

## FROM RIO TO PARIS: WHAT IS LEFT OF THE 1992 DECLARATION ON ENVIRONMENT AND DEVELOPMENT?

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This paper has a dubitative title. And this is for a good reason. It is meant to introduce the critical perspective in which I propose to assess the legacy of the 1992 Rio Declaration after almost a quarter of a century from its adoption. This retrospective outlook, it is hoped, may help assess the progress, if any, that international law has made in this field, at a time when we are facing the challenge of implementing the 2015 Paris agreement on climate change.

### *I. The Rio Declaration: A Retrospective Overview*

As is known, the Rio Declaration was one of the most important legal documents issued from the 1992 Earth Summit.<sup>1</sup> 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 and progress in the field of economic, social, and cultural rights.

Coherently with this purpose, the Declaration aimed also at a compromise between the ecocentric and the anthropocentric

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<sup>1</sup> United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1, Annex 1 (Aug. 12, 1992) [hereinafter *Rio Declaration*]. The other main legal instruments adopted at the Conference were: United Nations Framework Convention on Climate Change, Jun. 4, 1992, 1771 U.N.T.S. 107, and the Convention on Biological Diversity, Rio de Janeiro, Braz., Jun. 5, 1992, 1760 U.N.T.S. 79.

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approaches to nature conservation. It reflected 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 and social development.

The North-South divide, obviously, was nothing new in 1992. Every environmental negotiation presented, and continues 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,<sup>2</sup> to the Basel Convention on the Trans-boundary Movement of Hazardous Waste and their Disposal,<sup>3</sup> and to the Protocol on Environmental Protection to the Antarctic Treaty,<sup>4</sup> which had the unprecedented effect of banning any mineral activities in the whole continent of Antarctica for a period of fifty years. These remarkable successes had the effect of emboldening the group of the major 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, of which the present

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<sup>2</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, Can., Sept. 16, 1987, 1522 U.N.T.S. 3.

<sup>3</sup> Basel Convention on the Trans-boundary Movement of Hazardous Waste and their Disposal, Basel, Switz., Mar. 22, 1989, 1673 U.N.T.S. 57.

<sup>4</sup> Protocol on Environmental Protection to the Antarctic Treaty, Madrid, Sp., Oct. 4, 1991, 30 ILM, 1991, 1455 [hereinafter Antarctic Treaty].

author was a member, and adopted at an international forum organized at the University of Siena on April 17-21, 1990<sup>5</sup> and then presented at the 45<sup>th</sup> session of the U.N. General Assembly in October of the same year.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> The decision was widely criticized for giving priority to free trade over conservation policies.<sup>9</sup> But, at the same time it was generally hailed by developing countries which objected to the unilateral extra-territorial application of the U.S. environmental laws as a form of "green imperialism."

The impact of this political divide was immediately felt in 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,<sup>10</sup> thus abandoning the practice of lengthy and

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<sup>5</sup> The final document is published in Presidenza del consiglio dei Ministri, 1 VITA ITALIANA, 10-72, 1990.

<sup>6</sup> *Conclusions of the Siena Forum on International Law of the Environment*, U.N. Doc. A/45/666 (Oct. 24, 1990).

<sup>7</sup> *U.S. Restrictions on Imports of Tuna*, 30 ILM (1991) 1594.

<sup>8</sup> *Id.*

<sup>9</sup> See Francesco Francioni, *Environment, Human Rights and the Limits of Free Trade*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE, 13-17 (Francesco Francioni ed., 2001).

<sup>10</sup> The Preamble consists of only four short operative paragraphs, which read:

Reaffirming the Declaration of the United Nations Conference on the Human environment, adopted at Stockholm on 16 June 1972, and seeking to build upon it,

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inspirational texts that are typical of solemn declarations, including the 1972 Stockholm Declaration on the Human Environment.<sup>11</sup> 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.”<sup>12</sup> This language indicates that the anthropocentric approach clearly had prevailed over “ecocentrism” at the Rio Conference. At the same time, this approach was 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

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With the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of society and people,

Working towards international agreements which respect the interests of all and protect the integrity of the global environment and development system,

Recognizing the integral and interdependent nature of the Earth, our home,

[the Conference] Proclaims that . . .

*Rio Declaration, supra* note 1, at Preamble.

<sup>11</sup> The Preamble of the Stockholm Declaration consists of seven long inspirational paragraphs the first of which reads as follows:

Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man’s environment, the natural and the man made, are essential to his well-being and to the enjoyment of basic human rights -- even the right to life itself.

United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (June 16, 1972), [hereinafter *Stockholm Declaration*].

<sup>12</sup> *Rio Declaration, supra* note 1, at Principle 1.

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change and in the follow-up of the Paris agreement adopted in December 2015.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup> 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.”<sup>16</sup>

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.<sup>17</sup> 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

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<sup>13</sup> Adoption of the Paris Agreement, Nov. 30 - Dec. 11, *Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1, Annex (Dec. 12, 2015) [hereinafter Paris Agreement].

<sup>14</sup> *Rio Declaration*, *supra* note 1, at Principle 7.

<sup>15</sup> *Id.* at Principle 11.

<sup>16</sup> *Id.* at Principle 12. This is clearly a response to the *Tuna-Dolphin* type of disputes. See *U.S. Restrictions on Imports of Tuna*, *supra* note 7.

<sup>17</sup> *Rio Declaration*, *supra* note 1, at Principle 8.

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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.<sup>18</sup> This specific provision has become part of binding law with the adoption by the U.N. Economic Commission for Europe of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice.<sup>19</sup>

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.”<sup>20</sup> This language is cautious in choosing the term “approach” rather than “principle,” which is the word used in the text of Article 191 paragraph 2 of the Treaty on the Functioning of the European Union.<sup>21</sup> 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 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

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<sup>18</sup> *Id.* at Principle 10.

<sup>19</sup> United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Den., June 25, 1998, 2161 U.N.T.S. 447.

<sup>20</sup> *Rio Declaration*, *supra* note 1, at Principle 15.

<sup>21</sup> Treaty on the Functioning of the European Union, art. 191, ¶ 2, Mar. 25, 1957, 2012 O.J. (C 326) 1.

Madrid Protocol on the Protection of the Antarctic Environment<sup>22</sup> and the Cartagena Protocol on Biosafety.<sup>23</sup> But it remains contested as a principle of customary law status.<sup>24</sup> 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.”<sup>25</sup>

Finally, Principles 17 through 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. It is worth note that Principle 22 is a precursor of the 2007 U.N. 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.<sup>26</sup>

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<sup>22</sup> See Antarctic Treaty, *supra* note 4.

<sup>23</sup> Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, Can., Jan. 29, 2000, 2226 U.N.T.S. 208.

<sup>24</sup> See, e.g. Appellate Body Report, *European Community—Measures Affecting Meat and Meat Products (Hormones)*, WT/DS 26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (*adopted* Feb. 13, 1998). For a comprehensive analysis of the principle and of its limits, see *IL PRINCIPIO PRECAUZIONALE NEL DIRITTO INTERNAZIONALE E COMUNITARIO* (Bianchi & Gestri eds., 2006).

<sup>25</sup> *Rio Declaration*, *supra* note 1, at Principle 16.

<sup>26</sup> Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/Res/61/295 (Oct. 2, 2007).

22 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 11]II. *The Lasting 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."<sup>27</sup> 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.<sup>28</sup>

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

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<sup>27</sup> Marrakesh Agreement Establishing the World Trade Organization, Preamble, Apr. 15, 1994, 1867 U.N.T.S. 154.

<sup>28</sup> See K. Gordon & J. Pohl, *Environmental concerns in International Investment Agreements: A Survey*, 2011 OECD Working Papers on International Investment, available at <http://dx.doi.org/10.1787/5kg9mq7scrjh-en>; JORGE E. VIÑUALES, FOREIGN INVESTMENTS AND THE ENVIRONMENT IN INTERNATIONAL LAW (2012); Massimiliano Montini, INVESTIMENTI INTERNAZIONALI, PROTEZIONE DELL'AMBIENTE E SVILUPPO SOSTENIBILE (2015).

Principle 21 of the 1972 Stockholm Declaration<sup>29</sup> 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<sup>30</sup> and in virtually all treaties dealing with trans-boundary environmental harm.

Principle 7 on common but differentiated responsibilities (CBDR) has been adopted in the last generation of multilateral environmental agreements, including the U.N. Framework Convention on Climate Change,<sup>31</sup> the Kyoto Protocol with its fundamental distinction between Annex 1 parties, subject to climate stabilization requirement, and developing countries exempted from mandatory requirements,<sup>32</sup> the Persistent Organic Pollutants Convention<sup>33</sup> and the Minamata Convention on Mercury,<sup>34</sup> 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

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<sup>29</sup> *Stockholm Declaration*, *supra* note 11, at Principle 21.

<sup>30</sup> Convention on Biological Diversity, Rio de Janeiro, Braz., June 5, 1992, 1760 U.N.T.S. 79.

<sup>31</sup> United Nations Framework Convention on Climate Change, New York, U.S.A., art. 3, ¶ 2, May 9, 1992, 1771 U.N.T.S. 107.

<sup>32</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, Jap., Dec. 11, 1997, 2303 U.N.T.S. 162.

<sup>33</sup> Stockholm Convention on Persistent Organic Pollutants, Stockholm, Swed., May 22, 2001, 2256 U.N.T.S. 119 (entered into force May 17, 2004).

<sup>34</sup> Minamata Convention on Mercury, Kumamoto, Jap., Oct. 10, 2013 (not yet entered into force), *available at* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-17&chapter=27&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-17&chapter=27&lang=en).

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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,<sup>35</sup> the 1999 Protocol on Liability and Compensation additional to the Basel Convention on the Trans-boundary Movement of Hazardous Waste,<sup>36</sup> and the 2010 Nagoya–Kuala Lumpur Supplementary Protocol to the Cartagena Protocol on Biosafety.<sup>37</sup>

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 U.N. Declaration on the Rights of Indigenous Peoples,<sup>38</sup> which are rights rooted in the intimate relationship between these peoples and 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

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<sup>35</sup> Antarctic Treaty, *supra* note 4, at Annex VI. For a commentary, see INTERNATIONAL LIABILITY REGIME FOR BIODIVERSITY DAMAGE (Akiho Shibata ed., 2014).

<sup>36</sup> Basel Protocol on Liability and Compensation for Damage Resulting From Transboundary Movements of Hazardous Wastes and their Disposal, Basel, Switz., Dec. 10, 1999, U.N. Doc. UNEP/CHW.1/WG.1/9/2 (not yet in force).

<sup>37</sup> Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, Nagoya, Jap., U.N. Doc. UNEP/CBD/BS/COP-MOP/5/17, Oct. 15, 2010 (not yet in force).

<sup>38</sup> *Supra* note 26.

beyond its national jurisdiction.<sup>39</sup> 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)<sup>40</sup> and indirectly the recent ICJ judgment in the case *Whaling in the Antarctic* (Australia v. Japan).<sup>41</sup>

The precautionary approach codified in Principle 15 has been progressively implemented in the jurisprudence of the ICJ<sup>42</sup> and even more robustly in the Advisory Opinion of the Seabed Dispute Chamber of the International Tribunal on the Law of the Sea of February 1, 2011.<sup>43</sup> It is worth reproducing in its entirety paragraph 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

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<sup>39</sup> *Iron Rhine Railway* (Belg. v. Neth.), 27 R.I.A.A. 35 (2005).

<sup>40</sup> *Gabcikovo-Nagymaros* (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25).

<sup>41</sup> *Whaling in the Antarctic* (Austl. v. N.Z.), 2014 I.C.J. 226 (Mar. 31).

<sup>42</sup> *Pulp Mills on the River Uruguay* (Arg. v. Uru.), 2010 I.C.J. 14 (Apr. 20).

<sup>43</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of Feb. 1, 2011, ITLOS Rep. 11 [hereinafter *Advisory Opinion*].

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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.”<sup>44</sup>

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.”<sup>45</sup> 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.<sup>46</sup> This progressive interpretation of the precautionary approach is followed also in the practice of the judicial organs of the European Union.<sup>47</sup>

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

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<sup>44</sup> *Id.* at ¶ 135.

<sup>45</sup> This link is recognized explicitly in paragraphs 131 and 132 of the Opinion, where the Chamber recalls its order of August 27, 1999 in the *Southern Bluefin Tuna cases* (Australia and New Zealand v. Japan).

<sup>46</sup> Advisory Opinion, *supra* note 43, at ¶¶ 151-163.

<sup>47</sup> See Case T-13/99, Pfizer Animal Health SA v. Council, 2002 E.C.R. II-03305; Case C-77/09, Gowan Comércio Internacional e Serviços v. Ministero della Salute, 2010 E.C.R. I-13533.

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*<sup>48</sup> of 2001 and *Saramaka v Suriname*<sup>49</sup> 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*.

### *III. 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 some persistent 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 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

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<sup>48</sup> *Awas Tingni Community v. Nicaragua*, Case 79, Inter-Am. Comm'n H.R., (Judgment of Aug. 31, 2001), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf).

<sup>49</sup> *Saramaka v. Suriname*, Case 172, Inter-Am. Comm'n H.R., (Judgment of Nov. 28, 2007), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf).

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,<sup>50</sup> 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, vice versa, because nature conservation or environmental remediation may have negative consequences for human rights, especially economic, social and cultural 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.<sup>51</sup>

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 before arbitral tribunals, which have become also the forum for environmental

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<sup>50</sup> For further elaboration of this view, see Francesco Francioni, *The Preamble of the Rio Declaration & Principle 1: Human Rights and the Environment*, in *THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT. A COMMENTARY* 85-106 (Jorge E. Viñuales ed., 2015).

<sup>51</sup> Mr. John Knox of the United States 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.

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 to by the increasing number of investment disputes arising from contested environmental regulations. Arbitral decisions such as *Metalclad*,<sup>52</sup> *Myers*,<sup>53</sup> *Methanex*,<sup>54</sup> and *Glamis Gold*,<sup>55</sup> 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.<sup>56</sup>

Finally, a lingering gap that the Rio Declaration has left concerns the institutional deficit that remains today with regard to 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

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<sup>52</sup> *Metalclad Corp. v. Mexico*, ICSID Case No. ARB (AF)/97/1, Award (Aug. 30, 2000).

<sup>53</sup> *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Second Partial Award (Damages), 21 October 2002.

<sup>54</sup> *Methanex Corp. v. The United States of America*, UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.

<sup>55</sup> *Glamis Gold, Ltd. v. United States of America*, UNCITRAL (NAFTA), Award, 8 June 2009, <http://www.state.gov/documents/organization/125798.pdf>.

<sup>56</sup> For a more in-depth discussion of this issue, see the symposium on *International Investment Regulation: Trends and Challenges*, XXIII ITALIAN Y.B. INT'L L. 2014 (2013); and especially Francesco Francioni, *Foreign Investments, Sovereignty and the Public Good*, XXIII ITALIAN Y.B. INT'L L. 3-22 (2013); Jorge E. Viñuales, *Customary Law in Investment Regulation*, XXIII ITALIAN Y.B. INT'L L. 23-48 (2013); and Ernst-Ulrich Petersmann, *Fragmentation of International Law as a Strategy for Reforming International Investment Law*, XXIII Y.B. INT'L L. 49-68 (2013).

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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 Summit, which contemplated an agenda of reforms of the U.N. system. These proposals included, alternatively, the creation of a new U.N. agency, the strengthening of UNEP, and the establishment of a true international environmental organization along the model of the WTO,<sup>57</sup> 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 investment 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.

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<sup>57</sup> These options were presented in a preliminary study commissioned by the French Government to Professors Pierre-Marie Dupuy and Francesco Francioni and conducted at the European University Institute in 2005. The document is on file with this author.

*Conclusion*

The time passed since the adoption of the Rio Declaration barely covers the span of one generation. But in this 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's ecosystem; the hubris of exporting democracy all over the world has 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. The Paris Agreement of December 2015 on climate action 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 inadequacies, as I 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*."<sup>58</sup> In this brief clause we can find two essential dimensions of sustainability: the fulfillment of the basic economic, social and cultural rights necessary to a life in dignity, 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

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<sup>58</sup> *Rio Declaration, supra* note 1, at Principle 1 (*emphasis added*).

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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 “anthropocene” 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 secular admonition has been embraced by one of the most prophetic voices of our time, Pope Francis, in his letter *Laudato si’* of 2015,<sup>59</sup> is a compelling reminder of the continuing legacy of the Rio Declaration.

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<sup>59</sup> Pope Francis, *Encyclical Letter Laudato si’*, LIBRERIA EDITRICE VATICANA (May 24, 2015).