The general idea behind the Convention was that states that intended to export certain categories of waste should ensure that the movement of such materials was only allowed under certain conditions<sup>117</sup>, and with the consent of the importing country. As a practical tool for countries to comply with the new rules, the Convention established a *Prior Informed Consent procedure* (PIC), a mechanism that was later adopted in other MEAs. The procedure itself was an

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<sup>116</sup> Eli Louka, *Overcoming National Barriers to International Waste Trade: a New Perspective on the transnational movements of hazardous and radioactive wastes* (Dordrecht, The Netherlands: Graham & Trotman/ Martinus Nijhoff, 1994) at 46 [Louka].

<sup>117</sup> According to article 4(9)(a), (b) and (c) of the Basel Convention, *supra* note 8, as originally signed, “(a) The State of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in question in an environmentally sound and efficient manner; or (b) The wastes in question are required as a raw material for recycling or recovery industries in the State of import; or (c) The transboundary movement in question is in accordance with other criteria to be decided by the Parties, provided those criteria do not differ from the objectives of this Convention”. These are the exceptions according to which the Convention - as entered into force in May 5<sup>th</sup>, 1992 – allows the international trade and disposal of hazardous waste. As a matter of fact, these provisions were substantially modified in 1995, when a amendment to the Convention was adopted during the third meeting of the Conference of the Contracting Parties, held in Geneva from September 18-22. In the words of the amendment, which had not entered into force yet when this research was being undertaken, “Insert new preambular paragraph 7 *bis*: Recognizing that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention; Insert new Article 4A: 1. Each Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A, to States not listed in Annex VII. 2. Each Party listed in Annex VII shall phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes under Article 1, paragraph 1 (a) of the Convention which are destined for operations according to Annex IV B to States not listed in Annex VII. Such transboundary movements shall not be prohibited unless the wastes in question are characterized as hazardous under the Convention. Annex VII Parties and other States which are members of OECD, EC, Liechtenstein”.

attempt by the multilateral community to try to monitor waste movements and to establish state responsibility for such transfers.<sup>118</sup>

A preliminary analysis of the Basel Convention may lead to the assumption that the overall concerns of the international negotiations in this field were aimed at protecting human health. A glance over the Basel's preamble alone illustrates that the term "human health" is explicitly mentioned six times. A more detailed analysis of the core text of that convention shows that these two words were directly stressed about ten more times, not to mention how many times they appear in the Convention's annexes and in a ban amendment adopted in 1995.<sup>119</sup>

The problem is that a more detailed review shows that Basel's concerns had little to do with health. In fact, it adopted a very limited "concept of health", one that has made it more difficult for developing countries to prevent the health risks arising from the international movement of wastes. At academic level, the fact that Basel considered health as a minor issue can be confirmed by the fact that a substantial part of academic scholarship on the Convention simply focuses its attention on trade-related issues of wastes.<sup>120</sup> Its provisions are usually taken for granted by academics and legal scholars,

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<sup>118</sup> Louka, *supra* note 116 at 47. Louka explains that according to the PIC procedure: [S]tates parties must prohibit waste exports, unless they receive the prior written consent of the exporting state. The importing state must also respond in writing and consent to, refuse, or require additional information for the waste transfer.

<sup>119</sup> UN Doc. UNEP/CHW.3/35 (28 November 1995) [Basel Ban Amendment].

<sup>120</sup> See also David A. Wirth, "Trade Implications of the Basel Convention Amendment Banning North-South Trade in Hazardous Wastes" *Reciel* 7:3 (1998) 237 at 239 [Wirth]. Wirth notes that "[t]he Basel Convention is one of the principal multilateral agreements thought to raise questions about consistency with GATT/WTO rules". When stating that, Wirth makes reference to the debate on whether control measures that have been unilaterally taken by countries to protect the environment are acceptable *vis a vis* the provisions of GATT/WTO, particularly Article XX, General Exceptions. He completes his arguments by acknowledging that "[t]he availability of Article XX exceptions, has been substantially heightened by a

who refuse to provide a more in depth evaluation of both the language and the real world impact of the convention.

At the grass-roots level, in spite of a certain level of understanding about the impact of hazardous waste dumping on human health, the motivation of lay society was not much different when it demanded governmental action. The convention represented a response to a general uproar strictly related to the potential environmental effects of waste dumping in developing countries, supported by sensationalistic coverage by the media and by non-governmental organizations.<sup>121</sup> Part of the popular claim for the adoption of a control regime was due to Bhopal, whose legacy was to show that “[f]or the most part, developing countries tend to be recipient countries for the purpose of the transfer of hazardous technologies and products”.<sup>122</sup>

When the relationship between hazardous wastes dumping and its implications for health is added to the discussions about the North-South dimension of the Basel Convention, it turns out that both international diplomacy and the academic community could be given their share of responsibility for having supported the legalization of a flawed approach.

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series of dispute settlement panel reports issued under the auspices of the GATT and, subsequently , the WTO” (at 239).

<sup>121</sup> See Zada Lipman, “A Dirty Dilemma” (2002) *Harvard International Review* 67 at 69. [Lipman]. The author articulates the role played by NGOs in advocating for the adopting of the Basel ban amendment by the international community, and states that: “[G]reenpeace and the Basel Action Network have not encountered a single hazardous waste recycling facility in a non-OECD country that does not cause serious pollution” [Zada Lipman].

<sup>122</sup> Ved P. Nanda & Bruce C. Bailey, “Nature and Scope of the Problem” in Handl & Lutz eds., *Transferring Hazardous Technologies and Substances: The International Legal Challenge* (London: Graham and Trotman Limited, 1989) 3.

Starting with the preamble, Basel neglects two relevant aspects for setting policies and strategies aimed at protecting human health: *risk assessment* and *risk management*.<sup>123</sup> As explained by Lippmann,<sup>124</sup> *risk assessment* involves four steps<sup>125</sup>: (i) hazard identification; (ii) dose-response assessment; (iii) exposure assessment, and; (iv) risk characterization. It is based on these four steps that the scientific community and experts supporting the Basel negotiators decided whether a particular waste had to be included or not on a list of controlled hazards.

After the requirements for risk assessment were established (which are generally focused on the intrinsic features of the substance or product under consideration and their potential harm to human health), the next step taken by the international community in regard to the international trade of wastes was to design strategies for *risk management*. According to Lippmann, “[it] is a process by which responsible *authorities take action to reduce or eliminate risk factors* [emphasis added]. It is carried out at many different levels”.<sup>126</sup>

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<sup>123</sup> But see Mary H. O’Brien, “When Harm is not Necessary: Risk Assessment as Diversion” in *supra* note 44 at 113 [O’Brien].

<sup>124</sup> Lippmann, *supra* note 76 at 397.

<sup>125</sup> *Ibid.* The author defines these four steps as follows:

“Hazard identification: A review of the relevant biologic and chemical information bearing on whether an agent may pose a carcinogenic hazard and whether toxic effects in one setting will occur in other setting.

Dose-response assessment: The process of quantifying a dosage and evaluating its relation to the incidence of adverse health effects response.

Exposure assessment: The determination or estimation (qualitative or quantitative) of the magnitude, duration, and route of exposure.

Risk characterization: An integration and summary of hazard identification, dose-response assessment, and exposure assessment presented with assumptions and uncertainties. This final step provides an estimate of the risk to public health and a framework to define the significance of the risk”.

<sup>126</sup> Lippmann, *supra* note 76 at 421.

In effect, following the logic of Basel, negotiators had to take these preliminary steps in order to define the universe of wastes that was to be the object of control of the convention. Based on the results these processes, three annexes<sup>127</sup> were adopted in 1989, defining categories of wastes, their characteristics, disposal mechanisms, the above-mentioned PIC informed procedure, and a number of other provisions about arbitration.

The problem is that by relying on these logic and steps, Basel was not solving the problems of the South. Rather, it was creating new ones, reflecting the economic interests of the North. By requiring that a list of controlled hazards be built on the basis of those two scientific measures only, the range of wastes to be addressed by the convention became too vague and flexible. Rather than protecting health as it proposes to do,<sup>128</sup> it promoted the opposite, since both *risk assessment* and *risk management* are subject themselves to the same constraints facing science, i.e., they can fail.

This argument needs to be clarified, considering the definition of waste in the Convention. Article 2, Definition, states:

[W]astes" are substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of *by the provisions of national law*; [emphasis added].

By adopting this definition Basel created an fundamental problem. It did not make clear what would really constitute a hazardous waste.<sup>129</sup> Additionally, it allowed parties

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<sup>127</sup> Basel Convention, *supra* note 4.

<sup>128</sup> *Ibid.* The preamble of the Basel Convention states: "Convinced that States should take necessary measures to ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of their disposal".

<sup>129</sup> Charles W. Schmidt, "Trading Trash: Why the U.S. Won't Sign On to the Basel Convention" *Environmental Health Perspective* 107:8 (August 1999) A411 [Schmidt].



to determine what they themselves consider to be a waste, as defined in their national laws. Some commentators highlight the fact that this flexibility came about as an attempt to let developing countries adopt more restrictive measures in regard to the range of waste to be controlled. Others, like Zada Lipman, for example, argue that the same vagueness actually promoted the opposite, since it “allowed the continued export of hazardous wastes to developing countries for recycling on the basis that the toxic substances exported were *commodities rather than wastes*” [emphasis added].<sup>130</sup>

The solution adopted by the international community for this gap was the adoption of a Ban Amendment in 1995<sup>131</sup>, according to which shipments of hazardous wastes from countries of the Organization for Economic Co-operation and Development (OECD)<sup>132</sup>, the European Union and Liechtenstein intended for recovery or recycling to other states outside this group should be phased out. The amendment has yet to be ratified by the number of countries required for its entry into force.<sup>133</sup> In other words, the original provisions remain valid, and the flow of wastes between the industrialized and the developing world remains a tragic reality.

The fact is that regardless of the intended destination (whether for final disposal or for reuse or recycling), hazardous wastes represent a significant risk to health in the

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<sup>130</sup> Zada Lipman, *supra* note 121 at 68-69.

<sup>131</sup> Basel Ban Amendment, *supra* note 119.

<sup>132</sup> The Organization for Economic Co-operation and Development is compounded of 30 member countries “sharing a commitment to democratic government and the market economy. With active relationships with some 70 other countries, NGOs and civil society, it has a global reach. Best known for its publications and its statistics, its work covers economic and social issues from macroeconomics, to trade, education, development and science and innovation”. More information about the OECD is available online at <<http://www.oecd.org/>>.

<sup>133</sup> As of February 14<sup>th</sup>, 2005, only 55 countries had ratified the Basel Ban Amendment. The Amendment has not yet entered into force. Entry into force shall take place upon ratification by at least three-fourths of the Parties who accepted it.

South. Either for matters associated with occupational health or public health in a broader sense, “the unfortunate reality is that many developing countries lack the capacity to manage hazardous wastes safely”<sup>134</sup>. Not only is there a lack of expertise on how to handle wastes, but there are also problems associated with the identification of wastes that enter those countries. At the border, when present, officials lack the required means to differentiate what is declared as being hazardous from what is hazardous but is not declared as such. As previously noted, particularly in regards to recyclables, wastes are not always considered or declared by exporters as being “wastes”. They are sometimes declared as being “commodities”, thus out of reach of Basel. When it comes to health, these “commodities” are admitted in the South, even though had not the convention been so vague, they would be otherwise characterized as being “infectious substances” and/or “toxic substances”. The same problem would have less impact in a Northern country, since both the definitional problem and the failure to declare a shipment as being “hazardous” waste would be solved by its ability to rely on other sources of verification and more advanced technologies.

It is worth considering a practical example involving wastes of categories H6.2 (“infectious substances”) and H11 (“toxic substances”), as an attempt to clarify the relationship between these flaws and their consequences for public health.

Assume that the people of country X have a history of compassion and humanitarian approach to life, with an outstanding ability to raise funds and gather used products to be donated to less advantaged communities of a country Y in the South.

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<sup>134</sup> Schmidt, *supra* note 129 at A411.

Suppose that among a wide variety of goods raised as part of a national effort to provide basic relief to country Y are several used wheel-chairs, prescription glasses, used medical devices, mattresses from a recently renovated hospital, and medicines the expiry date of which would be reached within the following two months. To this act of charity, add the provision of thousands of tons of animal-protein-based feed and another ton of used clothes, all of them to be donated free of cost. Would such a shipment be liable under the provisions of Basel? Would the nature of this hypothetical shipment pose any risk to the health in the country of destination?

Similar situations happen every day in the real world. The reality is that the Basel Convention would not provide the means to prevent potential harms to human health. In this example, the importing country would have to bear the burden of inspecting all donated goods in order to establish whether they were safe or not. It would require not only trained staff and specialized equipment to verify the overall conditions of the donated goods, but also a remarkable ability to dispose of those deemed not to be in acceptable condition. If deemed infectious and not proper for human use, they would have to be disposed in the recipient country, which would also lack adequate technology for disposal.

The Basel Convention, when it comes to addressing the eventual harmful effects to human health sets only a general obligation that the exporting country “[r]equire[s] that information about a proposed transboundary movement of hazardous *wastes and other wastes* [emphasis added] be provided to the States concerned, according to Annex V(A), to state clearly the effects of the proposed movement on human health and the environment (..)”. The transcribed provision would only apply if the information

provided referred to "wastes". Donation, for instance, also because of its humanitarian approach would very unlikely to be declared as being part of that category, excepting the donor exporter from complying with it.

It seems that despite the apparent effort to incorporate health concerns into the international control of hazardous wastes, Basel failed to properly cope with the health particularities required in an effective control system. The introduction of a phasing out strategy in 1995, the Basel Ban Amendment, may represent a significant advance for some who realize that "any final benefits that the recycling of hazardous waste may provide should not offset against the costs to human health and the environment"<sup>135</sup>.

The constraints of Basel lie not only in the fact that it allows political interference to define what is waste and what is not waste, but rather rest on the logic according to which it was created in 1989 and has been implemented ever since. It was negotiated based on the perspective of the *economic dimension of environmental protection*. It was agreed upon reflecting the liberal paradigm as it was put forward by the North. Health remained as the background justification for the adoption of a new regime of notification and consent, from which the discipline of public health and international health have poorly benefited.

The "concept of health" adopted by the convention is deeply associated to the assumption that prevention is something that should rely exclusively on science. It suggests that enquiries about danger and hazards are better answered through *risk assessment* techniques, although they too can be proven to fail. Governmental

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<sup>135</sup> Zada Lipman, *supra* note 121 at 69.

regulations, as part of *risk management* strategies, are expected to be designed as a consequence of the former. Decisions are transferred to a group of academic experts. Science is deemed “neutral”.

Gramsci in his *Prison Notebooks*, provides an insight that could perfectly be applied to the limitations of Basel. Being economically beneficial to the North (that within the scope of Basel would be able to keep exporting wastes to the South), the Convention reflects the power of “superstructures”. They act in support of a dominant ideology, in order to reaffirm what it considers right or wrong, perpetuating its privileged status. According to Gramsci, superstructures are made up of a number of institutions within a society (including the “global society”), such as the media, the church and the academia. Each of them playing different but significant roles in a continuous process of building *hegemony*, which is finally achieved when the one being dominated “takes for granted” the ideas put forward by the dominant party. The same applies to the relationship between North and South in the Basel Convention, particularly in regards to health. The “concept of health” intimately linked to what part of the “superstructure” (scientists and academic experts) considers as to be the threat inherent in the waste trade. Similarly, building a system that is aimed at “protecting human health”, but at the same time is unfeasible due to substantive (poor technical knowledge and technological means) and procedural constraints, is also convenient for two reasons. First, at the multilateral level, it will appear that action is being taken to prevent the movement of wastes from North to South, satisfying the need of the public, the media and civil society. Second, the system itself allows that the transboundary movement of wastes resulting from high levels of production and consumption be carried out in a lawful way. The victims, on the

other hand, not being properly empowered through enhanced education and awareness, have very little to do against the “vicious cycle”. They also face the effects of mismanagement, with leaders often co-opted by interest groups, most of which rooted in the liberal environment promoted in the North.

Another milestone agreement of the “brown agenda” is the *Rotterdam Convention on the Prior Informed Consent for Certain Hazardous Chemicals and Pesticides*<sup>136</sup> It represents the efforts of the multilateral community to devise a solution for environmental and health concerns arising from the international trade of hazardous chemicals and pesticides. The convention is the result of a number of different initiatives started before the 1960s, which became more evident in the late 1960s and early 1970s in response to pressure by the environmental movement.<sup>137</sup> At that time, the world trade in chemical products rose more than fourfold to nearly US\$100 billion and exports to the South rose nearly 500%. By 1980, one-quarter of the global trade in chemical products went to developing countries, among which one-third were pesticides.<sup>138</sup> Data from the WHO suggests that perhaps 1.5 million to 3 million accidental poisonings happened worldwide in the early 1990s.<sup>139</sup> Despite the fact that only one-fifth of global pesticides

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<sup>136</sup> Rotterdam Convention, *supra* note 3.

<sup>137</sup> David G. Victor, “‘Learning by Doing in the Nonbinding International Regime to Manage Trade in Hazardous Chemicals and Pesticides’” in David G. Victor, Kal Raustiala & Eugene B. Skolnikoff eds., *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Austria: IIASA; Cambridge, MA: MIT Press, 1998) 221 at 224 [Victor]. Victor argues that early efforts towards the regulation of chemicals were mostly focused on protecting brands and consumers by ensuring that products on the market were effective and that trade names accurately described active ingredients.

<sup>138</sup> *Ibid.* at 227.

<sup>139</sup> *Ibid.* at 227.

application takes place in developing countries, by the 1990s those countries accounted for perhaps three-fourths of the world's poisoning.<sup>140</sup>

As described by Asante-Duah & Nagy<sup>141</sup>, hazardous chemicals can have harmful effect on people's health, among which are, "but are not limited to, (...) prognoses as cancers, birth defects, nervous system problems, reproductive system damage, cell mutations, etc".<sup>142</sup> In contrast, there is also a recognition that the use of pesticides and chemicals brings incontestable benefits for food production, control of pests and social development, since people would profit from enhanced crops and would be free from diseases such as malaria, among others. The fact is that pesticides in particular can be used both in agriculture and in public health programs each one adopting different methods for different purposes. The consequence of that is that "the parameters for assessing their efficacy or cost-effectiveness vary greatly".<sup>143</sup> In other words, when setting control measure for some hazardous chemicals, one has to take into consideration not only their intrinsic toxicological characteristics but also assess the intended use and the socio-economic, geographic and cultural aspects within which they are to be applied.<sup>144</sup>

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<sup>140</sup> Victor, *supra* note 137 at 226-227.

<sup>141</sup> D. Kofi Asante-Duah & Imre V. Nagy, *International Trade in Hazardous Waste* (London; New York: E & FN Spon, 1998) [Asante-Duah and Nagy].

<sup>142</sup> *Ibid.* at 113.

<sup>143</sup> Gilles Forget, "Balancing the need for pesticides with the risk to human health" in *Impact of pesticide use on health in developing countries. Proceedings of a symposium held in Ottawa, Canada, September 17-20, 1990* (Ottawa, ON: International Development Research Centre, 1993) [Forget].

<sup>144</sup> See also Forget, *supra* note 143. Forget acknowledges this peculiarity in regards to pesticides, and states that: It has been surmised that large-scale spraying of dichlorodiphenyltrichloroethane (DDT) on cotton in Central America was responsible for the development of resistance to pesticides in *Anopheles spp.*, which are malaria vectors.

It is in this context, and in addition to national attempts to control these substances and products,<sup>145</sup> that the multilateral community gradually recognized a preeminent need to set control mechanisms for the international trade of hazardous chemicals. This culminated with the adoption of the Rotterdam Convention.<sup>146</sup> By the time the convention was adopted there was very little doubt about the general potential risks to human health posed by hazardous chemicals. The challenge faced by the international community when the new instrument was created was to set concrete parameters according to which the substances and products to be effectively controlled would be defined.<sup>147</sup>

In the 1970s, opinions about the use of hazardous chemicals, particularly pesticides, vastly varied. Not only did different countries had different approaches towards the use and control of such substances and products, but environmental NGOs and international organizations also adopted different policies in regard to chemicals. As noted by Victor, “[n]one of the major development organizations favored a ban on trade

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<sup>145</sup> See also Krueger and Selin, *supra* note 35. Krueger & Selin point out that these measure were taken in order to regulate three categories of chemical: pesticides, industrial chemicals, and unintentionally produced by-products. The chemical industry is extremely relevant to “politically important sectors such as agriculture, industry, and trade. The products of the chemical industry are worth approximately US\$1,600 billion annually and account for around 13 percent of world trade” (at 323).

<sup>146</sup> *Ibid.* Krueger & Selin note that the need for an enhanced control was motivated by four basic circumstances. First, hazardous chemicals accumulate in regions remote from their emissions source. Second, many activities that cause chemicals problems are governed or influenced by multiple international institutions and organizations. Third, since the problem affects a number of nations with different knowledge, the global community was expected to enhance international co-operation mechanism. Fourth, there was a gap in terms of technical and financial ability in the South to deal with the risks posed by hazardous chemicals and, and thus an enhanced global approach would “function as a catalysts for the diffusion of such resources and lead to domestic actions that otherwise would not have been taken” (at 324).

<sup>147</sup> See also Victor, *supra* note 137 at 226. When comparing the previously control regime of hazardous chemicals based on rules established by the OECD, as well as the non-binding procedure adopted by the Food and Agriculture Organization (FAO) and the United Nations Environmental Programme (UNEP) with the current regime prescribed under the Rotterdam Convention, he states that “[t]he OECD chemicals regime would be the dominant system today and would have remained focused on harmonization of national standards—which industry sought—if environmental, consumers, and development NGOs had not pushed a different agenda: reduction of hazardous exports to developing countries”.



in hazardous pesticides, including pesticides banned for sale in industrialized countries".<sup>148</sup> If on the one hand, the use of hazardous chemicals such as pesticides and insecticides was already being criticized due to their toxicity<sup>149</sup>, on the other hand there was a "consensus that chemical pesticides will probably continue to be the principal component of most vector-control programs, at least in the foreseeable future (WHO 1988)".<sup>150</sup>

### **"Caesarism" and the PIC procedure for Hazardous Chemicals and Pesticides**

Aware of the dichotomies involving hazardous chemicals and pesticides, the multilateral community started developing an international control system for hazardous chemicals and pesticides. As a result of the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992,<sup>151</sup> there was a clear mandate to improve international actions on chemical safety. Agenda 21 in particular highlighted specific strategies where this mandate was expected to be exercised.<sup>152</sup> The growing interest in the subject resulted in the creation of different institutions responsible for different aspects of

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<sup>148</sup> Victor, *supra* note 137 at 227.

<sup>149</sup> See also Forget, *supra* note 143 at 6-7. The author presents statistics related to acute poisoning caused by the use of pesticides in countries such as Sri Lanka, Costa Rica, Fiji, Papua New Guinea, Western Samoa, Malaysia, during the 1970s. He reports cases of suicide and occupational poisoning due to the use of these substances and states that "[f]rom first suggesting in 1972 that 500,000 cases of pesticides poisoning were occurring annually, WHO has now increased its estimate to 1 million annual poisoning with 20,000 resulting in death (WHO 1986)".

<sup>150</sup> *Ibid.* at 4. In this context, Forget also discusses that the development of resistance in many disease vectors has been a major setback in the use of pesticides.

<sup>151</sup> Rio Declaration, *supra* note 2.

<sup>152</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. I, *Resolutions Adopted at the Conference* (United Nations publication, Sales No. E.93.I.8 and Corrigendum), resolution 1, annex II [The Agenda 21]. Chapter 19 of Agenda 21 sets forth for six priority program areas: (i) expansion and acceleration of international assessment of chemicals; (ii) harmonization of classification and labeling of chemicals; (iii) information exchange on toxic chemicals and chemical risks; (iv) establishment of risk reduction programs; (v) strengthening of national capacity and capability for chemicals management; and (vi) prevention of illegal international traffic in toxic and dangerous products.

a control system, making it complex and fragmented. Three organizations played a leading role in this realm: the Organization for Economic Co-operation and Development (OECD), the Food and Agriculture Organization (FAO) and the United Nations Environment Programme (UNEP).<sup>153</sup> On September 10, 1998, international efforts resulted in the adoption of the Rotterdam Convention.

The new system negotiated in the convention, which only recently entered into force, was celebrated and highly criticized at the same time. It was celebrated because it brought to the world new binding rules governing a fairly sensitive area. It was criticized because it did so by the adoption of an unusual procedure, where different stages in the life of those substances are regulated by different legal provisions, some of which outside the scope of the Rotterdam Convention itself. Various phases of a product or substance's life would be dealt with by separate pieces of legislation, with Rotterdam responsible for only a share of a broader "control network".<sup>154</sup> This explains why hazardous chemical

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<sup>153</sup> Victor, *supra* note 137 at 221-281. The author describes in detail the evolutionary process through which the international control of hazardous substances have been since the 1970s. He describes initiatives undertaken by the OECD in regard to setting standards for those substances and products, as well as its strategy to foster harmonization of standards at international level. Victor also describes the voluntary PIC procedure enforced by two international nonbinding instruments: UNEP's *Amended London Guidelines* and the FAO's *Code of Conduct on the Distribution and Use of Pesticides*. In his article he argues that this voluntary procedure operated under the co-ordination of a joint meeting of experts FAO/UNEP on the prior informed consent procedure was highly effective and had its recommendation voluntarily incorporated by the industry. Victor acknowledges that the meeting of experts, formed by scientists rather than by diplomats, among other qualities "has been able to make *political decision* that, in practice, has effectively expanded the PIC system" [emphasis added] (*Ibid.*, at 223). He also adds that "the nonbinding format was highly flexible and facilitated '*learning by doing*' during the implementation of the process" [emphasis added] (*Ibid.*, at 223). In his own words, Victor argues that "the conversion of the voluntary PIC procedure to a binding convention (...) has been costly and unnecessary".

<sup>154</sup> Krueger and Selin, *supra* note 35. They present three possible ways that could have been adopted in the international regulation of hazardous substances and industrial chemicals. The first one would be the negotiation of a single all-encompassing treaty within which the full life cycle of those substances would be approached. The second, on the other hand, would be to set up a framework convention within which issue specific protocols would be created. The third, at last, would be the way adopted by the international community in the negotiation of the current PIC procedure, i.e., the adoption of "free-standing agreements", each one encompassing a different stage of a chemical's life cycle and bearing enough autonomy to enforce the aspects for which they are separately responsible for.

wastes are not regulated by the Rotterdam Convention, but by the Basel Convention. Rotterdam itself does not address the production, use, re-use, import, export and disposal of hazardous chemical wastes, despite that they are still hazardous chemicals.

The result of this multi-tier regime is that it automatically creates membership and regulatory gaps, making effective control difficult if not impossible. Membership and regulatory gaps<sup>155</sup> result from the simple fact that, according to the regime's dynamics, countries cannot be deemed liable for the international trade of a hazardous chemical in all possible trade operations involving all its life. A country which has signed, for example, the Rotterdam Convention is thus expected to comply with a comprehensive notification requirements associated with the international trade of a hazardous chemical<sup>156</sup> does not necessarily have to be at the same time a Party to the Basel Convention, according to which that same chemical should be dealt with when it is a waste. A practical outcome of this gap is that regardless of the effort by a country to control the production and trade of a hazardous chemical under the provisions of Rotterdam, it may eventually be worthless if at the end of the day that same chemical or any of its by-products can be transferred beyond its borders in the form of a waste. Similarly, if a country is liable under the Basel Convention and it is not a party to the Rotterdam Convention, it fails to detect the import of a hazardous chemical waste if the

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<sup>155</sup> *Ibid.* at 338.

<sup>156</sup> See generally Victor, *supra* note 137. The author describes how a substance is included in the PIC procedure. As he states: "[F]or each substance in the PIC system the Secretariat prepares (usually by commission) a Decision Guidance Document (DGD) summarizing published (peer-reviewed) scientific information on the hazards of the chemical or pesticides. The DGD is sent to all DNAs [designated national authorities], who then evaluate whether and under what conditions to allow future imports. Each DNA summarizes its decision in an Importing Country Response. These responses are collated by the Secretariat and transmitted to all other DNAs. Thereafter, exporters of PIC chemicals have easy access to information on whether a particular nation allows imports of a particular substance the PIC system" (at 236-237).

exporting country does not explicitly state that it is in effect a waste. And in order to make the problem even more serious:

[I]f, for example, outdated or off-specification pesticides or pharmaceuticals are not defined as waste but as a "secondary product" or even as "aid", then Basel restrictions would not apply.<sup>157</sup>

The problem is that despite the fact that multilateral diplomacy has adopted this patchwork approach, it appears to be insufficient to protect human health, particularly in the South, where a significant lack of infrastructure, knowledge and technology seems to prevail.<sup>158</sup> If the system allows such breaches in the international management of hazardous chemicals, it potentially fails to prevent potential risks to workers at the port of entry and entire populations in importing countries. The aftermath is that if the system was originally created to protect human health from chemical hazards, but it instead consolidates gaps that lead to adverse health effects, it is reasonable to assume that it was structured with a purpose other than to promote health. Considered as a tool that potentially threatens the dynamics of a free market in such a powerful and profitable field, it would not be absurd to relate this fragmented control to pressure by interest groups over the negotiators. In this case, since manufactures and giant corporations are mostly in the North, it would be reasonable to assume that the multilateral arena (i.e., the UN), at least in the field of hazardous chemicals, would reflect Gramsci's notion of *Caesarism*. As an institution, it would be using its mandate not for the benefit of the South that would still be subject to hazards, but rather for the benefit of the North, whose

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<sup>157</sup> Krueger and Selin, *supra* note 35 at 334-335.

<sup>158</sup> *Ibid.* at 244.

paradigm of less state interference, minimum regulation and more wealth generation would prevail.

Other health concerns arise from the current PIC system. It potentially misses many substances that are hazardous, but are widely used in developing countries for a number of reasons. Since the procedure is triggered by the notification of *national regulatory measures* that include a ban, severe restriction, withdrawal, or rejection of a chemical, in theory, if a country does not have the capacity to adopt any of these control measures within its jurisdiction and thus notify eventual restrictions, it is reasonable to assume that even if it experiences health problems related to hazardous chemicals, this circumstances would not be considered under the dynamics of the PIC system.

A third concern relates to the decision making process involved in the composition of a list of hazardous chemicals to which the PIC procedure should apply. According to the provisions of the convention any inclusion to the so-called "PIC list" has to be approved by the Conference of the Parties to the Convention.<sup>159</sup> This latter constitutes a political body whose members, usually diplomats, are appointed by each country. As noted by Victor, "[n]egotiations for a binding system have shifted participation within governments from operational ministries (especially agriculture) that actually regulate pesticides and chemical hazards to foreign ministries". The obvious consequence of this shift in mandate is that the inclusion of a certain chemical on the list

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<sup>159</sup> Rotterdam Convention, *supra* note 3. Article 7, Listing of chemicals in Annex III, reads as follows: "(...) 2. The recommendation referred to in paragraph 1 [reference to a recommendation by the Chemical Review Committee to include a chemical in the PIC list] together with the draft decision guidance document shall be forwarded to the Conference of the Parties. The Conference of the Parties shall decide whether the chemical should be made subject to the Prior Informed Consent procedure and, accordingly list the chemical in Annex III and approve the draft decision guidance document".

also becomes a political decision. The negotiations involving the inclusion of the chrysotile form of asbestos in the PIC list is an example of the problem of political interference.

By notifying the Convention's Secretariat about a final regulatory action concerning the chrysotile form of asbestos, the Government of Chile triggered the PIC procedure for that substance in 2001.<sup>160</sup> As a result, a task force on that form of asbestos was created under the Convention's Interim Chemical Review Committee (ICRC) to consider whether or not the measure by Chile would lead to the inclusion of the substance on the PIC list of hazardous chemicals. After scientific discussion and formal approval by a group of experts (the ICRC), a conclusion was reached on the issue in 2003, according to which the chrysotile form of asbestos *should be* definitely added to that list. After considering the recommendations by the ICRC and based on the fact the Chile was not a Party to the Convention when the notification was made, the Conference of the Parties *agreed not to include* the substance on the PIC list. This example alone would demonstrate Gramsci's idea of *Caesarism*, with the system one more time erring on the side of the North, where the production of chrysotile represents an on-going source of wealth generation.

By illustrating the potential conflicts between recommendations based on science and decision-making based on factors outside science, I do not assume that "science" is the solution for the problems of the international management of hazardous chemical. As mentioned before, science itself has major constraints, since it does not necessarily reflect

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<sup>160</sup> See also McDorman, *supra* note 3 at 197.

other important values and particularities involving decision-making.<sup>161</sup> The dichotomy involving the use of DDT (a chemical that has already been incorporated to the PIC list) in the South as an effective and affordable way to control vectors responsible for the transmission of diseases such as malaria and dengue fever, for example, illustrates this point<sup>162</sup>. Decisions must be based on the likely effect on human health. If based on economic considerations alone, any system will be subject to domination, unfairness and vulnerability of the human kind, both in the North and in the South.

### **Health, Lies and the “Green Agenda”: Exercising Economic Hegemony through the “concept of health”**

Having situated how health has been conceptualized in the “brown agenda”, I move on to illustrate how it has been addressed within the “green agenda”. As opposed to the agreements discussed so far, the instruments under this category are usually a non-binding nature. They are commonly referred to as “soft law”, mainly due to their propositional and political characteristic. Rights and duties under this group of laws are often expressed by means of declarations, resolutions, recommendations and guidelines.<sup>163</sup> They can be either directly connected to the provisions of a particular

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<sup>161</sup> For more information about the implications of the Rotterdam Convention’s Prior Informed Consent on Free Trade and potential conflicts with the General Agreement of Tariffs and Trade (GATT) and other relevant agreements of the World Trade Organization, see Catherine Redwell, “Regulating Trade in Dangerous Substances: Prior Informed Consent under the 1998 Rotterdam Convention” in Alexandre Kiss, Dinah Shelton & Kanami Ishibashi eds., *Economic Globalization and Compliance with International Environmental Agreements* (The Hague: Kluwer Law International, 2003) 75.

<sup>162</sup> For more information about the dilemma involving the international management of DDT, see Don Mayer, “The Precautionary Principle and International Efforts to Ban DDT” (2002) 9 *S.C. Envtl. L.J.* 135 [Mayer]; see also Andrew J. Yoder, “Lessons from Stockholm: Evaluating the Global Convention on Persistent Organic Pollutants” (2003) 10:2 *Indiana Journal of Global Legal Studies* 113. [Yoder]

<sup>163</sup> See also Segger and Khalfan, *supra* note 73 at 9-10. The authors state that “[s]oft law is not a source on international law. However, certain ‘soft law’ documents can constitute evidence of emerging international law, (...)” (at 10).

agreement or they can arise as a result of new debates and concerns of the international community.

One of the most relevant aspects of “soft law” instruments in relation to health is their power to generate *customary international law*. As a source of law, they serve as an important tool for the interpretation of “hard law”. Additionally “soft law” has the ability to provide the basis for the consolidation of emerging principles.<sup>164</sup> As a matter of fact, history has shown that this group of norms has been responsible for the evolution of concepts currently incorporated to legal orders at the national level and by the multilateral community, such as the “precautionary principle”,<sup>165</sup> the principle of “co-operation between states” and the principle of “notification and consultation”, among others. The Rio Declaration agreed upon in 1992 is an example of this category of “soft laws” and includes all these principles, an analysis of which is worth undertaking due to its implications in regards to its approach to health.

### **The philosophy of Domination: Exposing Hidden Values behind Rio**

There is no doubt that the Rio Declaration on Environment and Development (“the Rio Declaration”), is considered a landmark in the history of IEL and ISDL. Although not a legally binding instrument, commentators usually highlight it as a successful effort, mostly due to a number of principles it incorporated, some of which expanded to other fields of knowledge. Both at national and international levels, Rio’s principles have been adopted and further developed by the multilateral community,

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<sup>164</sup> More general information about Public International Law is available online: Legal Information Institute <<http://www.law.cornell.edu/topics/international.html>>.

<sup>165</sup> Rio Declaration, *supra* note 2. The “precautionary principle” constitutes Principle 15 of the Rio Declaration.



influencing policies, behavioral changes and legislations. Similarly, environmentalists and other non-governmental stakeholders have also adopted Rio's principles in their political discourse. The international community, as a consequence, has adopted and adapted these principles in other multilateral agreements, including those under the World Trade Organization (WTO).<sup>166</sup>

In spite of this alleged success, it is also noteworthy that for a number of countries, translating the principles of Rio into tangible benefits remains a major challenge. This is due to a number of gaps surrounding the implementing of Rio in the real world, most of them arising from the historically misunderstood gap between North and South<sup>167</sup>.

In other words, despite these positive assumptions, it is hard to argue that the implementation of the principles affirmed in Rio have directly contributed to significant improvements in terms of quality of life in the South. In the contrary, the effects of globalization on socioeconomic indicators in the Southern hemisphere have been highlighted by several scholarly debates, showing the fragilities of the current model.<sup>168</sup> At the international level, this issue has become extraordinarily important, mainly due to

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<sup>166</sup> WTO, *Agreement on Sanitary and Phytosanitary Measures*, 15 April 1994. [SPS Agreement]

<sup>167</sup> Karin Mickelson, "South, North, International Environmental Law, and International Environmental Lawyers" (2000) 11 Oxford University Press Yearbook of International Environmental Law.

<sup>168</sup> Anand, *supra* note 12. The author notes that "[t]he problem stemming from incompatible North-South ecological and development agenda are accentuated in a global capitalist economy, dominated by neo-liberal ideals" (at 6).

the lack of a common understanding about the boundaries between economic development and social justice.<sup>169</sup>

A first review of the principles of Rio may lead to the assumption that indeed the UNCED took a positive approach towards health, since it put humankind at the “centre of concerns for sustainable development”.<sup>170</sup> Such perception is straight-forward, specially because it is clear that in order to be able to be put at the center of concerns, man and women would have to “exist”, a consequence of living in healthy condition. By adopting this principle, international diplomacy shows that the ultimate actor on whom the benefits or eventual failures of development policies will reflect is the global population. Social determinants of sustainable development such as health, education and poverty, for example, seem to be emphasized by Rio.

A more detailed analysis, however, unfortunately demonstrates the opposite. An statistical review of the Declaration shows that 13 of the overall 27 principles deal with issues of sustainable development, as opposed to the remaining 14 principles whose scope relate, predominantly, with the protection and conservation of environment. Only 3 principles directly mention “health”. Six others address social and/or other health-related determinants such as poverty and living conditions. A vast majority of 18 principles, on the other hand, emphasize values with no clear relation to social issues including health. Their provisions rather address isolated environmental concerns, somehow alienating them from the initial idea where priority was given to humankind.

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<sup>169</sup> FAO, *Law and sustainable development since Rio: Legal trends in agriculture and natural resources management*, FAO Legislative Study 73 (Rome: FAO Legal Office, 2002) at 347.

<sup>170</sup> The Rio Declaration, *supra* note 8.

An evaluation of the principles where “health” is directly mentioned demonstrates that it is addressed as a value to be protected and restored by national governments by means of differentiated contributions. In other words, North and South have common but differentiated duties if, for instance, better health conditions are to be pursued at the global level. According to the language adopted in the Declaration, an enhanced state of health is to be pursued through international development assistance and cooperation. Principles 9 and 14 illustrate this point, and read as follows:

Principle 9

States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

Principle 14

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

In the context of Rio, cooperation means also financial assistance from the North and technological improvement of the South, as well as a wide range of positive and negative duties that countries were given. An example of a positive obligation is the duty of developed countries to bear a heavier burden of the costs of financing the integrity of Earth's Ecosystem and development in view of the pressures historically placed by their societies on the global environment. On the other hand, the obligation of countries to “discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to

human health”<sup>171</sup> is a clear example of a negative obligation, i.e. a duty not to do something that can cause damage to other countries environment or health.

This is where the problem begins, showing that indeed Gramsci’s arguments about hegemonic power are also present in the 1992 Declaration. This time, however, they reveal themselves through the language adopted by the multilateral negotiators to express the values behind Rio’s principles. Principles 9 and 14 illustrate this point, showing that the “strength” of each of them will vary depending on who will be most likely to benefit from them. In other words, “positive obligations” including those related to promoting health and development, such as those contained in Principle 9 and 14, were framed in such a way that they became totally meaningless. Coincidentally or not, they are often associated with the idea that the North “has to do something” (e.g., transfer technology to the South). On the other hand, “negative obligations”, most of which involving the South, are more precise and supported by “strong” and more precise language. Principles 9 and 14, about co-operation and transfer of hazardous substances (among others obligations that in practice would fall into those belonging to the North) were written in a way that countries “should” let’s say provide financial assistance or prevent transboundary movement of wastes, for example. They were not structured as a precise command, but rather as something diluted, hard to enforce and subject to the willingness of those responsible for putting them into practice. A quick review of the principles of the other kind demonstrates this point. Principle 19 is an example of this category, and according to it:

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<sup>171</sup> The Rio Declaration, *supra* note 8.

## Principle 19

States *shall provide prior and timely notification* [emphasis added] and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

Why at this time, instead of using “should”, was “shall” used ? Clearly, by doing so, Rio negotiators agreed upon a stronger and more precise command, providing a real sense of obligation when it comes to complying with Principle 19.

The answer for this can be found in Gramsci's Caesarism (although Foucault would also provide a solid basis for explaining the surveillance nature of Principle 19). Being the promoter of the UNCED, the UN as a multilateral organization acted as a third party responsible for accommodating the need of the “global community”, as opposed to just those of individual countries either in the North or in the South. In theory, since it represents the interests of all nations, it would make neutral decision, based on consensus or sometimes of votes, thus expressing the decision of majority. According to Gramsci, a third party does not always act in a neutral way. It can reflect the ideas of one or another party, reinforcing their interests and points of view. By doing so, it errs to one side, replicates domination of one over the other, who indirectly accepts the imposed idea. This is Gramsci's concept of *Caesarism*, exercised in the Rio Declaration by means of language (“should do” or “shall do”).

Principle 19, above, stresses the need for countries to notify regarding events that can put other countries at risk. It emphasizes aspects of surveillance and describes in a very incisive way what “shall” be done in case such events occur. Being more vulnerable to the constraints described in that principle (e.g., due to lack of technology, expertise,

and others), the obligations it sets forth would deeply affect countries of the South. They would have to notify any accident or problems that could represent a risk to other nations, including those in the North. The principle creates a duty for self-surveillance, consultation and notification, in order to prevent that hazards such as those of Bhopal and Chernobyl, for instance, do not spread out, putting others in danger. As a matter of fact, the principle would also apply to Northern country. However, due to technological advances among others, the obligations of Principle 19 would be to a certain extent most likely to be imposed upon the South.

The conclusion is that by adopting this two-tier method of wording the Rio Declaration, multilateral diplomacy has proven that it privileged the North. This is due to the way in which Principles 9 and 14 ("should" principles) were described, without possibility of enforcement. As a consequence, it also illustrates the secondary role of health in that document, since the co-operation proscribed under these two principles would not be carried out. On the other hand, by proposing that countries "shall" take proactive measures in order to notify problems as described in Principle 19, the same multilateral diplomacy places safety in the North as a major issue of concern. This is due to the fact that they would be notified of accidents that happen in the South, which would remain as a potential importer of wastes and technology from the former, including obsolete ones such as that of Bhopal.

The same pattern of domination can be observed ten years after Rio in the *World Summit on Sustainable Development* held in South Africa, in 2002.<sup>172</sup> As in the former,

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<sup>172</sup> Johannesburg Declaration and Plan of Implementation, *supra* note 7.

the “concept of health” remained very strict, giving priority to the prevalence of market forces in the benefit of the North. In the section that follows (i) I show that the same problem persists in the Johannesburg Declaration adopted at the 17<sup>th</sup> plenary meeting of the World Summit on Sustainable Development, and; (ii) the role played by the UN in reproducing Gramsci’s strategies of domination and hegemony.

As the main outcome of the Summit, countries adopted a political declaration and a plan of implementation with principles, strategies and goals. The document, agreed upon ten years after Rio, reflects the global concerns with issues like peace, terrorism, crime prevention and corruption, as factors affecting sustainable development at the global level. A preliminary analysis of the Johannesburg Declaration leads to the assumption that its provisions remain very political, broad and vague enough to raise concerns about its likelihood to produce the results sought. On the other hand, in spite of an extensive preparatory process<sup>173</sup>, the multilateral declaration seems not only to have repeated commitments previously made in Rio, but also to have revisited these commitments in a different way. The statement under paragraph 15 about the weaknesses of governments in poor countries and their impact on democracy mistrust is an example of how much more explicit differences between North and South were highlighted in South Africa.

Another side of the spectrum is that Johannesburg reaffirms values and principles previously articulated in Rio, such as poverty eradication, reduction of the gap between

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<sup>173</sup> The preparatory process for the Johannesburg Summit was encompassing and included a number of events and consultations at local, national, regional and international levels. This latter includes four preparatory multilateral meetings with a wide range of stakeholders during the period of April 30<sup>th</sup>, 2001 until June 7<sup>th</sup>, 2002.

North and South countries, environmental protection, solidarity and cooperation, among others. Except for four renewed provisions out of thirty seven others, the document brought up important but well known values, most of which wrapped in the idealistic concept of universalism.<sup>174</sup>

The first renewed issue relates to the idea of integrated sustainable development. As opposed to previous definitions and conceptualization of the term, the Johannesburg Declaration clearly recognizes this integrated approach as the basis for sustainable development. It stresses the interdependency and mutual reinforcement of economic development, social development and environmental protection.

The remaining three innovations<sup>175</sup> refer to the explicit recognition of the role to be played by the private sector in pursuing development, as opposed to a government-only-based implementation strategy. By doing that, Johannesburg highlighted the basic premise that essential determinants of development are on the hands of the private sector, in spite of the crucial role to be played by national governments and international public organization in checking and balancing the public-private interaction through regulatory and enforcement measures. The multilateral community also recognized the duty of

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<sup>174</sup> As Onoral O'Neill and David McNaughton state "[t]he charge that ethical principles which prescribe the same for all abstract from differences between cases is true, but not damaging. No principle of action - whether of universal or non-universal form, whether of cosmopolitan or lesser scope - can prescribe with total specificity; even very explicit principles abstract from many circumstances. It follows that principles of action can always be satisfied in varied ways. A principle such as 'Tell the truth' does not prescribe what we must say to whom or when; a principle such as 'Pay your debts' does not determine the means or manner of repayment. Principles of action, including ethical principles, constrain action or entitlements, rather than picking out a single, wholly determinate line of action. Abstract principles can therefore guide action yet allow for flexible interpretation or application that takes account of differences between cases. So an ethics of universal principles can readily avoid both barren formalism and doctrinaire rigorism". Further discussion of universalism can be found online: [http://caae.phil.cmu.edu/Cavalier/80130/part2/Routledge/R\\_Deontology.html](http://caae.phil.cmu.edu/Cavalier/80130/part2/Routledge/R_Deontology.html).

<sup>175</sup> Johannesburg Declaration and Plan of Implementation, *supra* note 7 paras. 27, 28 and 29.



industry to contribute to sustainable development, and the role it should play in generating income and promoting accountability. The Johannesburg Summit also produced a comprehensive Plan of Implementation as a means to set forth concrete measures and establish tangible goals to be pursued by both the international and national community towards sustainable development.

In regard to health, in spite of some advances, Johannesburg replicated values and strategies that follow the same dynamics of Rio, reflecting the predominance of a market-oriented "concept of health".

### **Johannesburg and the creation of new markets in the field of Health: Exercising the Hegemony of Liberalism**

There is no need for complex formulations to realize that sustainable economic development is very likely to lead to better health standards and vice versa. In theory, assuming that the patterns of production and consumption associated with economic development as they have been adopted by developed countries in the last decades will not result in pollution and other harmful effects on human health, improvements in infrastructure are commonly perceived as positive. Unfortunately, the negative impact of the current pattern of production and consumption, especially in the North, has led national governments and the international community to debate about the extent to which consumerism will have positive results for global environment integrity and health. A clear example of this is the paradox related to an increased number of obesity cases worldwide. In order to address this particular issue, directly related to the consumption patterns that have been adopted so far, the WHO, for example, decided to launch a "*Global Strategy on Diet, Physical Activity and Health*", whose basic assumption is:

The rising epidemic reflects the profound changes in society and in behavioral patterns of communities over recent decades. While genes are important in determining a person's susceptibility to weight gain, energy balance is determined by calorie intake and physical activity. Thus societal changes and worldwide nutrition transition are driving the obesity epidemic. Economic growth, modernization, urbanization and globalization of food markets are just some of the forces thought to underlie the epidemic.<sup>176</sup>

The assumptions underling current high levels of consumption and production in the North must be considered if a meaningful assessment of the extent to which the multilateral system has been playing a legitimate role in the promotion of health though development is to be carried out.

The idea of development currently adopted, which was already present in Rio and remained in Johannesburg, is associated with the need for improved investments in infrastructure in the South and with the impact of such investments on equity, health and environmental quality. The energy and telecommunications sectors are good examples of this. Despite the obvious recognition that these utilities are significantly important for realizing part of what can be deemed development, the approach to both of them in Johannesburg has been built in such a way that they also represent an outstanding source of wealth generation for those providing them. Not coincidently, either because of technological ownership or due to know-how, these services are often located in the North. The South, lacking both means, thus represents markets to which such technologies and services are to be sold. This is how market-oriented economies work.

Consider now the same situation in the health sector. According to the provisions of the Johannesburg Plan of Implementation, these investments are described as the

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<sup>176</sup> WHO, "Obesity and Overweigh" online: The World Health Organization <<http://www.who.int/dietphysicalactivity/publications/facts/obesity/en/print.html>>

solution for achieving higher levels of development and health. The way in which Johannesburg addresses water and sanitation issues illustrate this. As agreed upon in 2002, improvements in water and sewage systems in the poor part of the world are dealt with under the title “Health and Sustainable Development”, that reads as follows:

[T]ransfer and disseminate, on mutually agreed terms, including through public-private multisector partnership, with international financial support, technologies for safe water, sanitation and waste management for rural and urban areas in developing countries and countries with economy in transition, (...) <sup>177</sup>

If on one hand, least-developed countries do not have the required technical and technological expertise that enable them to provide drinking water or to properly manage their waste, on the other hand they often lack the financial means to fund large scale investments of this nature. Either due to internal constraints or the lack of know-how, these countries usually rely on international loans from international financial institutions, such as the World Bank and the International Monetary Fund. As the Johannesburg Plan itself recognizes, official development assistance <sup>178</sup> is no longer the major source of funding for development. This is the current reality, despite the commitment by the North to allocate 0.7 per cent of their gross national product to help developing countries implement development goals. As a matter of fact, infrastructure investments are usually financed by funds borrowed under conditions of high interest rates, commonly leading to a significant increase in the amount of external debts in the South. The external debt of

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<sup>177</sup> Johannesburg Declaration and Plan of Implementation, *supra* note 7 at para. 54(1).

<sup>178</sup> *Ibid.* at para. 85(a).

Brazil, for instance, whose economy has been referred to as being “in transition”, accounts at present for 242.3 billion American dollars.<sup>179</sup>

Together with financial and economic constraints, are the lack of expertise and technology required to build infrastructure for health and development. Often, both technology and know-how are associated with investments made in research and development in the North, the costs of which are expected to be recovered as a result of transactions with the South. This happens not only in areas such as water and sanitation, but also in other essential areas for health, including pharmaceuticals.

In the Johannesburg Plan of Implementation, about six out of ten provisions dealing with infrastructure investments, for example, emphasize the need for national government to adopt less restrictive policies and regulatory schemes in order to enable international “cooperation” in their efforts to “improve access to reliable, affordable, economically viable, socially acceptable and environmentally sound” services.<sup>180</sup> Going in the same direction are the negotiations of the WTO, which have as a core assumption the idea of international development through a fostered commitment to free-trade principles, either for the exchange of goods or for the overseas provision of services. The water and sanitation sector itself is not different and can have a significant impact in terms of market share when it comes to the provision of these utilities in large scale. From this perspective, therefore, Johannesburg represents a substantive opportunity for those who detain know-how and technology to trade them, thus reinforcing the logic of

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<sup>179</sup> Online: The World Bank Group

<<http://devdata.worldbank.org/external/CPProfile.asp?SelectedCountry=BRA&CCODE=BRA&CNAME=Brazil&PTYPE=CP>>

<sup>180</sup> Johannesburg Declaration and Plan of Implementation, *supra* note 7 at para. 9(f).

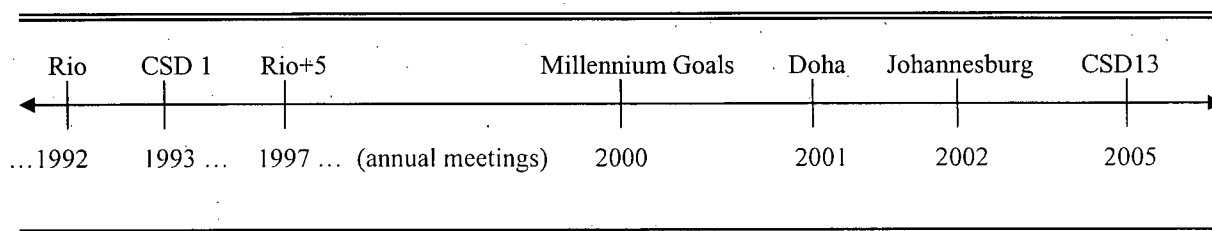
wealth accumulation of liberalism. By doing so, it accepts the harmful outcomes that this model of development is likely to bring in terms of debt and impoverishment in the South. It replicates domination Gramsci-style, with the multilateral system once more serving the North.

**Institutional "Caesarism": Limitations surrounding the concept of health adopted by the UN Commission on Sustainable Development**

At the multilateral level, besides the WHO, other agencies and bodies of the United Nations play different roles in relation to health. Usually reflecting the same model adopted by national governments, their universe of competences is usually compartmentalized. Lack of co-ordination and overlapping of competences and activities are not unusual, both among different sectors and within individual areas. The result is that themes such as "health and sustainable development" or "environmental health" can be addressed by different agencies and/or bodies at the same time and in different ways. In some cases, this diversified approach can be inherent in the multidisciplinary nature of the specific subject matter being addressed or it reflects the needs to establish the scope of one or another institution. In others, it reflects the result of bureaucracy, power imbalances, political dispute. For this reason, a topic such as "women and child health" can be simultaneously addressed by the WHO, the United Nations Population Fund (UNFPA), the United Nations Children's Fund (UNICEF), and by the United Nations Development Programme (UNDP). Similarly, issues related to "food safety" can be incorporated as an item agenda of the FAO and other bodies within the WHO. Co-ordination constitutes then a major challenge for the international community in order to agree upon meaningful and potentially effective policies and regulations.

When it comes to setting the boundaries of “health and sustainable development” the same complexity applies. Being one of the elements of the social pillar of sustainable development, it has been addressed by different actors at different levels in the multilateral system. At the technical and political level, the WHO has historically played a significant role in the field. For this reason, epidemiological trends associated with development issues (e.g., respiratory disease caused by air pollution, among others) are mostly considered under the WHO, which also acts as the advisory agency for a number of other institutions within and outside the UN system. At the level of broader international affairs, policies and international law, another body has been responsible for the negotiations of “health and sustainable development”: the UN Commission on Sustainable Development (CSD). Under the acronym WEHAB (Water, Energy, Health, Agriculture and Biodiversity), health issues have been discussed by the CSD since its creation in 1993, just a year after the Earth Summit in Rio. Figure 2 illustrates important milestones associated with the theme of “health and sustainable development” since 1992.

Figure 2: CSD negotiations and Development Milestones



The 13-year-timeframe illustrated may seem irrelevant at first if compared to the long-standing work of the WHO since its foundation in 1946 as the multilateral “headquarters” for health-related discussions. A closer look, however, shows that it is

also within this period that major issues highlighting the interrelation among health, environment and sustainable development have been brought to the international arena, particularly in the realm of law. It is also the time when the legal discipline of SDL has started to be shaped as a new area of international law. During this period, the universe of new elements brought to consideration under the already complex world of health expanded even more. In the health area, the impact of a number of economic aspects of development and a series of other important values had to be incorporated to an originally “medical-only” technical debate.

This phenomenon happened gradually at different levels within the UN system, as new values were being demanded by civil society, concepts were being consolidated and multilateral declarations were being agreed at multilateral level. A growing popular debate about the effects of HIV/AIDS in the developing world made international diplomacy also realize that health could be no longer confined to the WHO. As a problem causing and affecting a multitude of fields and actors, it had to be incorporated into other discussions, even if only in theory.

Table 1 below situates the discussion about “health” under the UN CSD over the years since 1993.

Table 1: Health and the Historical Series of CSD Negotiation Agenda

Meetings	Main Focus	Inclusion of Health	% of Commission Members North	% of Commission Members South
CSD 1	Procedural Matters Information Exchange	No	20.7%	79.3%

	Technology Transfer Financial Matters			
CSD 2	Agenda 21 Financial Matters Cross-cutting Issues <sup>181</sup> Co-operation <b>Health</b> Human Settlement Freshwater Toxic Chemicals Hazardous Wastes	Yes	24.5%	75.5%
CSD 3	Agenda 21 (poverty, food, trade) Financial Matters Cross-cutting Issues Co-operation Land Desertification Forests Biodiversity	No	24.5%	75.5%
CSD 4	Agenda 21 ("critical elements"- chapters 2-5) Financial Matters Cross-cutting Issues Co-operation Decision-Making Atmosphere Forests Small Islands	No	26.4%	73.6%
CSD 5	Agenda 21 (Rio+5 – Earth Summit review – health included) Forests	Yes	26.4%	73.6%
CSD 6	Freshwater Cross-cutting Issues Industry Small Islands	No	26.4%	73.6%
CSD 7	Oceans and Seas Consumptions and Production Tourism Small Islands Energy	No	26.4%	73.6%
CSD 8	Agriculture Finance Land Management	No	26.4%	73.6%

<sup>181</sup> "Cross-cutting Issues" entail the following topics: technology transfer; capacity-building; education; science, and; awareness-raising.



	Trade			
CSD 9	Atmosphere Energy Information International Co-operation Transport	No	26.4%	73.6%
CSD 10	Johannesburg Summit (Preparatory Committee – health included)	Yes	26.4%	73.6%
CSD 11	Follow-up of Johannesburg Summit Small Islands	No	26.4%	73.6%
CSD 12	Water Sanitation Human Settlement Small Islands	No	26.4%	73.6%
CSD 13	Water Sanitation Human Settlement	No	26.4%	73.6%

As one can see, as a single subject, health was only included once in the Commission's agenda. It was in 1994, when the CSD met for the second time. Besides that, the subject was addressed secondarily in two other occasions (CSD 5 – 1997 and CSD 10 – 2002). A part from a more detailed qualitative analysis of how encompassing “the concept of health” was during those three meetings, this scenario illustrates the following. First, that the subject itself has not been addressed as a separate agenda item nor it has been particularly perceived as a significant or peculiar topic of the social development pillar of sustainable development. Secondly, that “health” has been indirectly approached in two other occasions, in 1997 and in 2002, exactly when the results of the 1992 Earth Summit were being assessed having passed five and ten years after Rio. In both cases, health was considered in the context of reviews of the Agenda 21 (Chapter 6).

These aspects could find justification in two arguments. First, that the process of defining the items to be part of the CSD agenda is based on a previously defined multi-year program of work. Since the negotiation of “sustainable development” issues has to deal with a wide range of different subjects, topics would be fairly discussed and negotiated along the years in different meetings. The problem with this argument, which indeed has been the one adopted by the CSD, is that it seems not apply to with other issues of other two pillars of sustainable development – environmental protection and economic development. If the list of subjects and different issues that have to be considered by the CSD every year is big enough to justify the organization of topics in a multi-year period so that they can all be discussed, why topics like “forests” and “energy” are dealt with in more than one meeting, whereas “health” and other subjects of the “social development” pillar do not have similar treatment?

The second argument that could be used to justify the lack of a systematic treatment to “health” as a single item in the CSS agenda relies on the multi-sector nature of the “concept of health” itself. As proposed in Chapter Two, the notion of “health in a broader sense” would include a number of different concerns. For the purpose of setting an agenda, they would be then tackled by the CSD as separate items to be discussed over the years, rather than being incorporated to an all-encompassing cluster of “health”. In this perspective, the notion of health in a broader sense would only be said to have been addressed by the Commission if most of its main elements were addresses in different meeting over the years. In this case, the CSD agenda would include items such as housing, basic infrastructure, access to patented drugs, minimization of environmental risks, and so on. The problem with this approach is that if the elements of “health in a

broader sense” are not included in negotiations carried out over the years, the CSD will be only discussing a limited part of the universe of health. Table 2 below shows that this has been the approach adopted by the CSD within those meetings where health had been addressed, resulting in an incomplete “concept of health”. Only a limited number of elements of “health in a broader sense” were addressed in those three meetings. Most of them were strictly related to the need for financial investments by the South and to the creation of new market opportunities for the North. The inclusion of “water and sanitation” as an agenda item of CSD 12 demonstrates this point, arising the following question: Why should “water and sanitation” be given priority by the CSD instead of other problematic areas of health such as the production of “orphan drugs” and “health economics” particularly its relation with the gap between North and South ?

Table 2: CSD meetings and Health

CSD	Year	UN Document	Agenda Item	Secondary <sup>182</sup>
CSD 2	1994	E/CN.17/1994/20	√	
CSD 5	1997	E/CN.17/1997/25 (E/CN.17/1997/2/Add.5)		√
CSD 10				
Prepcom 1	2001	A/56/19 <sup>183</sup>		√
Prepcom 2	2002	A/CONF.199/PC/2		√ <sup>184</sup>
Prepcom 3	2002	A/CONF.199/PC/14		√
Prepcom 4	2002	A/CONF.199/4		√

In spite of an uncontested recognition that “water and sanitation” represent a basis component of health, it is far from enough to achieve “health in a broader sense”.

<sup>182</sup> For the purpose of the current analysis, classification as ‘Secondary’ indicates that despite not depicted as an ‘Agenda Item’, at least one health-specific document figured as a meeting document.

<sup>183</sup> *Report of the Commission on Sustainable Development acting as the preparatory committee for the World Summit on Sustainable Development*, UN GAOR, 56<sup>th</sup> Sess., Supp.No. 19, UN Doc. A/56/19 (2001).

<sup>184</sup> Health issues were negotiated as part of a draft Plan of Implementation for the WSSD first considered at this meeting. The document was also considered and amended during the third and fourth Prepcoms.

However, it enables the international community, specially developed nations to articulate arguments that justify their action in this field, either through the indirect provision of inputs for building water and sanitation systems in the South through governmental international bidding or directly through the privatization of services in the developing world. The multilateral agenda, in this case, would not necessarily represent an opportunity to translate health in a broader sense in the real world. It would be rather a convenient tool for the generation of wealth and the expansion of markets already saturated in the North.

Another result of this analysis refers to how the CSD is made up. As illustrated in Table 1, only 26.4% on average of the Commission members are from the North, as opposed to the vast majority of members from the developing word. Bearing this discrepancy in mind, would not it be a contradiction to argue that the North has been taking advantage of the negotiation under the CSD? According to Gramsci, the answer would be "no". Rather, this contradictory relation reflects what his notion of "caesarism", showing that the multilateral system is not as neutral as one would expect. Being a separate institutional body (not the North nor the South), the CSD would represent a third party in which the interests of one group would prevail over the interests of another. Gramsci shows that the prevalence of one idea over the other follows the steps of domination and hegemony. Both on them are carefully articulated and based on ideas strategically created and spread as being "the truth" or the "way to go". When applied to the example of "water and sanitation" previously articulated, domination and hegemony are reflected in that the topic are presented as "the solution" for achieving better health, thus deserving a specific place in the CSD agenda. It is hegemonic because it has been

placed in the negotiations with the consent of the South, the majority. It is dominant because it has been absorbed and applied over the years based on the recommendation of “experts” for whom “water and sanitation” is to be given priority, even though other priorities such as “hunger”, Malaria” and “Chagas Disease” exist. In the political arena it has found support in the popular argument that resources should be well allocated where they are scarce (classic benefit-cost economic analysis). Even in the single case where “health” was directly considered as an agenda item (CSD 2), similar aspects of domination could be observed. Table 3 below illustrates the aspects of health addressed in 1994 and a series of recommendation by the CSD in regard to “health”.

Table 3: CSD 2 Final Report: Summary of Health Issues and Recommendations

Health Issues	Recommendations
Integration of “health” to sustainable development”	<ol style="list-style-type: none"> <li>1. To adoption of “innovative and holistic approaches” to health</li> <li>2. To implementation of WHO “Global Strategy for Health”</li> <li>3. To integrate “health” in environmental assessment procedures</li> <li>4. To enhance participation of NGOs</li> <li>5. To promote public-private partnership</li> </ol>
Health Financing	<ol style="list-style-type: none"> <li>6. To prioritize preventive measures, as well as interventions in rural areas and urban slums</li> <li>7. To provide basic healthcare “to women and children as a prerequisite to the reduction of population growth” (p.23)</li> <li>8. To invest in public information and awareness</li> <li>9. To support research and use of alternatives based on traditional knowledge</li> </ol>
Poverty	10. To foster provision of food aid
Occupational health	11. To implement and monitor preventive health programs
Production and consumption patterns	12. To create a list of products “whose consumption and/or sale have been banned, withdrawn, severely restricted or not approved by governments” (p.23)
Hazardous chemicals	13. To control use and emissions
Health Reform	<ol style="list-style-type: none"> <li>14. To adopt a “community health development” model (p.23)</li> <li>15. To direct financial resources to the most cost-effective health protection and promotion programmes (p.23)</li> <li>16. To include health in national decision making</li> <li>17. To incorporate health in development planning</li> </ol>
Food security, quality and	18. To be included in national development plans

safety	
Epidemiology	19. To eradicate communicable diseases, AIDS and malaria 20. To determine mechanisms "that identify and control newly emerging infectious diseases and their possible environmental linkages" (p.27) 21. To report on epidemiological studies involving health and depletion of the ozone layer
Health Infrastructure	22. To strengthen "health infrastructure" with "cooperation" of international community (p.23) 23. To establish structures for environmental health services 24. To invest in institutional capacity
Health Technology	25. To find "concrete ways and means to transfer appropriate health-related technologies, including medical and pharmaceutical technologies to developing countries and economies in transition" (p.27)

A quick review of the items address by the CSD during its second meeting reveals two mechanisms through which domination is put into practice. The first one relates to the dissemination and unconditional acceptance of the "right paradigm". The second refers to the articulation of "fallacies".

Table 3, item 7 and 12, are examples of the first domination mechanism ("right paradigm"). In Item 7, the Commission prescribes a healthcare model oriented to addressing two groups: women and children. Rather than setting a rationale based on the health conditions of these groups (e.g., high mortality rates of pregnant women or child malnutrition, among others), the CSD justifies the inclusion of this item in the agenda for a different reason: population growth. Notwithstanding the constraints arising from overpopulation, some of which predicted by Thomas Malthus (1766-1834) in the nineteenth century<sup>185</sup>, the nature of this concern by the CSD is merely

<sup>185</sup> Malthus was a political economist who was concerned about, what he saw as, the decline of living conditions in nineteenth century England. He blamed this decline on three elements: The overproduction of young; the inability of resources to keep up with the rising human population; and the irresponsibility of the lower classes. To combat this, Malthus suggested the family size of the lower class ought to be regulated such that poor families do not produce more children than they can support. More information about Malthus is available online: <<http://www.ucmp.berkeley.edu/history/malthus.html>>.

economic. By doing so, the Commission is mostly concerned with the increased financial burden for funding healthcare. Indirectly, though, it would endorse the limitation of people's right to decide how many children they want to have, what common sense seems to deem unacceptable if the same was prescribed to a family in the North. Another example of domination through the imposition and acceptance (Gramsci's hegemony) of the "right paradigm" type can be seen in item 12 of Table 3. At that point the Commission ratified the supremacy of liberal regimes, where wealth accumulation has supremacy over other values, including health. Instead of taking an approach in which problems related to the current patterns of production and consumption in the North are addressed at their origin, the CSD decided to tackle the problem through a different route. Rather than recognizing, for example, that the developed world should use less natural or other resources in the production of goods or consume less, thus addressing problems at the very origin, the Commission simply agreed to transfer this responsibility. By suggesting the creation of a list of banned products, it assumes that other countries, including those in the South, have the required means to detect and avoid these products.

Table 3 also illustrates that the CSD has exercised Gramsci's notion of Caesarism through the consolidation of "fallacies". Items 22, 23 and 25 are examples of recommendations that have been repeatedly adopted in the international arena as a solution for the gap between North and South. The only problem, however, is that those recommendation hide practical constraints or are rarely applicable in the real world. Strengthening "health infrastructure" as set forth in items 22 and 23, means in other words massive investments in the construction of healthcare units for basic and

complex care, as well as medical technology and equipments. Similarly, "cooperation" of the international community usually translates into high interest rates loans, with strict and binding rules. It is seldom put in practice through official development assistance (ODA) for the funds "donated" by the North are mostly used by grantee countries to pay experts and inputs provided by the donor countries. The same applies to item 25 about technology transfer. It is perhaps one of the biggest fallacies often associated with sustainable development. As a matter of fact, one aspect is noteworthy in this regard: technology is something that belongs to the private sector, rather than to governments. It is the result of expensive research and development ultimately protected by intellectual property rights. For this reason alone, the transfer of "appropriate technology" as agreed by the North and usually celebrated by the South means very little in the concrete world. Despite governmental commitments at the multilateral level, only industry could effectively transfer technology. In the health field, this constraint seems to be even bigger, with the private sector being represented by pharmaceutical giants and by those dealing with more complex technologies.

Table 4 below demonstrates that the same pattern remained in 1997, when the world gathered once more to assess the achievements in the sustainable development field. However, besides the old problems, the results of the Commission's meetings



seems to have brought up new ones, contradicting its own recognition that the “G-7 placed health as a fundamental objective in environmental policies”.<sup>186</sup>

Table 4: CSD 5 Final Report: Summary of Health Issues and Recommendations (based on doc E/CN.17/1997/2/Add.5<sup>187</sup>)

Health Issues	Identified Progress	Recommendations
Integration of “health” to sustainable development	<ul style="list-style-type: none"> <li>• Large number of local Agenda 21</li> <li>• G-7 placed health as a fundamental objective in environmental policies</li> </ul>	<ol style="list-style-type: none"> <li>1. To promote WHO ‘Health for All’ and ‘Healthy Cities’ initiatives.</li> <li>2. To incorporate “health” to major UN documents</li> <li>3. CSD to consider “health” as a cross-cutting issue</li> <li>4. To face health constraints caused by national structural adjustment plans</li> </ol>
Climate change	<ul style="list-style-type: none"> <li>• Document ‘Global Solar UV Index’</li> </ul>	None
Food Safety	<ul style="list-style-type: none"> <li>• FAO harmonization efforts of safety standards accepted by the WTO</li> </ul>	None
Environmental Health Infrastructure at local level	<ul style="list-style-type: none"> <li>• Launch of Africa 2000 initiative on water and sanitation</li> </ul>	<ol style="list-style-type: none"> <li>5. CSD to support local level strengthening initiatives</li> </ol>
Environmental Health Information System	<ul style="list-style-type: none"> <li>• WHO initiative ‘Information for Decision-Making in Environment and Health</li> </ul>	None
Health in Environmental Impact Assessments	<ul style="list-style-type: none"> <li>• WHO, FAO, UNEP and Habitat guidelines on incorporating health to development projects</li> </ul>	<ol style="list-style-type: none"> <li>6. Donor agencies to consider health dimensions of environmental assessment methodologies</li> <li>7. CSD to consider issue as priority</li> </ol>
Chemicals	<ul style="list-style-type: none"> <li>• Improvement of methodologies</li> </ul>	None

<sup>186</sup> Overall progress achieved since the United Nations Conference on Environment and Development: Report of the Secretary-General Addendum – Protecting and promoting human health (Chapter 6 of Agenda 21), UN ECOSOC, UN Doc. E/CN.17/1997/2/Add.5 (1997) at 6.

<sup>187</sup> The final report of the Fifth Session of the Commission on Sustainable Development did not provide a specific section for “health matters”. Rather, the subject was dealt with as part of a more encompassing “package” of subject matters reviewed by the CSD acting as the preparatory forum for the Rio+5 special session, held in 1997.

	for risk assessment by WHO/IPCS and OECD <sup>188</sup>	
Emerging and Re-emerging Diseases	<ul style="list-style-type: none"> <li>Establishment of WHO's Division of Emerging and other Communicable Diseases Surveillance and Control and investments in research in Tropical Diseases funded by the UNDP/World Bank/WHO.</li> </ul>	None

One of these problems, that in fact is new in the sense that it became explicit in the document but reflects a constraint that has been criticized over the years, is the institutional deficiencies within the multilateral system. Although not exclusively affecting the Commission, the apparent lack of strict co-ordination among the UN bodies and agencies responsible for different aspects of health seems to contribute to the adoption of a more balanced "concept of health". Similarly, the lack of proactive interaction within the system seems to have contributed to perpetuation of numerous "misunderstanding".

Table 4 shows that at least two health-related issues addressed in the CSD background document reflect this problem: Food Safety and Climate Change. In regard to the former, the Commission highlights the acceptance of standards from one UN Agency by another as a major sign of progress in the area. Limited consideration is given to other relevant issues associated with the problem, despite the political

<sup>188</sup> Guidelines for exposure to chemicals have been developed by the International Programme on Chemical Safety (IPCS) and the Organization for Economic Cooperation and Development (OECD). The CSD final report acknowledges the effort as a "coordinated manner to promote the development, improvement and harmonization of methodologies for risk assessment as well as for toxicity testing" (at 8). The issue of harmonization of methodologies itself is not less problematic if considered the constraints in poses in relation to North and South. In this regard, the Commission simply takes for granted the assumption the harmonization of methodologies for risk assessment is the right way to go towards development, even though it brings with it a series of constraints to the South, unable to "up-grade" its system to all the requirements of the OECD, for example.

nature of the CSD itself. Rather than treating the theme in a more encompassing way, it seems that the Commission assumed that any more “daring” or proactive discussion on the issue would not belong do it. In order not to be completely silent on that subject matter, it chose to highlight only a procedural aspect, an important one, but certainly not more important than the political complexities involving the topic in the real world.<sup>189</sup> In the realm of climate change the same seems to have happened. In spite of the technical and technological knowledge available at the time of the meeting, it seems that the Commission addresses the topic only in a secondary way, perhaps due to the complexities it raises in terms of the current patterns of production and consumption in the countries of the North.

Table 5: CSD 10 (WSSD Prepcom 2): General Issues and Health Concerns by Geographical Regions<sup>190</sup>

<b>Geographic Regions</b>	<b>Concerns</b>	<b>Claims</b>
AFRICA	Poverty	Alleviation/Eradication
	Market Access	Elimination of Barriers
	Micro-credit	Access
	Energy	Affordability
	<b>Health</b>	Access to Health Services and HIV/AIDS drugs
	Agriculture	Development
	Food Security	Enhancement
	Water and Sanitation	Access
	Natural Disasters and Environmental Risks	Minimization
	Education	Access
	Economy	Better flow and Debt relief

<sup>189</sup> I refer to the relationship between considerations about “food safety” and access to new markets, particular by the South in the North. As part of a political body within the UN Economic and Social Council, it seems appropriate that the CSD had address more substantial issues relating sustainable food production and export to development, among others.

<sup>190</sup> This table reflects issues negotiated as part of a draft Plan of Implementation for the WSSD, which was also considered and amended during the third and fourth preparatory meetings to the WSSD held in September 2002, in South Africa.

ASIA AND THE PACIFIC	Economy	Development and debt management
	Governance	Enhancement and national and international level
	Education	Improvement
	<b>Health</b>	Access to Health Services
	Indicators and Targets	Development
	ODA <sup>191</sup>	Enhancement
	Market Access	Elimination of Barriers
EUROPE AND NORTH AMERICA	SD policies	Integration and achievement of a “global deal”
	Cooperation	North to enhance ODA
	Poverty	Based on “ <b>mutual responsibilities</b> ”
	Economy	North to promote debt relief
	Market Access	North to enhance duty-free and quota-free market
	Investment	North to enhance FDI <sup>192</sup>
LATIN AMERICA AND CARIBBEAN	SD policies	Adoption of a “ <b>new ethic</b> ” and integration of SD pillars
	Cooperation	Enhancement of ODA and GEF funds
	Institutional Development	Diffusion of scientific knowledge
	Market Access	Elimination of Barriers
	Research	Promotion
	Mountain ecosystems	Improvement
	Data and Indicators	Development of a “vulnerability index”
	Energy	Alternative sources and efficiency
SMALL ISLANDS	Natural Disasters	Prevention and Minimization of effects
	Climate Change	Reduction of vulnerability
	Ecosystems	Reduction of ecological fragility
	Economy	Development
WEST ASIA	SD policies	Based on “ <b>common but differentiated responsibilities</b> ”
	Poverty	Alleviation and reduction of population growth rates
	Urban Areas	To reduce migration
	Economy	To promote reform, job creation, debt relief and foster role of private sector
	Education	Improvement
	Natural Resources	Conservation
	Social Security	Enhancement
	ODA	Enhancement

<sup>191</sup> Official Development Assistance (ODA).

<sup>192</sup> Foreign Direct Investments (FDI).

Table 5 summarizes the negotiations held during the second preparatory meeting to the Johannesburg Summit. The topics raised at that point of discussion were drafted in a way that they could be easily related to a particular geographical region to which they were deemed a priority. For the same reason, the meeting covered a vast range of aspects of development presented as demands by individual areas, with limited systematic categorization. This might have been due to the fact that the issues brought to multilateral consideration had been previously discussed at regional level by groups of countries belonging to those geographical areas, reflecting their specific needs and particularities.

In spite of having figured as a topic of concern in the draft document submitted for negotiation at the meeting, particularly for Africa and the Asia Pacific region, health itself did not appear as a specific item of Prepcom 2 agenda. One possible explanation for this is that other health-related issues such as “poverty eradication” and access to “water and sanitation” were included as major topics of concern. Health seemed to have been perceived by the international diplomacy as being intrinsically included or covered by both.

As Table 5 demonstrates, the meeting is also illustrative of the pattern of domination involving North and South. The claims highlighted in bold letters on the right hand side of the table are noteworthy. Although they do not directly refer to health, they reflect the background understanding of two different worlds in regards to what “sustainable development” really is and how it should be pursued. As a result, it subsequently reflects different perceptions of what the “concept of health” really represents.

European and North American countries claim that global development is to be based on “mutual responsibility”, since at a first glance (and indeed one of the basis principles of Public International Law) all countries are equal and thus should be treated the same. This is nothing new in the multilateral world and can be said to be one of the basic reasons why the United States has not joined world community in its efforts to minimize the “greenhouse effect” under the Kyoto Protocol. On the other hand, countries of West Asia reinforces the idea that sustainable development has to be pursued on the basis of “common but differentiated responsibilities”, another well consolidated principle of both IEL and ISDL. In the middle of these two opposite directions are the Latin American countries advocating a “new ethic” in the development realm.

The aftermath is that countries in the South still struggle to put forward the idea that they cannot give up their economic development since they are now trying to catch up and reach the “stability” already achieved by the North. In the pursuit of development, industrialized countries are usually criticized for having had opportunity to use up and deplete resources. At the same time, by claiming “mutual responsibility”, they prevent the South from following the same route towards the use of already scarce resources, putting into practice the idea of “do what I say but don’t do what I do”. The “new ethic” proposed by Latin America, on the other hand, perhaps summarizes an alternative route towards development. It arises as an acknowledgement that the efforts that have been made so far have proven to be unsuccessful. For this reason, by proposing the adoption of a new ethic, countries of that geographical region put forward the need to overcome the current negotiation of a right to develop and consume North-like style by the South. A new model would evolve based on ethical decisions that associate the differences

between North and South with other philosophical values (e.g., need for food, health, dignity, and life) other than to just the "right to deplete and consume in the name of development".

## CHAPTER FOUR

### CONCLUSION

In the previous chapters I have discussed how health, as a multifaceted value, has been approached by the international laws of environment and sustainable development. This analysis was based on two arguments. First, health has been neglected by current multilateralism, both at the political and the legal level. The international community has not been able to consolidate a legal framework that truly addresses a broader “concept of health”, in a way that includes its preventive, protective, promotional and curative nuances. Secondly, the negotiations under the environmental and developmental regimes have failed to provide practical benefits for the achievement of global health, and have created further constraints for the South. This has been the case for both “soft” and “hard” law, in spite of their claim that health constitutes the motivation and the ultimate rationale for their existence in the legal world. A review of preambles of agreements and declarations produced under the IEL and ISDL illustrates this.

The preceding chapters have shown that multilateral efforts to tackle hazardous chemicals and wastes as well as those of the “green agenda” have been unsuccessful in providing legal solutions for the protection of health. Instead of promoting the notion of human sustainability, they have rather succumbed to the pressure of free-market ideology, and to the dynamics of wealth accumulation, often to the benefit of the North.

Having put social concerns such as health at the very bottom of their scale of concerns, IEL and ISDL have left humankind as just a mere detail in the multilateral



world. This approach in addition to being morally problematic, has made it more difficult for the South to achieve equitable and sustainable development. The approach has also exposed a complex reality of injustice and unfairness that surround the gap between North and South, which is already too wide.

The “brown agenda” has placed significant responsibility on the South, which remained alone with the challenge to protect its population from the ferocity of the North that seems to have used the multilateral arena as a convenient solution for getting rid of banned pesticides, and other hazardous substances and wastes. Limited consideration is given to solving the problem through addressing its very origin, mostly related to a historical pattern of high production and consumption. In spite of the principle of *common but differentiated responsibilities*, in order to protect and promote “the concept of health” in a broader sense, countries of the South have struggled financially and technologically. The contradiction behind all this is that although conventions such as Basel and Rotterdam have been celebrated by the North, they have also been negotiated in a way that the “concept of health” they entail is flawed. A Gramscian analysis reveals that this happens not by chance, but reflects instead the consolidation of hegemonic power by the North, whose main purpose in the international arena seems to be the pursuit of its economic interests.

The “green agenda”, in turn, seems to have provided a broader understanding of the “concept of health”, since it addresses relevant determinants such as food safety, housing, education, poverty alleviation, among others. However a detailed review of some instruments in this category illustrates that it has also been aimed at creating new markets, particularly in the South. From this perspective, it seems to have successfully

incorporated into its language the Gramscian notion of “superstructure”, resulting in more domination by the North. If on the one hand multilateral instruments on sustainable development have been presented as providing positive solutions for the South, they have also reflected the power of interest groups willing to sell goods and services outside their borders in the North. From Rio to Johannesburg it seems to have been the approach consolidated by and within the UN, providing an example of Gramsci’s idea of *caesarism*. Besides this economic motivation, an alternative justification for this trend of domination involving North and South may also lie in the inability of multilateralism to make *ethical decisions*. In this case, the whole system would have to be rethought, following perhaps the notion of a “new ethic” put forward by Latin America, where humankind is placed at the centre of development.

Being multidisciplinary as it is, it seems that the problem of addressing health in a broader sense would be mostly solved by incorporating it into all related agendas within the universe of international law. The “concept of health” would be in this case a cross-cutting issue, and would be included in treaties and declarations addressing environment, trade, labour, human rights, just to mention a few. Such an approach could represent a step towards the achievement of Fidler’s notion of “Global Public Good for Health”.

The implication is that Public International Law, particularly its environmental and sustainable development branches, must be reformulated in order to address the “concept of health” in a more holistic way. It seems awkward to pretend that the problem belongs to the other or that it would be solved by simply transferring it to another jurisdiction “across the border”. At the dawn of the 21<sup>st</sup> century, the world (North and South) has experienced constraints with new strains of deadly viruses and other

pathogens. Ebola, Avian Influenza and the BSE crises are just recent examples of how health-related problems can pose serious threats to humanity, regardless of ethnicity, gender or nationality. Refraining from situating health, its elements and determinants, at the centre of concerns appears to conflict with the Brundtland Commission's notion of sustainability. The main problem with the creation of laws in a hegemonic fashion relates to "recognition" and "integration": recognition that health is something that has to be constantly pursued at local, national and global levels; integration in the sense that the protection and promotion of health is the core value that has to permeate IEL and ISDL. Without bearing in mind these two values any efforts will prove to be ineffective, immoral and with possibly irreversible consequences for humankind, in the North, South, East and West.

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