CENTRO INTERNAZIONALE DI STUDI GENTILIANI

SAN GINESIO (MC)

Alberico Gentili

Diritto internazionale e Riforma

Atti del convegno della
XVI Giornata Gentiliana

San Ginesio, 19-20 settembre 2014

a cura di Vincenzo Lavenia

eum edizioni università di macerata


eum

Studi gentiliani

Collana diretta da Luca Scuccimarra, Paolo Palchetti e Vincenzo Lavenia

2

isbn 978-88-6056-532-7
Prima edizione: novembre 2017

Centro Direzionale, via Carducci snc – 62100 Macerata
info.ceum@unimc.it
http://eum.unimc.it

Impaginazione: Carla Moreschini

CENTRO INTERNAZIONALE DI STUDI GENTILIANI

SAN GINESIO (MC)

Alberico Gentili

Diritto internazionale e Riforma

Atti del convegno della
XVI Giornata Gentiliana

San Ginesio, 19-20 settembre 2014

a cura di Vincenzo Lavenia

Il Convegno è stato realizzato dal
CENTRO INTERNAZIONALE STUDI GENTILIANI

In collaborazione con

Birkbeck College, University of London
SIDI/ISIL – Società Italiana di Diritto Internazionale - Roma
ISGI – Istituto di Studi Giuridici Internazionali del CNR - Roma
Università degli Studi di Macerata

Patrocinio

MIBACT- Ministero dei Beni e delle Attività Culturali e del Turismo

Patrocinio e contributo

Regione Marche
Provincia di Macerata
Comune di San Ginesio
Università degli Studi di Macerata
CariFermo - Fondazione della Cassa di Risparmio di Fermo

Sessione prima

Protection of the Environment as a Global Concern of the International Community

Paolo Palchetti

Introduzione

Il diritto internazionale dell'ambiente si è sviluppato nel corso dei decenni da sistema di regole volto a tutelare la sovranità di uno Stato rispetto a danni derivanti da condotte di un altro Stato a sistema di regole diretto a proteggere un interesse "pubblico" dell'intera comunità internazionale a combattere forme di inquinamento derivanti da attività che uno Stato svolge sul proprio territorio, o su territori non sottoposti alla sovranità di alcuni Stati, ma che hanno ripercussioni sull'ambiente complessivo del pianeta. I cambiamenti climatici, la rarefazione della fascia di ozono, la distruzione della biodiversità e altre forme di inquinamento "globale" sono fenomeni che non procurano un danno specifico in un determinato Stato ma che toccano gli interessi di tutti gli Stati. Rispetto a questi si pone l'esigenza di una cooperazione attiva tra tutti i membri della comunità internazionale. L'interesse pubblico a combattere queste forme di inquinamento globale ha portato all'emergere di nozioni quali quella che vuole la tutela dell'ambiente come «common concern of mankind». Tale concetto si ritrova nella Convenzione di Washington del 1959 sull'Antartide, il cui preambolo stabilisce che «it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes». Egualmente il preambolo della Convenzione di Rio del 1992 sulla biodiversità afferma che «the conservation of biological diversity is a common concern of humankind», mentre la Convenzione quadro sui cambiamenti climatici riconosce che «change in the Earth's climate and its adverse effects are a common concern of humankind».

Il riconoscimento di un certo bene od obiettivo ambientale come «common concern» non è privo di implicazioni giuridiche. Esso enuncia quanto meno una disponibilità degli Stati verso un'azione concertata a difesa di un valore condiviso, azione a livello normativo, attraverso lo sviluppo di regole comuni, ma anche condotte concrete volte a realizzare gli obiettivi fissati. Resta tuttavia, come si può facilmente capire, un'enunciazione vaga. All'affermazione dell'esistenza di "interessi comuni" non corrisponde una eguale disponibilità degli Stati ad accettare limitazioni alla propria sovranità. La protezione dell'ambiente deve venire a patti con l'esigenza di rispettare la sovranità degli Stati e soprattutto il diritto di questi allo sviluppo economico. Alla nozione di «common concern» si affianca così quella – altrettanto generica – di «sustainable development». Sullo sfondo resta la difficoltà che gli Stati accettino di vincolarsi a prendere misure che, per essere realizzate, richiedono l'impegno di importanti risorse tecniche e finanziarie.

Il tema della tutela dell'ambiente come interesse generale della comunità internazionale ha costituito l'oggetto della sessione internazionalistica della XVI Giornata Gentiliana. Ne hanno discusso due illustri specialisti del diritto internazionale dell'ambiente come la professoressa Catherine Redgwell, Chichele Professor of Public International Law (All Souls College-University of Oxford) e Francesco Francioni, Emeritus Professor of International Law all'European University Institute, nonché, con interventi programmati, due giovani internazionalisti, il dott. Lucas Carlos Lima e la dott.ssa Cosetta Di Stefano. Qui di seguito sono riprodotte le relazioni del prof. Francioni e del dott. Lima. Si tratta di relazioni tra loro strettamente complementari, la prima dedicata ad un esame dei principi sostanziali alla base del moderno diritto internazionale dell'ambiente, la seconda diretta invece a fornire una panoramica dei principali contenziosi tra Stati in materia ambientale che sono stati sottoposti all'esame dell'organo giudiziario principale delle Nazioni Unite, la Corte internazionale di giustizia. Attraverso l'esame dei principi enunciati nella Dichiarazione di Rio del 1992 su ambiente e sviluppo e dell'impatto che questi hanno avuto nella prassi successiva, la relazione di Francioni offre un quadro complessivo, che

include un riferimento ai recenti accordi sul clima del dicembre 2015, delle luci e delle ombre che caratterizzano lo stato attuale della normativa internazionale dell'ambiente e della sua attuazione da parte degli Stati. Lo scritto mette in evidenza l'incapacità degli Stati di mantenere la promessa, contenuta al principio I della Dichiarazione di Rio, che crescita economica e sviluppo avvengano «in harmony with nature». La relazione di Lima mostra invece il crescente numero di controversie in materia ambientale che sono sottoposte al giudizio della Corte e le difficoltà di natura procedurale che la Corte incontra nel fornire risposte alle complesse questioni tecnico-scientifiche sollevate da queste controversie. Se il ricorso ad esperti ha costituito l'inevitabile risposta a questa difficoltà, resta l'incertezza legata alle diverse tipologie di esperti che possono essere impiegate dalla Corte. Lo scritto di Lima dà conto di queste diverse tipologie e dei limiti e pregi a queste associate, fornendo da una prospettiva strettamente processuale la misura di come l'aumento delle controversie in materia ambientale sia destinato ad avere un impatto sul metodo di lavoro della Corte internazionale di giustizia.

Francesco Francioni

Twenty Five Years on: What is Left of the Rio Declaration on Environment and Development?*

I wish, first of all, to thank the organizers of this meeting and congratulate them, in particular Ms Pepe Ragoni and Prof. Diego Panizza, for their commendable efforts in keeping alive the tradition of Alberico Gentili and the special relation between San Ginesio and Oxford. I also take a personal pleasure in joining Catherine Redgwell in this panel, because of our past connection in Oxford and of our common endeavor in trying to introduce international environmental law in the Oxford law curriculum.

I chose a dubitative title for this talk in accordance with the critical perspective in which I propose to look at the 1992 Rio Declaration after almost a quarter of a century from its adoption. I hope that this retrospective analysis of the Declaration will help assess the present status of international law on the environment and measure the progress, if any, that the law has made in this field.

1. *The Rio Declaration: A Retrospective Overview*

As is known, the Rio Declaration was one of the most important legal documents issued from the 1972 Earth Summit[1].

* This paper was completed and submitted on 30 December 2015.

[1] The Declaration was adopted on June 13, 1992 and is reprinted in 31 ILM, 1992, pp. 874 ff. The other main legal instruments adopted at the Conference were the UN Framework Convention on Climate Change of June 14, 1992 (1771 UNTS 107), and the Convention on Biological Diversity of June 5, 1992, reprinted in 31 ILM, 1992, pp. 818 ff.

Its importance stems from the fact that it takes stock of prior developments in the field of environmental protection while, at the same time, it provides a framework of principles for further progress in the protection of the environment without blocking development at economic and social level.

Coherently with this purpose, the Declaration aims also at a compromise between the eco-centric and the anthropocentric approaches to nature conservation. It reflects a great bargain between the industrialized countries of the North, aiming at the globalization of environmental protection, and countries of the South, focusing primarily on their economic an social development.

The North-South divide, obviously, was nothing new in 1992. Every environmental negotiation presented, and continue to present, the traditional North-South fault line. However, in the context of the Rio Conference this traditional divide presented a character of its own. This was due mainly to two new factors. The first was the optimistic expectation of the industrialized world that the Rio Meeting would mark the beginning of a new ecological globalism and produce an "Earth Charter" based on the idea of sustainable development. The implication of this position was a certain presumption that developing countries should, and be convinced that they could, avoid pursuing the same development policies of the North, which had led to the deplorable state of environmental degradation mainly due to unsustainable patterns of production and consumption. This expectation was fed by a certain hubris generated by unquestionable successes in environmental standard setting in previous years. I am referring especially to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer[2], to the Basel Convention on the Trans-boundary Movement of Hazardous Waste and their Disposal[3], and to the Protocol on Environmental Protection to the Antarctic Treaty[4], which had the unprecedented effect of banning any mineral activities in the whole continent

[2] Done in Montreal September 16, 1987, 152 UNTS 3.
[3] Signed March 22, 1989, reprinted in 28 ILM, 1989, pp. 657 ff.
[4] Signed in Madrid October 4, 1991, reprinted in 30 ILM, 1991, pp. 1455 ff.

of Antarctica for a period of fifty years. These unquestionable successes had the effect of emboldening the group of the more industrialized states. In 1989 the G7, entrusted the Italian Government with the task of preparing a restatement of international environmental law in view of its adoption at the G7 meeting in Houston, 1990. The document was elaborated by an international group of experts and adopted at an international forum organized at the University of Siena on 17-21 April 1990[5] and then presented at the 45th session of the UN General Assembly in October of the same year[6].

The second factor contributing to the deepening of the North-South divide on the eve of the Rio Conference was the re-invigorated position of the developing countries in rejecting an environmental agenda disconnected from economic growth and from meaningful commitment to the fighting of poverty. In the famous *Tuna-Dolphin* case, brought by Mexico against the United States, a GATT panel had to deal with a complaint that the United States import restriction on Mexican tuna violated the obligations undertaken by the United States under the General Agreement. The panel rejected the United States argument that the import restrictions were necessary to discourage the use of unsafe fishing methods by Mexican tuna fleets, which had the effect of killing dolphins entangled in the nets[7]. The decision was widely criticized for giving priority to free trade over conservation policies[8]. But, at the same time it was generally hailed by developing countries which objected to the unilateral extra-territorial application of the US environmental laws as a form of "green imperialism".

[5] The Final document is published in Presidenza del Consiglio dei Ministri, «Vita Italiana», 1, 1990, pp. 10-72.

[6] UN Doc. A/45/666, 24 October 1990.

[7] *US Restrictions on Imports of Tuna*, 30 ILM 1991, pp. 1594 ff.

[8] See Francesco Francioni, *Environment, Human Rights and the Limits of Free Trade*, in Id. (ed.), *Environment, Human Rights and International Trade*, Oxford-Portland, Hart Publishing, 2001, pp. 13-17.

The impact of this political divide was immediately felt on the negotiations that led to the adoption of the Rio Declaration.

The Preamble of the Declaration in its final text was unusually short and matter of fact, thus abandoning the practice of lengthy and inspirational texts that are typical of solemn declarations, including the 1972 Stockholm Declaration on the Human Environment. Principle 1 also is extremely short with its proclamation that «Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature». This language indicates that the anthropocentric approach clearly had prevailed over "eco-centrism" at the Rio Conference. At the same time, this approach is balanced by the introduction of the concept of sustainable development, of the idea that environmental protection is closely linked to human rights, and, most important, that a healthy and productive life must be 'in harmony with nature'. This requirement, as we shall see later in the conclusions of this paper, has profound implications in the context of the strategic choice that humanity has to make today with regard to climate change and in the follow-up of the Paris agreement adopted in December 2015. Principle 4 specifies that sustainable development can be achieved only by integrating environmental considerations in development policies and that environmental protection cannot be pursued in isolation from the development process. Other provisions of the Declaration are more elaborate and innovative. Principle 7 introduces the concept of «common but differentiated responsibilities» of states in view of their «…different contributions to global environmental degradation» and of the different technological and financial capabilities they command. In different words, the same concept is reiterated in Principle 11, which requires states to enact effective environmental legislation having in mind the different environmental and developmental contexts and the economic and social cost they may entail for other countries. This is an echo of the complaint about the alleged "green imperialism" by rich countries trying to give extra-territorial application to their environmental legislation. This echo is further reflected in Principle 12 with its call on the need to avoid unilateral trade measures to

deal with environmental issues «outside the importing country»[9]. Principle 8 is a reminder that sustainable development can be achieved only by a reduction and progressive elimination of «…unsustainable patterns of production and consumption» and by the promotion of appropriate demographic policies. This is one of the most neglected principles of the Rio Declaration when we consider that instead of a reduction there has been a wild expansion of the unsustainable patterns of production and consumption in the new emerging economies and more generally in the developing world, and a relentless demographic growth especially in the poorest areas of the world. Principle 10 focuses on the role of citizens in the management of environmental issues. It lays down the triple obligation for the states to provide access to information concerning the environment, to allow citizens participation in environmental decisions, and to ensure the right of access to justice, including the right to redress and remedy. This specific provision has become part of binding law with the adoption by the UN Economic Commission for Europe of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice[10]. Principle 15 provides that «[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation». This language is cautious in choosing the term "approach" rather than "principle", which is the word used in the text of Article 191 para. 2 of the Treaty on the Functioning of the European Union. This linguistic discrepancy reflects a continuing disagreement on the scope and concept of the precautionary principle. While it is widely accepted that it entails the obligation of every state not to allow environmentally hazardous activities within its jurisdiction until an environmental impact assessment has

[9] This is clearly a response to the *Tuna-Dolphins* type of disputes. See *supra* note 7.

[10] Adopted on 25 June 1998, 2161 UNTS 447.

been made, it remains uncertain whether the precautionary approach entails also the obligation to abstain from performing or permitting activities that present serious environmental risks with possible irreversible consequences. This more radical version of the precautionary principle is accepted in the law of the European Union, as well as in some treaties, such as the Madrid Protocol on the Protection of the Antarctic Environment[11] and the Cartagena Protocol on Biosafety[12]. But it remains contested as a principle of customary law status[13]. The term "approach" instead of principle is also used in Principle 16 with regard to the duty of national authorities «…to promote the internalization of environmental costs and to use economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution». Finally, Principles 17 to 24 restate the procedural obligations of environmental impact assessment, early notification of disasters and prior notification to potentially affected states of activities that are likely to have a significant adverse trans-boundary impact; they highlight the important role of women and youth in the pursuit of sustainable development, and recognize the vital role of indigenous people and local communities in environmental management and development (Principle 22). Worth of note is that Principle 22 is a precursor of the 2007 UN Declaration on the Rights of Indigenous Peoples, which significantly upgrades the status of the right holders by using the term "peoples" rather than "people" as in Principle 22[14].

[11] See *supra* note 4.

[12] Adopted 29 January 2000, 2226 UNTS 208.

[13] See, e.g. the ruling of the WTO panel and Appellate Body in the GATT dispute concerning *EC – Measures Affecting Meat and Meat Products (Hormones)*, 13 February 1998, WT/DS 26, DS 48/ AB/R. For a comprehensive analysis of the principle and of its limits, Andrea Bianchi, Marco Gestri (eds.), *Il principio precauzionale nel diritto internazionale e comunitario*, Milano, Giuffrè, 2006.

[14] Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 of 2 October 2007, A/Res/61/295.

2. *The Impact of the Rio Declaration on International Law*

Turning now from the retrospective analysis of the Rio Declaration to what is left of its legacy in contemporary international law it is useful to distinguish between two different levels at which the impact of the Rio Declaration can be assessed on today's environmental law and practice. The first level is that of the *normative* impact, in the sense of the Declaration being an instrument spurring production of new treaties, soft law, customary law and general principles. The second level concerns the influence that the Declaration has exercised in the interpretation and evolution of norms contained in existing treaties.

a) *Production of New Norms*

As far as the production of new law is concerned, Principle 1 has certainly influenced the drafting of the 1994 WTO Agreement which in its Preamble recognizes that the goal of economic growth and of expanding trade in goods and services is to be pursued having in mind «…the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment…». Sustainable development is also shaping the practice of investment treaties, with an increasing tendency in the past two decades to integrate environmental protection in this category of treaties[15]. Principle 2 has restated the obligation to prevent harm to the environment of other states and areas beyond national jurisdiction thus contributing to the reaffirmation of the almost identical norm of Principle 21 of the 1972 Stockholm Declaration and to its consolidation as a norm of customary international law. Today, the preventative principle can be found restated also in article 3 of the Convention on Biological diversity and virtually in all treaties dealing with trans-boundary environmental harm. Principle 7 on common but differentiat-

[15] See Kathryn Gordon, Joachim Pohl, *Environmental concerns in International Investment Agreements: a Survey*, OECD Working Paper n. 2011/1; Jorge E. Viñuales, *Foreign Investments and the Environment in International Law*, Cambridge, Cambridge University Press, 2012; Massimiliano Montini, *Investimenti internazionali, protezione dell'ambiente e sviluppo sostenibile*, Milano, Giuffrè, 2015.

ed responsibilities (CBDR) has been adopted in the last generation of multilateral environmental agreements, including the UN Framework Convention on Climate Change[16], the Kyoto Protocol with its fundamental distinction between Annex 1 parties, subject to climate stabilization requirement, and developing countries exempted from mandatory requirements, the Persistent Organic Pollutant Convention[17] and the Minamata Convention on Mercury[18], both of which incorporate Principle 7 on CBDR in their preamble. The Climate accord reached in Paris in December 2015, although not expressly adopting the CBDR language is entirely based on its underlying concept with the recognition of climate as a "common concern" of humanity and with the grounding of climate stabilization on the decentralized mechanism of nationally intended contribution, which obviously embraces the idea of differentiated responsibilities. Also the strong emphasis on technological and financial assistance by industrialized countries to developing countries reflects the philosophy of CBDR. Principle 10 on public participation, as already mentioned, has provided the blueprint for the 1998 Aarhus Convention, and Principle 13 on the development of liability and compensation system has spurred negotiations for the adoption of innovative liability regimes in several areas of environmental protection. We can just mention the 2005 Annex VI on liability to the Madrid Protocol on environmental Protection to the Antarctic Treaty[19], the 1999 Protocol on Liability and Compensation additional to the Basel Convention on the Trans-boundary Movement of Hazardous Waste[20], and the 2010 Nagoya –Kuala Lumpur Supplementary Protocol to

16 Article 3 para. 2. The text of the Convention is reprinted in 31 ILM, 1992, pp. 849 ff.

17 Adopted on 22 May 2001 and entered into force 17 May 2004.

18 Adopted at Kumamoto on 10 October 2013. Not yet in force.

19 Annex VI to the Protocol on environmental Protection to the Antarctic Treaty, Liability for environmental Emergencies, adopted at the 28th Antarctic Treaty Consultative Meeting, Stockholm, 2005. For a commentary, Akiho Shibata (ed.), *International Liability Regime for Biodiversity Damage*, London-New York, Routledge, 2014.

20 Basel Protocol on Liability and Compensation adopted at the Fifth COP on 10 December 1999.

the Cartagena Protocol on Biosafety[21]. In this brief survey we cannot forget the impact that the Rio Declaration has produced also on areas other than environmental protection. Principle 22, in particular, has preceded and influenced the movement toward the recognition of the special status of indigenous peoples under international law and contributed to the adoption of the 2007 UN Declaration on the Rights of Indigenous Peoples[22], which are rights rooted in the intimate relationship of these peoples with their natural environment.

b) *Impact on the Interpretation of Existing Norms*

It is at this level that the influence of the Rio Declaration has been most significant and visible. If we take Principle 2 on prevention of environmental damage, it has been implemented in an innovative manner in the arbitration between Belgium and the Netherlands in the *Iron Rhine* case. In this case the arbitral tribunal held that, when a state exercises a right under international law within the territory of another state, considerations of environmental protection must apply extraterritorially in order to prevent harm beyond its national jurisdiction[23]. By this decision the arbitral tribunal extended the scope of the principle of prevention to activities that a state lawfully carries out in the territory of another state thus delinking the operation of the principle from the traditional principle of territorial sovereignty. Principle 1 on sustainable development has influenced directly the ICJ judgment in *Gabcikovo-Nagymaros* (Hungary v Slovakia)[24] and indirectly the recent ICJ judgment in the case *Whaling in Antarctica* (Australia v Japan)[25].

The precautionary approach codified in Principle 15 has been progressively implemented in the jurisprudence of the ICJ[26] and even more robustly in the Advisory Opinion of the Seabed Dis-

[21] Supplementary Protocol on Liability and Redress, adopted by Decision BS-V/11 on 15 October 2010, UNEP/CBD/BS/COP-MOP/5/17.

[22] *Supra*, note 14.

[23] Award of 24 May 2005, RIAA, vol. XXVII, pp. 35-125.

[24] Judgment of 25 July 1997, *ICJ Reports 1997*.

[25] Judgment of 31 March 2014, *ICJ Reports 2014*, pp. 226 ff.

[26] *Pulp Mills on the River Uruguay* (Argentina v Uruguay), Judgment.

pute Chamber of the International Tribunal on the Law of the Sea of 1 February 2011[27]. It is worth reproducing in its entirety para 135 of the Opinion:

> The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law. This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the 'standard clause' contained in Annex 4, section 5.1, of the Sulphides Regulations. So does the following statement in paragraph 164 of the ICJ Judgment in Pulp Mills on the River Uruguay that 'a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute' (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties). This statement may be read in light of article 31, paragraph 3(c), of the Vienna Convention, according to which the interpretation of a treaty should take into account not only the context but 'any relevant rules of international law applicable in the relations between the parties'.

It is clear from this passage that, in the view of the Chamber, 1) the precautionary approach has evolved from the soft law of the Rio Declaration into binding law, 2) that at the same time Principle 15 is gradually becoming part of customary law, and 3) that this principle is an integral part of the principle of "due diligence"[28]. Another important aspect of this Opinion is the link it establishes between the precautionary approach and Principle 7 on the CBDR. While the Chamber recognizes that in principle all sponsoring states – developed or developing – are subject to the same rules, it acknowledges that different levels of due diligence affect the precautionary approach in light of different scientific and technological capabilities of sponsoring states[29]. This progressive interpretation of the precautionary ap-

[27] Advisory Opinion 1 February 2011, ITLOS *Reports*, 2011, pp. 11 ff., para. 125-135.

[28] This link is recognized explicitly in paras 131 and 132 of the Opinion, where the Chamber recalls also its order of 27 August 1999 in the *Southern Bluefin Tuna cases* (Australia and New Zealand v Japan).

[29] Advisory Opinion cited *supra* note 27, para. 151-163.

proach is followed also in the practice of the judicial organs of the European Union[30].

A provision that merits special focus for its impact on the judicial practice of international courts and bodies is Principle 22 on indigenous people and local communities. This Principle, besides preparing the ground for the adoption of the already mentioned 2007 Declaration on the Rights Indigenous Peoples, has had a vast influence in the progressive development of human rights especially in the jurisprudence of the Inter-American Court of Human Rights and of the African Commission. Cases like *Awas Tingni v Nicaragua* of 2001 and *Saramaka v Suriname* of 2007 are too well known to require a comment. Suffice it to say that Principle 22 has greatly facilitated the innovative expansive reading given by the American Court to Article 21 (right to property) of the American Convention in order to construe a special right of the indigenous peoples and local traditional communities to the customary management of their ancestral lands. The same approach characterizes the interpretation of the African Charter of Human and Peoples' Rights as it emerges from several decisions of the African Commission, notably in the *Ogoni* case and in *Endorois v Kenya*.

3. *An Unfinished Project*

In spite of the unquestionable importance of the Rio Declaration as a propulsive element in the creation of new norms and in promoting a progressive interpretation of existing instruments, a balanced assessment of its legacy must recognize also its shortcomings and lacunae.

First of all it would be wrong to consider the Rio Declaration as a true "constitutive" instrument of modern international environmental law. In spite of its name, it falls short of having the power and the effect of bringing about a structural transformation of international law. As compared to the Universal Declaration of Human Rights, which transformed the basic inter-state

[30] See *Pfizer v. Council* 11 September 2002, cases T-13/99 and T-70/99, and *Gowan v Ministero della Salute* 22 December 2010, case C-77/09.

paradigm of international law by establishing obligations owed by states directly to individuals, the Rio Declaration remains cast into the traditional architecture of international law as a legal order governing inter-state relations. States are the addressees of its prescriptions. Besides, in spite of its marked anthropocentric approach and emphasis on economic development, the Declaration falls rather short in connecting environmental protection with human rights. In a way, it is a step backward as compared to the 1972 Stockholm Declaration[31], whose Preamble had proclaimed the environment as an essential condition for «the enjoyment of basic human rights, even the right to life». This limit of the Rio Declaration is all the more regrettable because experience has shown that since 1992 environmental protection has become inseparable from human rights, either because environmental degradation has adverse impact on the enjoyment of human rights or, *viceversa*, because nature conservation or environmental remediation may have negative consequences for human rights. This important connection is at the basis of the initiatives taken by the Human Rights Council in March 2012 to establish a mandate on human rights and the environment, which will (among other tasks) study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and promote best practices relating to the use of human rights in environmental policymaking[32].

Another area in which the Rio Declaration reveals obsolescence and inadequacy in the face of contemporary challenges is that of the environmental dimension of foreign investments regimes. In the past twenty years investment law and arbitration have undergone a phenomenal development. Many cases arising from host states regulation of environmental issues, and from deregulation of previously regulated fields, have been brought

[31] For further elaboration of this view, see Francesco Francioni, *The Preamble of the Rio Declaration" and "Principle 1: Human Rights and the Environment*, in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and development. A Commentary*, Cambridge, Cambridge University Press, 2015, pp. 85-106.

[32] Mr. John Knox was appointed in August 2012 to a three-year term as the first Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. His mandate was further extended in March 2015 for another three years as a Special Rapporteur.

before arbitral tribunals, which have become also the forum for environmental adjudication. The Rio declaration takes into account the environmental implications of economic regulation. But this is limited to trade law, which is addressed in Principle 12, and only with regard to the alleged undesirability of the adoption of unilateral trade measure to deal with environmental issues. But the Declaration is silent with regard to foreign investments and to the relevance of sustainable development for their international regime. The seriousness of this gap is attested by the increasing number of investment disputes arising from contested environmental regulations. Arbitral decisions such as *Metalclad*[33], *Meyers*[34], *Methanex*[35], *Glamis Gold*[36], to mention just a few, have tried to fill the gap by interpreting applicable investment treaties in light of legitimate environmental aims of the host countries. But this does not go without controversy, because international investment law and arbitration are meant primarily to protect free movements of capital and the economic interests of foreign investors, not the environment[37].

Finally a lingering gap that the Rio Declaration has left concerns the institutional deficit that remains to day with regard the organization of international cooperation for the management of global environmental problems. Principles 12 and 27 underscore the importance of international consensus and cooperation in the fulfillment of the Declaration and in the further development of international law in the field of sustainable development. But this promise has been hardly maintained. Attempts at introducing proposals for the strengthening of environmental institutions were made in preparation of the 2005 World Sum-

[33] *Metalclad v Mexico*, ICSID award, case n. ARB/(AF)/97. Of 30 august 2000.

[34] *Meyers v Canada*, NAFTA Arbitration, award of 21 October 2002.

[35] *Methanex v. United States of America*, NAFTA award of 3 August 2005.

[36] *Glamis Gold v United States of America*, ICSID award of 8 June 2009.

[37] For a more in depth discussion of this issue, see the symposium on *International Investment Regulation: Trends and Challenges*, «XXIII Italian Yearbook of International Law», (2013) 2014, and especially Francesco Francioni, *Foreign Investments, Sovereignty and the Public Good*, pp. 3-22; Jorge E. Viñuales, *Customary Law in Investment Regulation*, pp. 23-48; and Ernst-Ulrich Petersmann, *Fragmentation of International Law as a Strategy for Reforming International Investment Law*, pp. 49-68.

mit, which contemplated an agenda of reforms of the UN system. These proposals included, alternatively, the creation of a new UN agency, the strengthening of UNEP, the establishment of a true international environmental organization along the model of the WTO[38], but no consensus emerged at the Summit on any possible development of a diplomatic initiative toward the adoption of one of these three institutional models. This is all the more regrettable because this institutional gap not only weakens the quality of global environmental governance and the effectiveness of the enforcement of existing environmental standards; it also places environmental law in a subordinate position as compared to other areas of international law, especially international economic law. Trade and investments are areas of strong law and strong enforcement by virtue of the compulsory and binding dispute settlement within the framework of international institutions, such as WTO and ICSID. By comparison, international environmental law remains weak and depending for its international enforcement on "borrowed fora" of trade, investment and even human rights law.

Conclusion

The time passed since the adoption of the Rio Declaration barely covers the span of one generation. But in this span of time the world has radically changed. New emerging economies have come to dominate the international scene; millions of people have been lifted from poverty, but at the cost of further stress on the planet ecosystem; the hubris of exporting democracy all over the world has been met with failure, resentment, and the intractable problem of terrorism and new conflicts; a deep and lingering economic crisis in the developed world is now followed by an unprecedented and destabilizing exodus of migrant people toward Europe. Against this backdrop, the existential threat of climate change continues to haunt humanity.

[38] These options were presented in a preliminary study commissioned by the French Government to proff. P.-M. Dupuy and F. Francioni and conducted at the European University Institute in 2005. The Document is on file with this author.

The accord concluded in Paris in December of 2015 is the first, if modest, step in the right direction.

Given the scale of these planetary transformations, it is no wonder that the Rio Declaration may show signs of age and some shortcomings, as we have tried to demonstrate in the above sections. But the most important legacy of the Rio declaration remains its proclamation of the principle of sustainable development. In the words of Principle 1 this meant a type of development that would permit «a healthy and productive life in *harmony with nature*»[39]. In this brief clause we can find two essential dimensions of sustainability: the fulfillment of the basic rights of productive work, health and food, and other socio-economic-cultural rights, and the duty to pursue the satisfaction of those right in harmony with nature. After almost a quarter of a century from the adoption of this clause it is hard to see anywhere in the world a trace of the fulfilment of its admonition. Nowhere economic growth and development has occurred 'in harmony with nature'. With the possible exception of indigenous peoples and of traditional local communities who have fought for the maintenance of the special relation with their land, development has occurred in the industrial world and in developing countries at the expense of nature, with intensive extraction of minerals, deforestation, irresponsible industrial fishing, chemical and waste contamination, reduction of biodiversity, and with the overall consequence of climate change. Today, the prevailing tendency is to address environmental issues by relying on science, technology and economic-financial tools. Even the definition of our era as "anthopocene" reveals the shift from life on this planet as necessarily conditioned by its fixity in, and harmony with, nature to an idea of life beyond nature and of man as absolute master of nature. It is in this climate of unlimited faith in technology and human innovation as the key to resolving the impending environmental threats of our time that it may be wise to bear in mind the proclamation of Principle 1 of the Rio declaration that sustainable development must be achieved "in harmony with nature". The fact that this eminently

[39] Emphasis added.

secular admonition has been embraced by one of the most prophetic voices of our time, Pope Francis', in his letter *Laudato sì* of 2015[40], is a compelling reminder of the continuing legacy of the Rio Declaration.

[40] Enciclical Letter of Pope Francis, *Laudato si'*, *sulla cura della casa comune*, 24 May 2015.

Indice

eum edizioni università di macerata

ISBN 978-88-6056-532-7

€ 23,00