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Sustainable Development and International Law:
The Way Forward

Working Group on Environmental Law

**EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW**

*Sustainable Development and International Law:
The Way Forward*

WORKING GROUP ON ENVIRONMENTAL LAW

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Abstract

This Working Paper collects the contributions that were elaborated for a Roundtable held at the European University Institute in May 2006. The Roundtable was meant to discuss the emergence of the new field of studies in law: Sustainable Development Law. The Roundtable gathered members of the Working Group on Environmental Law of the EUI and guest speakers from European Universities. Together, professors and researchers try to delineate the material content of such new field of law, its relation with the more familiar field of environmental law, and underlined some problems arising from the legal use of concepts such as sustainable development, sustainable management and sustainability

Keywords

Sustainable Development – Développement Durable – Desarrollo Sostenible – Sviluppo Sostenibile – Sustainable Use – Antarctic Resources – Climate Change – Risk Management – Sustainability Standards

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Introduction

The Working Group on Environmental Law (WGEL) was established in early 2004 by a group of researchers at the European University Institute (EUI), whose Ph.D. research focuses on different aspects of international, EU or comparative environmental law.

The WGEL objectives are:

- providing updates on the developments of environmental law at the national, European and international level;
- information sharing on research sources, publication opportunities, and conferences/events concerning environmental law; and
- keeping environmental law on the agenda of the European University Institute.

In 2006, the Working Group undertook to convene a roundtable to exchange reflections on sustainable development law, with the objective to benefit from the contributions of a friendly network of well-known experts and young researchers in this new field of academic research. The initiative of the WGEL was supported financially by the Law Department of the EUI, and by the personal and financial contributions of Professors Francesco Francioni and Pierre-Marie Dupuy. On the 12th May 2006, around twenty participants gathered in the Teatro of the Badia Fiesolana (EUI), to discuss some major questions emerging in relation to this emerging field of law: the framework and substance of sustainable development law; its sectoral dimensions and developments; but also the uncertainties that derive from the use in law of concepts such as “sustainability” and “sustainable development.” Presentations were made in English, French, Italian and Spanish, to reflect the multi-lingual character of the Working Group. The Working Paper hereinafter, edited by Elisa Morgera and Patricia Quillacq, is a collection of the contributions presented at the round table.

WGEL members

EUI Researchers

- Hélène Boussard, *Human Genome and the Relation between Ethics and Law*
- Patrycja Dabrowska, *New Governance and Regulation of GMOs in the EU*
- Sofia de Abreu Ferreira, *Aarhus Convention and EU law*
- Hanne Birgitte Jensen, *From Economic to Sustainable Development*
- Elisa Morgera, *Corporate Accountability and International Environmental Law*

- Emanuela Orlando, *Environmental Liability Instruments, EU Law and the International Perspective*
- Patricia Quillacq, *Comparative Study on the Principle of Public Participation in Environmental Planning*
- Aphrodite Smagadi, *Biological Diversity Convention and Indigenous Rights*
- Virginie Barral, *Sustainable Development and International Law*
- Chien-Huei Wu, *Judicial Review of Legal Measures concerning External Trade*

EUI Professors

- Francesco Francioni, Professor of International Law and Human Rights Law
- Pierre-Marie Dupuy, Professor of International Law
- Fabrizio Cafaggi, Professor of Comparative Law
- Christian Joerges, Professor of Economic Law

Visiting professors and other guest speakers

- Prof. Massimiliano Montini, Università di Siena, Italy
- Prof. Ricardo Pavoni, Università di Siena, Italy
- Dott.ssa Patrizia Vigni, Università di Siena, Italy
- Francesca de Vittor, EUI Jean Monnet fellow
- Laura Zanotti, EUI Jean Monnet fellow

Preface

Patricia Quillacq and Elisa Morgera¹

Les contributions que le lecteur trouvera ci-après sont le fruit de la volonté de partage, de discussion et de réflexion de professeurs, chercheurs et professionnels sur le thème du développement durable. Le développement durable est un concept au départ essentiellement politique, d'où la profusion de définitions et l'utilisation multiple et hétéroclite du terme. L'exigence de précision du droit s'accommode mal de cette réalité, et de nombreuses contributions dans ce recueil le soulignent. Selon la thèse de Hanne Birgitte Jensen, qui s'attarde sur la nature même du concept, le développement durable, tel un méta-principe, contient et suppose un changement paradigmatique et épistémologique pour la société. Il est logique alors que ce concept ait envahi la sphère du droit, et qu'il contribue à élargir la compréhension de ce qu'est le droit. Le glissement vers une compréhension rénovée du droit passe par l'étape actuelle, à la fois prolifique et confuse, dans laquelle la littérature juridique commence à affirmer l'existence d'un « droit du développement durable », qui demeure malgré tout marqué par une grande fragmentation disciplinaire. Tel était le thème de la journée du 12 mai 2006 : celui de s'interroger, premièrement, sur l'existence ou non d'une nouvelle branche du droit et deuxièmement sur l'objectif, l'objet, la structure, le contenu de celle-ci.

Une des préoccupations qui anime la doctrine est celle de savoir si l'exigence de développement durable transcrite en droit peut faciliter, orienter, ou imposer des pratiques réellement durables, ou si, au contraire, il faut se méfier des approches volontaires à l'objectif de « durabilité », dont les paramètres ne répondent pas aux critères plus sévères du droit de l'environnement. Les contributions concernant les dimensions sectorielles du développement durable, démontrent que la balance s'appesantit parfois d'un côté et parfois de l'autre. Le Prof. Montini expose le cas de l'évolution du régime du changement climatique et, en particulier, l'utilisation progressive du mécanisme pour un développement propre en tant qu'instrument de développement durable. Ceci illustre le potentiel positif des techniques d'un régime environnemental sur la poursuite du développement durable. Elisa Morgera propose à son tour une vision du rôle du développement durable comme moteur pour la création de standards qui peuvent contribuer au contrôle des activités du secteur privé et en particulier des grandes sociétés multinationales. Patricia Quillacq discute de l'évolution du principe de participation publique en matière d'environnement comme un des aspects procéduraux du développement durable.

La nouveauté de certains risques et l'amplitude de certains événements naturels confrontent le juriste à des problèmes qui ne peuvent se voir analysés exclusivement en

¹ Ph.D. researchers, European University Institute, Florence, Italy.

termes d'environnement. Comment approcher sinon, nous demande le Prof. Laura Zanotti, la dimension catastrophique des désastres naturels ? Alors que la globalisation économique et les migrations humaines dessinent une nouvelle géographie des risques, l'exigence du développement durable apparaît dans son urgence la plus immédiate : celle de la survie de l'espèce humaine. Sofia de Abreu nous entraîne dans une exploration de la difficile gestion des risques contemporains, notamment ceux de la biotechnologie, à travers l'analyse d'une décision récente du Tribunal européen de Première Instance. L'exigence de démocratie peut aussi être décrite comme une manifestation de l'évolution des systèmes sociaux humains, et en tant que telle, elle s'inscrit aussi dans le processus de développement durable. Le droit contemple et reçoit cette exigence, de manière certes imparfaite, mais croissante. Les analyses par le Prof. Campins, Sofia de Abreu et Patricia Quillacq permettent de constater l'importance des questions procédurales et participatives dans ce domaine.

Le deuxième groupe de contributions que le lecteur trouvera ci-après s'intéresse à la théorie et à la pratique concernant la durabilité et le développement durable. Le Prof. Mar Campins soulève certaines questions précises et subtiles mais essentielles sur la cohérence et l'adéquation des standards de 'durabilité' (sustainability standards) dans le cadre plus large du commerce international. La contribution du Prof. Patrizia Vigni se positionne aussi dans une perspective de prudence envers la notion de «sustainable use» des ressources naturelles de l'Antarctique ; cette expression pourrait, si elle était interprétée trop largement, ou selon des critères en vigueur dans d'autres régimes comme celui sur la biodiversité, contredire l'esprit du régime général de protection du continent blanc. Il s'agit bien, en fin de compte, comme l'avait souligné Prof. Prieur dans sa présentation, de savoir si l'affirmation croissante du développement durable dans le droit signifiera moins de droit de l'environnement, mais plus d'environnement dans tous les domaines du droit.

Les contributions ci-après recueillies se complètent de manière très intéressante, jetant des ombres et des lumières sur les normes qui veulent contribuer, autant que possible, au développement durable des sociétés. Elles évoquent la substance encore floue, mais palpable et identifiable malgré tout, de ce que contient le droit du développement durable. Et à tous ceux qui doutent encore de l'utilité de la notion, les commentaires du délégué de l'association Legambiente Toscana Massimo Migani devraient rappeler la finalité pratique des instruments pensés par le droit.

On regrettera de ne pouvoir fournir aux lecteurs les contributions de deux professeurs émérites que les participants à la table ronde ont eu la chance d'écouter pendant la journée du 12 mai : le talent unique de Professeur Pierre-Marie Dupuy à marier droit et littérature pour questionner l'existence du développement durable, les résultats exhaustifs et récents d'une étude comparée menée par Prof. Michel Prieur en Europe sur les liens entre droit et développement durable. Tels des mandalas de sable, ces contributions furent pensées pour la journée, mais il n'y a pas de doute à ce que le lecteur intéressé retrouvera les idées de ces professeurs dans leurs innombrables travaux.

On regrette aussi quelque peu de ne pas avoir inclus dans ce Working Paper – pour des raisons de longueur évidente – les contributions d'autres invités venus participer aux sessions du Groupe de Travail sur le Droit de l'Environnement de l'IUE au cours de l'année 2006, comme celles des Professeurs Klaus Bosselmann et Prue Taylor, de

Preface

l'Université de Auckland, Nouvelle-Zélande, ou celle de Kati Kulovesi, membre de l'Institut International du Développement Durable. Ces visiteurs comme les participants à la table ronde et les membres du groupe de travail ont su le maintenir en vie.

On remercie tous les participants de cette journée du 12 mai pour leurs efforts, l'enthousiasme et le soutien démontrés à cette initiative, démarrée sur une idée des membres du Groupe de Travail sur le droit de l'environnement de l'IUE. Ce dernier semble, tout comme le climat, destiné à subir des cycles d'activité plus ou moins intense. Les membres du groupe qui l'ont animé depuis 2003 sont à présent en fin de parcours à l'IUE. On ne peut alors que souhaiter un renouveau à ce groupe de travail, fruit du travail d'autres chercheurs qui lui emboîteront le pas.

Sviluppo Sostenibile e Principi di Diritto Internazionale dell'Ambiente

Francesco Francioni¹

1. Introduzione

Sono trascorsi vent'anni da quando, nel 1987, la World Commission on Environment and Development adottò per la prima volta l'espressione "sviluppo sostenibile" nel celebre rapporto Brundlandt "Our Common Future"². Da allora essa è entrata nel linguaggio giuridico della comunità internazionale pervadendo come una sorta di mantra ricorrente la quasi totalità di testi convenzionali e di soft law in materia ambientale e, talvolta, anche di tipo economico³. Nella sua formulazione originaria essa presupponeva un principio di equità su scala intergenerazionale prescrivendo una utilizzazione delle risorse naturali del pianeta tale da soddisfare i bisogni delle generazioni presenti senza pregiudicare la capacità delle generazioni future di soddisfare i loro bisogni. Nella sua semplicità tale definizione postulava una rivoluzione nel modo di concepire il ruolo del diritto internazionale nella gestione delle risorse naturali. L'impostazione "westfaliana" del diritto internazionale aveva diviso, infatti, il mondo in tante sfere di giurisdizione territoriale lasciando agli stati la decisione sovrana di come gestire le proprie risorse naturali e affidando al principio di libertà di accesso e del "first come first served" lo sfruttamento delle risorse di spazi comuni come il mare internazionale o le orbite spaziali. Con il concetto di sviluppo sostenibile e di equità intergenerazionale si introduceva un principio di etica collettiva che imponeva ad ogni stato di gestire razionalmente le proprie risorse in modo da non pregiudicare lo sviluppo durevole e le condizioni di vita sul pianeta delle generazioni future. Tale impostazione non era isolata. Negli anni ottanta il diritto internazionale aveva accettato questo nuovo principio di razionalità ed equità con l'adozione del regime del "patrimonio comune dell'umanità" nella Parte XI della Convenzione delle Nazioni Unite sul diritto del mare e con il lungo e complesso negoziato sulle risorse minerarie del continente antartico, prima soggette ad un regime di sfruttamento controllato a livello internazionale con la Convenzione di Wellington del 1988 e poi sottoposte a moratoria di cinquant'anni con il Protocollo di Madrid del 1991⁴.

¹ Professor of Human Rights Law, European University Institute, Florence, Italy.

² Per i lavori preparatori del Rapporto dal punto di vista della elaborazione dei principi giuridici che sottendono la protezione internazionale dell'ambiente e lo sviluppo sostenibile, si veda *Environmental Protection and Sustainable Development*, Expert Group on Environmental Law of the World Commission on Environment and Development, Dordrecht, London/Boston, 1987.

³ Si veda ad esempio il preambolo dell'accordo istitutivo della più importante organizzazione economica internazionale, la World Trade Organization, che pone appunto lo sviluppo sostenibile tra le finalità dell'istituzione, nonché l'articolo 6 (ex 3 c) del Trattato CE che ne fa l'obiettivo delle politiche e delle azioni comunitarie a tutela dell'ambiente.

⁴ Vedi *infra* para. 5, note 42 e 43.

Ma nonostante il forte contenuto innovativo del principio dello sviluppo sostenibile, o magari proprio a causa di esso, il suo significato normativo e il suo posto nel diritto internazionale contemporaneo rimangono controversi. In dottrina ad esso è stato attribuito da alcuni autori il carattere di vero e proprio principio generale accettato dalla comunità internazionale nel suo complesso⁵, e da altri al contrario quello di mero obiettivo di politica economica e ambientale che ogni stato persegue secondo proprie scelte sovrane; di criterio meta-giuridico utilizzabile sul piano interpretativo,⁶ e di “approccio” ai problemi dello sviluppo attraverso l’integrazione di standards ambientali consolidati, specialmente nei grandi trattati multilaterali (MEAs). Nella dottrina italiana, in particolare, la nobile tradizione della manualistica, che offre una visione complessiva della disciplina attraverso l’osservazione e l’esperienza degli autori più rappresentativi, lo sviluppo sostenibile, o è volutamente ignorato o è minimizzato come mera aspirazione priva di qualsiasi contenuto prescrittivo.⁷

È quindi opportuno che a vent’anni di distanza dalla sua enunciazione Il Gruppo di Lavoro sul Diritto dell’Ambiente dell’IUE inviti i suoi membri ad interrogarsi sul significato e il ruolo dello sviluppo sostenibile nel sistema complessivo del diritto internazionale. Per quanto mi riguarda, ho accettato volentieri di dare il mio contributo a questa riflessione. Tuttavia in questa mia relazione non mi occuperò della questione astratta se lo sviluppo sostenibile costituisca un principio vincolante, un mero ideale politico o criterio interpretativo. La mia tesi è che il principio dello sviluppo sostenibile non sia “cristallizzabile” nel tempo secondo il criterio generale di formazione delle norme internazionali attraverso la reiterazione di comportamenti e la graduale formazione di una coscienza dell’obbligatorietà sociale di tali comportamenti. Esso costituisce piuttosto un metodo, un processo per integrare considerazioni ambientali nelle politiche dello sviluppo e della regolazione del mercato. In questo senso non è riconducibile ad una matrice normativa omogenea, della quale si deve discutere se abbia carattere precettivo o programmatico. Ma è piuttosto lo strumento che condiziona in modo trasversale la⁸ formazione e l’atteggiarsi di principi e regole eterogenee fra loro, e che permette di coordinare regole consolidate talvolta in conflitto al fine di adattarle a esigenze nuove di tutela ambientale.

⁵ Si veda, ad esempio l’opinione individuale del giudice Weeramantry relativa alla sentenza della Corte Internazionale di Giustizia nell’affare *Gabcikovo-Nagymaros* del 25 settembre 1997, ref. *infra*, nota 28, pp. 7 ss, p. 88. Per la dottrina, cfr. P. Sands, *Principles of International Environmental Law*, Second Ed., Cambridge, 2003, p. 266 ss.

⁶ V. Lowe, “Sustainable Development and Unsustainable Arguments”, in *International Law and Sustainable Development* (Boyle and Freestone eds.), Oxford, 1999, p. 19 ss.

⁷ Così i manuali recenti, in particolare, B. Conforti, *Diritto internazionale*, Napoli, 2006, p. 203, che esclude l’esistenza di obblighi dello stato nella gestione delle risorse naturali secondo principi di sviluppo sostenibile “... in assenza di sicuri dati della prassi”; A. Cassese, *International Law*, Oxford, 2005, p. 491 s., che non include lo sviluppo sostenibile tra i principi del diritto internazionale dell’ambiente ma tra le ‘general guidelines’ ricavabili dalla soft law; e T. Treves, *Diritto internazionale, problemi fondamentali*, Milano, 2005, che non riserva una trattazione del principio nel complesso delle fonti del diritto internazionale. Nel manuale collettaneo S. M. Carbone, R. Luzzatto, A. Santa Maria, *Istituzioni di diritto internazionale*, Torino, 2003, il capitolo sulla tutela dell’ambiente, a firma F. Munari, dedica un paragrafo allo sviluppo sostenibile mettendo in rilievo la sua emergenza nella prassi giurisprudenziale recente, ma senza poterne sviluppare, nell’economia complessiva del manuale, il significato giuridico e la portata.

2. Settorialità e incoerenza

Il metodo sopra delineato sembrerebbe porsi in contrasto con due dati rilevabili empiricamente dalla prassi: da un lato, il carattere marcatamente settoriale del diritto internazionale dell'ambiente, che lo farebbe apparire refrattario all'approccio olistico che abbiamo ritenuto intrinseco al concetto di sviluppo sostenibile; dall'altro, l'incoerenza alla prova dei fatti tra l'enunciazione a livello teorico dello sviluppo sostenibile e la crescente insostenibilità dello sviluppo, accresciuta dal furore produttivo delle economie emergenti, che sta portando verso crisi globali, di cui il pericoloso cambiamento climatico è la manifestazione più vistosa.

Sul primo punto, non si può certo negare che la caratteristica del diritto internazionale dell'ambiente è stata, fin dalla sua origine nei primi anni settanta, quella di affrontare i problemi ambientali in modo settoriale e frammentario. Ci si è occupati dell'inquinamento atmosferico transfrontaliero,⁹ della prevenzione dell'inquinamento marino¹⁰, del commercio di specie animali e vegetali protette,¹¹ dei rifiuti pericolosi,¹² della tutela di determinate aree geografiche,¹³ del danno nucleare,¹⁴ e di tanti altri settori specifici di degrado ambientale o di tutela di particolari componenti ambientali. Tuttavia è anche vero che in tempi più recenti a questo approccio settoriale ha fatto seguito un approccio "ecosistemico", fondato sulla conoscenza della interazione tra le molteplici componenti fisiche e biologiche che caratterizzano una determinata area,¹⁵ e in ultima analisi un approccio globale a problemi che riguardano l'ambiente nella sua totalità e indivisibilità, quali la fascia di ozono,¹⁶ la diversità biologica¹⁷ e il cambiamento climatico.¹⁸ In questo contesto il principio dello sviluppo sostenibile può servire a dare unitarietà sul piano sostanziale ad una *governance* ambientale che sul piano formale rimane settoriale e frammentata soprattutto a causa della sua origine in norme di trattati

⁹ Cfr. *Geneva Convention on Long-Range Transboundary Pollution*, 1979, disponibile all'indirizzo <http://www.unece.org/env/lrtap/full%20text/1979.CLRTAP.e.pdf>

¹⁰ *London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 1972, disponibile all'indirizzo <http://www.londonconvention.org/documents/lc72/LC1972.pdf>; *International Convention for the Prevention of Pollution from Ships* (MARPOL Convention), 1973, disponibile all'indirizzo <http://sedac.ciesin.org/entri/texts/pollution.from.ships.1973.html>

¹¹ Cfr. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 1973 (CITES Convention), disponibile all'indirizzo <http://www.cites.org/eng/disc/text.shtml>

¹² Cfr. *Basilea Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal*, 1989, disponibile all'indirizzo <http://www.basel.int/text/con-e-rev.pdf>

¹³ Cfr., ad esempio, *Madrid Protocol on Environmental Protection to the Antarctic Treaty*, 1991, disponibile all'indirizzo http://www.antarctica.ac.uk/About_Antarctica/Treaty/protocol.html

¹⁴ Cfr. *Vienna Conventions on Civil Liability for Nuclear Damage*, 1963 e 1997, disponibile, nel testo consolidato, all'indirizzo http://f40.iaea.org/worldatom/Documents/Legal/protamend_annex.shtml

¹⁵ Un primo esempio di tale approccio è dato dalla CCAMLR (*Convention on the Conservation of Antarctic Marine Resources*), che riguarda le risorse biologiche dei mari antartici, 1980, disponibile all'indirizzo <http://sedac.ciesin.org/entri/texts/antarctic.marine.resources.1980.html>

¹⁶ Cfr. *Vienna Convention for the Protection of Ozone Layer*, 1985, disponibile all'indirizzo <http://www.unep.ch/Ozone/pdfs/viennaconvention2002.pdf> e *Montreal Protocol on Substances that Deplete the Ozone Layer*, 1987, disponibile all'indirizzo <http://sedac.ciesin.org/entri/texts/montreal.protocol.ozone.1987.html>

¹⁷ Cfr. *Convention on Biological Diversity*, 1992, disponibile all'indirizzo <http://www.biodiv.org/convention/convention.shtml>

¹⁸ Cfr. *United Nations Framework Convention on Climate Change*, 1992, disponibile all'indirizzo <http://unfccc.int/resource/docs/convkp/conveng.pdf> e *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 1998, disponibile all'indirizzo <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

che, per quanto importanti, rimangono inopponibili agli stati terzi. Esempio eloquente di ciò è dato dalla utilizzazione dello sviluppo sostenibile allo scopo di integrare specifiche considerazioni di conservazione ambientale nella interpretazione di norme del sistema OMC in controversie che coinvolgono membri che non hanno aderito ai trattati multilaterali applicabili.¹⁹

Per quanto concerne il divario tra enunciazioni teoriche del principio dello sviluppo sostenibile e le modalità reali di sviluppo economico, esso certamente dimostra che, alla prova dei fatti, gli stati antepongono al valore della sostenibilità ambientale l'esigenza di sostenere la crescita economica e i consumi dei loro cittadini. Questo è evidente nel Rapporto 2005 dell' UNDP (Programma delle Nazioni Unite per lo Sviluppo) nel quale si segnala che oltre il 60% dei Paesi considera la tutela ambientale come un ostacolo allo sviluppo piuttosto che come una componente dello stesso²⁰. Ciò non sorprende se si pensa che in quel 60% sono compresi i paesi poveri che non vedono certo di buon occhio politiche di tutela ambientale i cui costi ricadano sulle loro spalle. Ma nonostante ciò, è proprio la crescita economica e dei consumi ad accelerare in modo impressionante il degrado ambientale ed a porre ormai in termini di "sicurezza globale" la questione della sostenibilità dello sviluppo economico.. Questo nuovo rapporto tra sostenibilità ambientale e sicurezza collettiva è alla base delle iniziative per la riforma del sistema delle Nazioni Unite. Esso emerge nel Rapporto dello High Level Panel on Threats, Challenges and Change²¹, che insiste sulla necessità di nuove iniziative per andare al di là del Protocollo di Kyoto, ritenuto insufficiente a contrastare la crisi globale dei cambiamenti climatici, e soprattutto nel rapporto del Segretario Generale Kofi Annan del marzo 2005 che propone misure mirate a specifici settori quali la desertificazione, la salvaguardia della biodiversità e il riscaldamento atmosferico.²²

È in questa ricerca di una unità di azione, che superi il vecchio settorialismo ambientale, e di una coerenza tra le proclamazioni astratte e le reali scelte di politica economica degli stati che il principio dello sviluppo sostenibile può svolgere un ruolo unificante rispetto ai principi già consolidati o emergenti di diritto internazionale dell'ambiente. Senza alcuna pretesa di completezza, dati i limiti del presente lavoro e il suo carattere di introduzione alla discussione più ampia del nostro convegno, cercherò di esaminare nei paragrafi che seguono il ruolo di integrazione e di coordinamento che lo sviluppo sostenibile può svolgere all'applicazione di un certo numero di principi che appaiono particolarmente rilevanti per la nostra discussione. Essi sono 1) il principio di prevenzione, 2) il principio di responsabilità degli attori non statali, in particolare le imprese multinazionali, rispetto all'osservanza degli standards internazionali in materia ambientale, 3) il principio di precauzione, 4) il principio di equità nella ripartizione dei benefici derivanti dallo sfruttamento delle risorse naturali, 5) i principi della

¹⁹ Significativa a questo riguardo è la pronuncia dell'Organo d'Appello dell'OMC nel caso *United States – Import Prohibition of Certain Shrimp and Shrimp Product* (India, Pakistan, and Thailand v. United States, WTO Doc. WT/DS58/AB/R del 12 ottobre 1998) nel quale il principio della conservazione di una specie minacciata – le tartarughe marine – è stato assunto a causa di potenziale liceità di misure restrittive del commercio nei confronti di un membro, parte in causa, che non aveva ratificato il trattato multilaterale rilevante in materia – la Convenzione CITES (*supra*, nota 9) – proprio in virtù del riferimento allo sviluppo sostenibile contenuto nel preambolo dell'accordo istitutivo dell'OMC.

²⁰ Si veda lo *Human Development Report 2005* dell'UNDP, New York, 2005.

²¹ *A More Secure World*, 2 October 2004, <www.un.org/secureworld/>.

²² Kofi Annan, *In Larger Freedom – Toward Development security and Human Rights for All*, 20 March 2005.

informazione e partecipazione delle popolazioni interessate nelle decisioni che investono importanti questioni ambientali.

3. Sostenibilità e Prevenzione

Il principio di prevenzione del danno ambientale comporta l'obbligo dello stato di far sì che il proprio territorio non venga usato in modo tale da arrecare danno ad altri stati. Nella sua formulazione originaria tale principio aveva carattere squisitamente transfrontaliero, nel senso di esser parte dei rapporti di buon vicinato, che non tollerano l'uso nocivo del territorio. In tal senso esso si innestava perfettamente nelle strutture normative del diritto internazionale classico fondato sulla sovranità e sull'obbligo speculare di rispettare la sovranità altrui. Questa impostazione è evidente nei casi classici di danno ambientale, attuale o temuto, quali *Trail Smelter*²³ e *Lago Lanoux*.²⁴ Un passo avanti nella elaborazione di un concetto più ampio di prevenzione si ha con la decisione della Corte Internazionale di Giustizia nel caso *Corfu Channel*²⁵ in cui la Corte va al di là del mero criterio del rispetto della sovranità altrui introducendo il riferimento alle "elementary considerations of humanity" come criterio di prevenzione del danno. Il caso *Corfù*, come sappiamo, non riguardava il danno ambientale²⁶, ma l'allargamento dell'obbligo di prevenzione del danno ambientale al di là dei rapporti di vicinato si realizza compiutamente con la Dichiarazione di Stoccolma del 1972 sull'ambiente umano che col principio 21 proclama l'obbligo ("the responsibility") di ogni stato di prevenire il danno all'ambiente non solo di altri stati ma anche degli spazi comuni al di là della giurisdizione nazionale. Non è un caso che tale obbligo nei confronti di beni ambientali internazionali segua di solo due anni l'enunciazione da parte della Corte internazionale di giustizia degli obblighi *erga omnes* nei confronti della comunità internazionale nel suo complesso²⁷, fra i quali figurano anche l'obbligo di prevenire il danno significativo a beni pubblici internazionali quali l'atmosfera, i mari, la biodiversità. È in questa dinamica evolutiva che si inserisce il concetto di sviluppo sostenibile che allarga ulteriormente l'ambito di applicazione del principio di prevenzione.

In questa linea evolutiva si inseriscono gli sviluppi giurisprudenziali più recenti in materia di integrazione del concetto di sviluppo sostenibile nel principio di prevenzione del danno ambientale. Tre precedenti appaiono particolarmente significativi al riguardo. Il primo è costituito dalla sentenza della Corte Internazionale di giustizia nel caso *Gabcikovo Nagymaros*²⁸ che non solo conferma il carattere vincolante dell'obbligo di

²³ *Trail Smelter Arbitration* (USA-Canada), decisione arbitrale dell'11 marzo 1941, in *RIAA*, Vol.III, p. 1905 ss.

²⁴ *Lac Lanoux Arbitration* (Spagna-Francia), in *ILR*, 1957, Vol. 24, p. 101 ss.

²⁵ *Corfu Channel*, ICJ, 9 April 1949, *ICJ Reports* 1949, pp. 4 – 36.

²⁶ E' noto che la controversia riguardava l'azione della Gran Bretagna contro l'Albania per il danno materiale subito dalla flotta da guerra britannica a seguito della esplosione di mine nello stretto di Corfù del quale la Corte ritenne responsabile l'Albania sulla base del dovere di buona diligenza e di informazione circa l'esistenza di una esposizione al pericolo nell'ambito della propria giurisdizione territoriale. *Ibid.* p. 22.

²⁷ *Barcelona Traction* (Belgio c. Spagna), ICJ, 5 February 1970, *ICJ Reports* 1970, p. 3-51.

²⁸ *Gabcikovo Nagymaros* (Hungary v. Slovakia) ICJ 25 september 1997, *ICJ Reports* 1997, p. 7-84.

prevenire il danno all'ambiente²⁹, ma affronta per la prima volta la questione se l'adempimento di tale obbligo determini un effetto di liceità della mancata attuazione di opere previste da un trattato (nel caso la costruzione di dighe sul Danubio) la cui esecuzione poneva seri problemi di compatibilità ambientale. Qui compare, di nuovo per la prima volta, il riferimento della Corte allo sviluppo sostenibile come strumento di coniugazione delle sviluppo economico e della salvaguardia ambientale. La Corte dà ampio spazio alla esplorazione della questione se, sul piano formale, la sostenibilità ambientale possa configurare una circostanza di esclusione della responsabilità in termini di "necessità" di salvaguardare elementi essenziali di un ecosistema. Come sappiamo la sentenza della Corte dà, in ultima analisi, una risposta negativa a tale questione, preferendo mantener fermi i principi tradizionali in materia di diritto dei trattati e di responsabilità internazionale. Tuttavia la strada è aperta per l'ingresso nella giurisprudenza internazionale dello sviluppo sostenibile come obiettivo legittimo che può condizionare l'interpretazione e l'applicazione di norme convenzionali. Tale strada viene ampiamente battuta nell'opinione dissidente del giudice Weeramantry.³⁰ Ma quel che più conta è che essa viene seguita anche nella giurisprudenza internazionale successiva.

Il secondo caso in cui lo sviluppo sostenibile viene assunto a criterio di valutazione della portata di obblighi internazionali nascenti da trattato è dato dal rapporto dell'Organo d'Appello dell'OMC nella controversia tra India, Pakistan e Thailandia contro Stati Uniti e vertente sulle restrizioni di quest'ultimo stato alle importazioni di gamberetti dai paesi asiatici ritenuti responsabili della distruzione incidentale di una specie minacciata - le tartarughe marine - nel corso delle loro attività di pesca commerciale. Per la prima volta l'Organo d'Appello ha fatto ricorso al concetto di sviluppo sostenibile, riconosciuto nel preambolo dell'accordo istitutivo dell'OMC per stabilire la liceità di misure prese in deroga alla libertà degli scambi ed ai sensi dell'Articolo XX para. g. del GATT, che prevede la salvaguardia di risorse naturali esauribili come eccezione alla libertà degli scambi.³¹

Il terzo caso che dimostra la saldatura in atto tra sviluppo sostenibile e principio di prevenzione del danno ambientale è costituito dalla recente sentenza del tribunale arbitrale istituito nell'ambito della Corte Permanente di Arbitrato nella controversia del *Rhin de fer* tra Belgio e Olanda.³² Il tribunale arbitrale doveva decidere se preoccupazioni di sostenibilità ambientale dovessero essere tenute presenti nella attuazione del Trattato del 1839 che conferiva al Belgio un diritto di passaggio in territorio olandese. Lungi dall'assumere un atteggiamento restrittivo nell'interpretazione delle limitazioni della sovranità³³, il tribunale ha utilizzato a piene mani gli articoli 31 e 32 della Convenzione di Vienna sul diritto dei trattati al fine di arrivare ad una

²⁹ Ibid. para. 53. Su questo punto la Corte ribadisce una presa di posizione già emersa nel parere consultivo sulla *Legality of the Threat or Use of Nuclear Weapons*, ICJ Opinion, 8 July 1996, <www.icj-cij.org>, para. 29.

³⁰ *Supra* nota 25.

³¹ Vedi *supra* nota 16.

³² Sentenza 24 maggio 2005.

³³ Vedi i casi *Lotus* (*The Case of S.S. Lotus*, Permanent Court of International Justice, 7 settembre 1927, Publications of the Permanent of International Justice, Series A – No. 10) e *Wimbledon* (*The Case of S.S. Wimbledon*, Permanent Court of International Justice, 28 giugno 1923, Publications of the Permanent of International Justice, Series A – No. 1).

interpretazione conforme alle esigenze contemporanee di rispetto della sostenibilità ambientale. Come si legge nella sentenza,

«when a state exercises a right under international law within the territory of another state, considerations about environmental protection also apply. The exercise by Belgium's right of transit (...) thus may well necessitate measures by the Netherlands to protect the environment by which Belgium will have to contribute as an integral element of its request.»

E' interessante come il tribunale estenda qui il principio di prevenzione del danno dalle attività che uno stato svolge o permette che siano svolte nel proprio territorio ad attività extra-territoriali svolte nell'esercizio di un diritto previsto da un trattato internazionale. Il Belgio è quindi tenuto a cooperare con l'Olanda affinché le opere richieste all'esercizio del suo diritto di passaggio in territorio olandese siano compatibili con gli standards di compatibilità ambientale al cui rispetto esso è tenuto a contribuire.

4. La responsabilità ambientale di attori privati

La sentenza arbitrale appena citata si presta alla individuazione di una ulteriore prospettiva di estensione del principio di sviluppo sostenibile nel campo delle attività di attori non statali. Molto si è scritto sulla responsabilità ambientale delle imprese, specie di quelle che operano su scala transnazionale ed è evidente che è soprattutto dalle attività di queste imprese che deriva il maggiore impatto ambientale nei paesi di penetrazione e di investimento. Ciò pone il problema se anche questi attori non statali, ma nondimeno protagonisti dello sviluppo economico e responsabili diretti dell'impatto ambientale, non siano tenuti a rispettare gli standards internazionali di protezione ambientale come requisito fondamentale dello sviluppo economico di cui sono promotori. Il tema è controverso perché solleva la vecchia questione se le imprese private possano essere considerate soggetti di diritto internazionale e di conseguenza essere destinatarie di obblighi internazionali fra cui l'obbligo di prevenzione del danno all'ambiente. Non intendo certamente riaprire qui una simile questione teorica. Mi preme piuttosto rilevare come nella prassi degli ultimi dieci anni, accanto all'obbligo dello stato di prevenire il danno all'ambiente, si è fatto strada, specie nell'ambito delle Nazioni Unite, il principio secondo cui anche le imprese sono tenute ad una condotta responsabile sul piano della tutela ambientale. Tale tendenza si realizza a vari livelli. Il primo comporta il riconoscimento della necessità dell'apporto del settore privato nella realizzazione dello sviluppo sostenibile e la promozione quindi di iniziative di partenariato idonee a mobilitare risorse, esperienze, tecnologie necessarie a conciliare crescita economica e sostenibilità. L'esempio forse più significativo di partenariato è costituito dal c.d. Global Compact promosso nel 1999 nell'ambito delle Nazioni Unite al fine di incentivare il settore privato verso il rispetto di alcuni principi fondamentali di responsabilità sociale delle imprese. Tra questi principi figura la "sostenibilità ambientale" accanto al rispetto dei diritti umani, dei diritti dei lavoratori e della lotta alla corruzione³⁴. Le imprese che partecipano all'iniziativa si impegnano a rispettare i principi a fornire rapporti periodici e ad accettare un dialogo costruttivo con le

³⁴ Vedi "Secretary General Proposes Global Compact on Human Rights, Labour, Environment", Address to World Economic Forum in Davos, < <http://www.un.globalcompact.org> >.

organizzazioni non governative che sottopongano osservazioni o denunciino gravi abusi.³⁵

Il secondo livello di iniziative tese a responsabilizzare le imprese rispetto al perseguimento dello sviluppo sostenibile è quello dei codici di condotta che al contrario del Global Compact, fondato sull'adesione volontaria, prevede la fissazione di norme di condotta che dovrebbero riflettere gli standards internazionali in materia di tutela ambientale, diritti umani e diritto umanitario. L'esempio più significativo sono le Guidelines dell'OCSE, applicabili nell'ambito dei paesi industrializzati, e, a livello universale, le "Norms on the Responsibilities of Transnational Corporations and Other Business Companies" adottate dalla Sotto-Commissione per la Promozione e Protezione dei Diritti Umani nel 2003³⁶. Benché principalmente finalizzate al rispetto dei diritti umani, queste ultime norme prevedono anche il rispetto dell'ambiente attraverso la trasfusione nel loro testo di principi, standards e pratiche consolidate nei trattati multilaterali e nella giurisprudenza internazionale.

Il terzo livello a cui si può perseguire la realizzazione dello sviluppo sostenibile da parte delle imprese private è quello della supervisione, fact-finding e monitoraggio ad opera di organi internazionali dotati di specifiche competenze ambientali. Un caso particolarmente significativo è quello del Comitato del Patrimonio Mondiale istituito con la Convenzione Unesco del 1972 sulla Protezione del Patrimonio Mondiale Culturale e Naturale. A partire specialmente dal 1995 il Comitato ha affrontato numerosi casi di iniziative di sviluppo industriale e commerciale la cui compatibilità con il valore eccezionale dei siti interessati era messa in discussione. Si possono ricordare il caso del parco nazionale di Yellowstone negli Stati Uniti, minacciato dal progetto di apertura sui confini di una miniera d'oro; il caso delle isole Galapagos minacciate dall'impatto di un turismo insostenibile e dalla pesca illegale di specie in via di estinzione; nonché il caso forse più noto e controverso della miniera di uranio all'interno del parco nazionale di Kakadu in Australia. In tutti questi casi il monitoraggio internazionale, l'azione efficace delle organizzazioni non governative e il forte spirito di cooperazione presente nell'istituzione internazionale competente hanno permesso soluzioni conformi alla sostenibilità ambientale, consistenti nel primo e nel terzo caso nella cancellazione del progetto di attività.

Naturalmente il panorama sopra delineato con riguardo al contributo che le imprese private possono dare alla realizzazione dello sviluppo sostenibile presenta anche molte ombre. Le iniziative fondate sulla partecipazione volontaria delle imprese alla promozione dello sviluppo sostenibile, come il Global Compact, si sono rivelate finora poco efficaci per mancanza di trasparenza e di un efficace meccanismo di monitoraggio e di esposizione degli abusi. Per quanto concerne le "norme" non volontarie, esse sono state adottate dalla Sotto-Commissione delle Nazioni Unite, ma la ormai defunta e screditata Commissione dei diritti Umani ha fatto in tempo prima della sua estinzione a dare un forte segnale di scetticismo sulla utilità delle norme evitando sia di adottarle che di respingerle. Tuttavia, nel 2005 ha chiesto al Segretario Generale delle Nazioni Unite la nomina di un nuovo rapporteur sulla materia che è stato scelto nella persona di un non giurista, il professore di Harvard John Ruggie. Nel suo rapporto preliminare il

³⁵ Quest'ultima possibilità è stata introdotta nel 2005 a seguito di una policy review del Segretario Generale sul funzionamento del Global Compact.

³⁶ UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

nuovo rapporteur ha rovesciato l'impostazione data nelle "norme" del 2003 mettendo in discussione l'applicabilità degli standards internazionali in materia di diritti umani e di ambiente alle imprese e mettendo l'accento sulla elaborazione a livello sociale di standards di condotta³⁷. Si tratta di vedere quindi in che modo nel nuovo contesto creato con l'istituzione del Consiglio dei Diritti Umani la nuova impostazione, più sociologica che giuridica, possa portare ad una effettiva promozione dello sviluppo sostenibile ad opera delle imprese multinazionali e di altre imprese commerciali.

5. Sviluppo sostenibile e principio di precauzione.

Sostenibilità dello sviluppo e principio di precauzione sono in stretto rapporto di complementarietà poiché lo sviluppo economico è sorretto e accompagnato da un costante progresso scientifico e da innovazioni tecnologiche le cui applicazioni industriali o agricole sono suscettibili di procurare, accanto agli indubbi benefici, anche danni seri all'ambiente e alla salute, talvolta irreversibili. Questo rapporto è ben messo in evidenza già nella Dichiarazione di Bergen del 1990 sullo sviluppo sostenibile nell'area della Commissione Economica per l'Europa, dove si legge:

«In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.»³⁸

Da questo riconoscimento deriva l'esigenza, sul piano procedurale, di utilizzare le conoscenze scientifiche e le risorse economiche necessarie alla piena valutazione dei rischi che una determinata azione o progetto di sviluppo comportano per l'ambiente e la salute e, sul piano sostanziale, di concedere il beneficio del dubbio alla salvaguardia di tali valori piuttosto che all'interesse economico di procedere alla immediata realizzazione di un progetto che presenti rischi ambientali seri e in parte imponderabili. Questa è la filosofia che sottende il Principio 15 della Dichiarazione di Rio, secondo la quale :

«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».

Il carattere indeterminato del concetto di precauzione e lo stesso uso del termine "approccio" nel testo della Dichiarazione di Rio hanno fatto propendere parte della dottrina ed alcune manifestazioni della prassi a ritenere che il principio abbia carattere meramente descrittivo di un approccio politicamente desiderabile ma non giuridicamente vincolante³⁹. Questo è vero se si intende negare che la precauzione

³⁷ Interim report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. E/CN.4/2006/97, 22 feb. 2006.

³⁸ *Bergen Ministerial Declaration on Sustainable Development in the ECE Region*, UN Doc. A/CONF.151/PC/10 (1990).

³⁹ Byrnie and Boyle, *International Law and the Environment*, Oxford, 1992, p. 92; (vedi anche 2a edizione); Bodansky, *Scientific Uncertainty and the Precautionary Principle*, *Environment* n. 33, p. 4. nella prassi, si veda la posizione degli Stati Uniti nella celebre controversia con la Comunità Europea

abbia assunto il valore di norma consuetudinaria capace di creare obblighi perfetti e incondizionati per gli stati. Tuttavia non è nella natura dei principi di creare simili obblighi, ma piuttosto di dar forma a valori che la coscienza collettiva della comunità internazionale assume come propri e utilizza sul piano operativo come linee guida verso la realizzazione di un determinato interesse sociale in un certo momento storico. E' in tal senso che va inteso il linguaggio descrittivo di "approccio" utilizzato nella Dichiarazione di Rio, che tuttavia colloca tale approccio sotto il titolo prescrittivo di "Principio 15". Ed è così che va inteso il principio di precauzione ormai adottato nella quasi totalità dei trattati multilaterali in materia ambientale⁴⁰ nonché posto come cardine della politica ambientale dell'Unione Europea⁴¹.

Se è vero che è nella stessa natura dei "principi" di presentare un margine di indeterminazione del loro contenuto e di incertezza nella loro applicazione, ciò non significa che essi non siano capaci di ispirare specifiche decisioni nella prassi giudiziaria e di far prevalere precise scelte a favore della protezione ambientale nella prassi convenzionale in materia.

Esempio del primo caso si ha nella giurisprudenza della Corte di giustizia delle Comunità europee che non ha esitato a bloccare l'utilizzazione di certi prodotti o tecnologie in base al calcolo prudenziale che la loro utilizzazione avrebbe comportato il rischio di un impatto ambientale e sulla salute umana difficilmente contrastabile una volta che si fosse concretamente realizzato. Nel caso *Pfizer*⁴² si trattava della pretesa dell'omonima industria farmaceutica di immettere nel commercio antibiotici per uso animale la cui dispersione nell'ambiente avrebbe determinato il rischio di un pericoloso incremento della resistenza dei batteri agli antibiotici per uso umano. Il ragionamento seguito dal Tribunale è ineccepibile: essendo il rischio molto serio, ed non essendo possibile prevedere con quali mezzi e con quale efficacia si possa contrastare in futuro la aumentata virulenza batterica e il conseguente pericolo per la salute umana, è necessario anticipare le misure protettive errando per eccesso di prudenza piuttosto che per difetto.

Gli esempi di utilizzazione del principio di precauzione come linea guida nella formazione di trattati internazionali in materia ambientale abbondano: qui se ne possono dare tre esempi significativi e diversi. Il primo è costituito dall'approccio "soft" della Convenzione quadro sui cambiamenti climatici che pone in termini di

sul caso degli *Ormoni: European Communities-Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R-WT/DS48/AB/R del 16 gennaio 1998, par. 122.

⁴⁰ Sarebbe impossibile in questa sede dare un quadro completo dei trattati in materia ambientale che hanno recepito il principio precauzionale. A titolo di esempio possiamo menzionare la Convenzione di Vienna del 1985 e il Protocollo di Montreal del 1987 sulla protezione della fascia di ozono (*supra*, nota 14), la Convenzione di Basilea sul movimento transfrontaliero di rifiuti pericolosi del 1989 (*supra*, nota 10), la Convenzione sulla biodiversità del 1992 (*supra*, nota 15) e specialmente il suo Protocollo di Cartagena sulla biosicurezza del 2000 (*Cartagena Protocol on Biosafety*, disponibile all'indirizzo <<http://www.biodiv.org/biosafety/protocol.html>>). Per un'ampia rassegna si veda la recente monografia Bassan, *Gli obblighi di precauzione nel diritto internazionale*, Napoli, 2006, pp.21-83.

⁴¹ Si veda l'articolo 174 (ex 130 R) del Trattato istitutivo della Comunità Europea, secondo il quale la politica della Comunità in materia ambientale "...è fondata sui principi della precauzione e dell'azione preventiva, sul principio della correzione, in via prioritaria alla fonte, dei danni causati all'ambiente, nonché sul principio "chi inquina paga" .

⁴² Tribunale di primo grado, sentenza 11 settembre 2002, causa T-13/99, *Pfizer Animal Health*, in *Racc.* 2002, p.II-3305 (in pari data, il Tribunale ha emesso una sentenza pressoché identica a quella ora citata: Causa T-70/99, *Alpharma*, *ivi*, p. II-3495 e ss.).

dovere sul piano etico-politico l'adozione di "precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects". È superfluo ricordare che tale convenzione fu adottata in una situazione di partenza caratterizzata da forti polemiche sulla fondatezza scientifica del nesso di causalità tra attività di produzione, consumo umano e riscaldamento globale. Il suo scopo non era quindi quello di predisporre precise norme di prevenzione del danno climatico – successivamente elaborate con il Protocollo di Kyoto del 1997 – ma di far stato proprio sulla necessità di evitare che la mancanza di un consenso scientifico al 100% sulle cause umane del riscaldamento finisse per giustificare l'elusione o il rinvio di misure limitative dell'immissione di gas serra nell'atmosfera.

Il secondo caso di applicazione del principio precauzionale come elemento integratore dello sviluppo sostenibile si ha con il Protocollo di Cartagena sulla biosicurezza.⁴³ Qui il principio di precauzione presenta una intensità normativa più forte rispetto al caso precedente poiché viene assunto a criterio di giustificazione di eventuali deroghe ai principi dell'OMC della libera circolazione delle merci e di accesso ai mercati in considerazione dei limiti di prevedibilità scientifica dell'impatto di organismi geneticamente modificati sull'ambiente e delle diverse posizioni epistemologiche formatesi sul problema. La conseguenza è quella dell'ampliamento della facoltà degli Stati Parti di vietare, in deroga all'OMC, in particolare all'Accordo sulle Misure Sanitarie e Fitosanitarie, l'ingresso nel loro territorio di organismi geneticamente modificati che non siano ritenuti sicuri per l'ambiente e la biodiversità. Logica vorrebbe che, una volta così formalizzato in un trattato multilaterale, il principio precauzionale servisse a legittimare misure di difesa ambientale adottate dagli Stati Parti nell'ambito del proprio territorio. Così invece non è stato nella recente controversia sugli *OGM*⁴⁴ davanti all'OMC. Il panel ha infatti applicato il criterio della non opponibilità del Protocollo di Cartagena agli Stati Uniti, che contestavano l'asserita moratoria della Comunità Europea nel rilascio delle autorizzazioni all'importazione e commercializzazione di OGM trascurando proprio di valutare che il principio precauzionale non è una mera regola convenzionale del Protocollo ma un principio che informa la politica ambientale della più gran parte della comunità internazionale e come tale avrebbe ben potuto costituire criterio di interpretazione delle norme OMC e di bilanciamento degli interessi contrapposti.

Il terzo e più radicale caso di applicazione del principio precauzionale nella prassi dei trattati è quello della accettazione di soprassedere alla realizzazione di un determinato progetto di sviluppo a causa delle incognite circa l'impatto ambientale e le modalità di gestione dei rischi da esso prodotti. Questa soluzione è stata adottata con il Protocollo di Madrid del 1991 sulla protezione ambientale dell'Antartide che di fatto ha messo da parte la Convenzione di Wellington del 1988⁴⁵ sulla regolamentazione delle attività minerarie in Antartide mediante la proclamazione del continente come "riserva

⁴³ V. Spec. PAVONI, *Biodiversità e biotecnologie nel diritto internazionale e comunitario*, Milano, 2004, pp. 265 ss.

⁴⁴ *European Communities – Measures affecting the approval and Marketing of Biotech Products, Rapporti Panel*, WTO Docs. WT/DS291/R, WT/DS292/R, WT/DS293d del 29 settembre 2006.

⁴⁵ Cfr. *Convention on the Regulation of Antarctic Mineral Activities*, Wellington, 1988, disponibile all'indirizzo < <http://sedac.ciesin.org/entri/texts/acrc/cramra.txt.html> >.

naturale” e la contemporanea interdizione di attività di sfruttamento minerario per un periodo minimo di 50 anni.⁴⁶

Un’ultima riflessione sul ruolo che il principio di precauzione può svolgere nella determinazione di che cosa deve intendersi per sostenibilità ambientale riguarda la possibilità di una applicazione diretta di questo principio alle attività dei privati. A questo riguardo a me sembra che, al contrario del principio di prevenzione sopra esaminato, la precauzione costituisca il terreno privilegiato di scelte politiche che rimangono nella responsabilità dello stato. Non spetta infatti al singolo privato o all’impresa operare la scelta tra l’assunzione di rischi impliciti in nuove iniziative tecnologiche o industriali o la tutela prudente dell’ambiente o della salute. Tale scelta fa parte della dialettica democratica tra le varie componenti della società e si risolve in decisioni politiche da parte degli organi rappresentativi dello stato e, nel caso di problemi ambientali transfrontalieri o globali, nella negoziazione di standards internazionali da parte dei governi e con il contributo delle organizzazioni non governative che esprimono l’etica collettiva della comunità internazionale.

6. Sostenibilità e equità

Il principio di equità, inteso come ragionevolezza e “fairness”, condiziona tutti i settori del diritto internazionale ma nel campo del diritto internazionale dell’ambiente esso si pone come elemento costitutivo dello sviluppo sostenibile sotto due aspetti distinti. Il primo è quello che si ricava dal Principio 3 della Dichiarazione di Rio, che recita: “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”. Il secondo riguarda invece l’equa ripartizione dei benefici derivanti dallo sfruttamento delle risorse naturali e in particolare delle risorse biologiche.

Sul primo aspetto non c’è molto da aggiungere rispetto a quanto detto nel corso di questo lavoro. L’equità intergenerazionale infonde la prassi convenzionale mirante a conservare per le generazioni future gli elementi essenziali dell’ecosistema globale, quali la biodiversità, il clima, l’ozono, gli oceani e l’Antartide. Tuttavia, al momento attuale non si può dire sia stato oggetto di applicazione come principio vincolante, salvo il caso isolato della Corte Suprema delle Filippine in materia di conservazione delle foreste, che peraltro si rifa alla costituzione nazionale e a principi di diritto naturale⁴⁷.

Il secondo aspetto, invece, pone problemi molto più complessi ed attuali con riguardo alla lotta alla povertà e all’esclusione di molti paesi arretrati e alla equa ripartizione dei benefici economici derivanti dallo sfruttamento commerciale delle risorse naturali.

Riguardo alla lotta alla povertà, non c’è dubbio che sostenibilità dello sviluppo ed equità significano che si debba tener conto delle specifiche necessità dei paesi meno sviluppati attraverso forme di discriminazione positiva e di assistenza finanziaria e tecnologica e del criterio delle responsabilità comuni ma differenziate come richiesto dai Principi 5 e 7 della Dichiarazione di Rio⁴⁸. Questo approccio caratterizza i grandi trattati

⁴⁶ Si veda il Protocollo di Madrid sulla protezione ambientale dell’Antartide, *supra*, nota 11.

⁴⁷ *Minor Oposa v Secretary of Department of the Environment*, ILM, 1994, p. 173 ss.

⁴⁸ Il principio 5 stabilisce che “[a]ll states and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development...”; il Principio 7 afferma che tutti gli stati devono collaborare al fine di proteggere l’integrità dell’ecosistema della terra

multilaterali in materia di protezione ambientale, dal Protocollo di Montreal sull'ozono, al Protocollo di Kyoto sul clima, alla Convenzione sulla desertificazione⁴⁹.

Per quanto concerne l'aspetto della "equa ripartizione dei benefici economici", l'integrazione tra equità e sviluppo sostenibile opera a diversi livelli. Ad un primo livello essa riguarda il ragionevole e giusto accomodamento degli interessi contrapposti di due o più stati nello sfruttamento di risorse naturali comuni. Esempi di simile accomodamento li troviamo nell'ampia prassi convenzionale in materia di usi non navigabili dei corsi d'acqua internazionali dove il concetto di equità tiene conto non solo di fattori geografici e naturali – privilegiati dalla CIG nella sua giurisprudenza in materia di delimitazione della piattaforma continentale⁵⁰ - ma anche di fattori economici e sociali quali i bisogni delle popolazioni interessate, la loro dipendenza dalle risorse condivise e la possibilità di accesso a risorse alternative⁵¹. Ad un secondo livello il ruolo dell'equità assume una grande rilevanza pratica in relazione alla attuale controversia circa l'accesso e le modalità di sfruttamento delle risorse biologiche del pianeta e in particolare delle risorse biogenetiche. La Convenzione sulla Diversità Biologica del 1992 ha abbandonato il principio del "patrimonio comune dell'umanità" di tali risorse, proclamato dalla FAO negli anni ottanta⁵², per aderire al principio della sovranità dello stato territoriale. Questo ultimo è a sua volta temperato dal principio del "fair and equitable sharing of the benefits arising out of the utilization of genetic resources".⁵³

Quest'ultimo principio dovrebbe regolare i rapporti tra stato di origine delle risorse genetiche e investitori che dal relativo materiale genetico sviluppino invenzioni e applicazioni industriali coperte da diritti di proprietà intellettuale. Ma c'è da chiedersi se in questi rapporti l'equità operi come principio autonomo e destrutturato o viceversa debba essere applicata *infra legem*, nel contesto cioè delle norme e dei principi di diritto internazionale di volta in volta applicabili. La rilevanza di questa distinzione non è di poco conto poiché nel primo caso si lascia per definizione un margine estremamente ampio alla libertà contrattuale tra Stato e privati con il rischio che l'equità venga imposta dal partner che dispone del maggiore potere contrattuale a livello tecnologico e finanziario. Nel secondo caso invece l'equità svolge una funzione complementare alle norme diritto internazionale astrattamente applicabili alla materia, che, oltre al principio di sovranità territoriale, includono le norme sul trattamento degli interessi economici degli stranieri, le norme sui diritti umani, ivi compreso il principio di

e che "[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities".

⁴⁹ Cfr. articoli 5 del Protocollo di Montreal (*supra*, nota 14) e 10 del Protocollo di Kyoto (*supra*, nota 16), nonché articoli 4 e 5 della Convenzione sulla desertificazione (*United Nations Convention to Combat Desertification*, 1994, disponibile all'indirizzo <<http://www.unccd.int/>>).

⁵⁰ Per una approfondita analisi di questa giurisprudenza si rinvia a P. Weil, *L'équité dans la jurisprudence de la Cour Internationale de Justice- Un mystère en voi de dissipation?*, in *Fifty Years of the International Court of Justice* (Lowe and Fitzmaurice eds.), 1996, p. 121 ss.

⁵¹ Vedi l'articolo 5 della Convenzione delle Nazioni Unite sugli Usi non-Navigabili dei Corsi d'Acqua Internazionali del 1997 (36 ILM 700); la Convenzione sulla Cooperazione per la Protezione e l'Uso Sostenibile del Fiume Danubio del 1995 (disponibile all'indirizzo <<http://eelink.net/~asilwildlife/DanubeConvention.html>>); l'Accordo di Cooperazione per lo Sviluppo Sostenibile del bacino del fiume Mekong del 1995 (34 ILM 864), nonché la Convenzione del 2003 per la Protezione e lo Sviluppo Sostenibile dei Carpazi (disponibile all'indirizzo <<http://www.carpathianconvention.org/text.htm>>).

⁵² FAO Undertaking on Plant Genetic Resources del 1983.

⁵³ Si vedano gli articoli 1, 8, 15 e 19 della Convenzione sulla diversità biologica (*supra*, nota 15).

autodeterminazione, e le norme sullo status internazionale delle risorse che costituiscono patrimonio comune dell'umanità, oltre naturalmente alle norme generali in materia di protezione dell'ambiente. Per chi scrive, quest'ultima è la soluzione corretta essendo quella che permette di prendere in considerazione gli interessi dei soggetti interessati – Stato, privato investitore, comunità locali – non in un vuoto giuridico, ma nel quadro di obblighi sanciti a livello internazionale che nel loro insieme costituiscono il parametro di sostenibilità dello sviluppo delle risorse biologiche⁵⁴.

7. Sostenibilità, Trasparenza e Partecipazione Pubblica

La valutazione dello sviluppo sostenibile nel contesto del diritto internazionale dell'ambiente sarebbe incompleta senza un accenno agli “obblighi procedurali” che negli ultimi 25 anni si sono venuti consolidando nella prassi degli stati in materia ambientale. Tali obblighi includono 1) l'informazione, 2) la consultazione, 3) la valutazione d'impatto e del rischio, 4) la partecipazione pubblica nelle decisioni ambientali, e 5) il monitoraggio.

Il rispetto di tali obblighi procedurali è requisito essenziale della sostenibilità dello sviluppo poiché permette la piena consapevolezza dei rischi e il coinvolgimento delle popolazioni interessate nelle decisioni che riguardano l'approvazione di progetti con un significativo impatto ambientale. La prassi convenzionale in materia è vastissima. Basti pensare ai trattati multilaterali in materia di valutazione di impatto ambientale nei rapporti transfrontalieri,⁵⁵ di consenso preventivo informato ai fini dell'importazione di sostanze pericolose⁵⁶ e di organismi viventi modificati,⁵⁷ alle procedure di notifica di incidenti nucleari⁵⁸ e di consultazione circa l'uso di corsi d'acqua internazionali.⁵⁹

Questi obblighi procedurali spostano il centro dell'analisi da quelli che dovrebbero essere i *risultati* dello sviluppo sostenibile ai *processi* che gli Stati dovrebbero seguire al fine di adattare le loro decisioni e le loro politiche a standards internazionali di sicurezza e qualità ambientale. E' quanto affermato nella sentenza della Corte internazionale di Giustizia nel caso *Gabcikovo-Nagymaros* dove si fa esplicito riferimento agli obblighi delle parti di valutare, riconsiderare e monitorare i loro progetti alla luce degli standards ambientali e dello sviluppo sostenibile. Ed è su questi stessi obblighi, come parte essenziale del processo d'integrazione del giudizio di sostenibilità nel processo di decisione e messa in opera di attività di sviluppo economico, che la Corte è chiamata di nuovo a pronunciarsi nella controversia attualmente pendente davanti ad essa tra Argentina e Uruguay nel caso delle *Fabbriche di Pasta per Carta*. L'Argentina, come

⁵⁴ Su questo punto vedi *amplius* Francioni, *International Law for Biotechnology: Basic principles*, in Francioni and Scovazzi (Eds.), *Biotechnology and International Law*, Oxford and Portland, 2006, p. 3 ss., p. 21.

⁵⁵ Cfr. Espoo *Convention on Environmental Impact Assessment in a Transboundary Context*, 1992, disponibile all'indirizzo <http://www.unece.org/env/eia/documents/conventiontextenglish.pdf>

⁵⁶ Convenzione di Basilea del 1989 sui rifiuti pericolosi (supra, nota 10); Convenzione di Rotterdam del 1998 sulla procedura di previo consenso informato per certi prodotti chimici e pesticidi pericolosi, disponibile all'indirizzo < <http://www.pic.int/> >.

⁵⁷ Protocollo sulla biosicurezza del 2000 (supra, nota 38).

⁵⁸ Cfr. Vienna *Convention on Early Notification of a Nuclear Accident*, 1986, disponibile all'indirizzo <<http://iaea.org/Publications/Documents/Infcircs/Others/inf335.shtml>>.

⁵⁹ Vedi la già citata Convenzione delle Nazioni Unite del 1997 sugli Usi non-Navigabili dei Corsi d'Acqua Internazionali (supra, nota 49).

parte attrice, lamenta infatti l'insufficiente consultazione e presa in considerazione da parte dell'Uruguay dell'impatto che la costruzione e futuro funzionamento delle fabbriche di pasta per carta potranno avere sull'ecosistema del corso d'acqua interessato, il fiume Uruguay. Sebbene la Corte abbia declinato di accordare misure cautelari miranti alla sospensione dei lavori di costruzione degli impianti contestati, il caso presenta profili estremamente interessanti nel merito. Si tratta infatti un'azione di danno temuto derivante da attività industriali autorizzate dall'Uruguay e intraprese da investitori esteri (spagnoli e finlandesi), che solleva la questione se oltre allo stato ospite dell'investimento – l'Uruguay - anche le società straniere investitrici debbano cooperare affinché le loro attività non costituiscano un uso insostenibile e perfino nocivo di un ecosistema fluviale condiviso con altri stati. Se, come abbiamo ritenuto in precedenza lo sviluppo sostenibile s'impone anche agli attori privati, le cui attività industriali e tecnologiche sono suscettibili di arrecare un danno all'ambiente, non si vede perché in tal caso le società interessate non debbano tenere a rispettare gli obblighi di valutazione preventiva dell'impatto, di informazione, consultazione e monitoraggio sistematico delle loro attività al fine di prevenire un danno ambientale transfrontaliero. Naturalmente, l'assolvimento di questi obblighi procedurali potrà incidere sugli interessi economici dell'investitore estero nella misura in cui ad esso vengano imposti da parte delle autorità locali requisiti di esecuzione del contratto d'investimento (*performance requirements*) dettati da esigenze di sostenibilità ambientale e di utilizzo di *best available practices and technologies* nella gestione dei rischi ambientali. Il ricorso al concetto di sviluppo sostenibile in simili ipotesi può permettere il corretto bilanciamento tra diritti dell'investitore e diritto della popolazione locale o di stati esteri a non essere esposti al pericolo di degrado ambientale per effetto di un investimento che alla prova dei fatti si riveli insostenibile.

8. Conclusioni

Come indicato all'inizio di questa relazione, lo sviluppo sostenibile, piuttosto che costituire il contenuto di una norma di diritto internazionale generale capace di sortire effetti obbligatori per gli stati e per attori non statali, si presenta oggi piuttosto come espressione di un metodo intellettuale ed etico da seguire nel governo dei processi di sviluppo economico in un modo di risorse limitate. L'adozione di tale metodo nella vasta prassi convenzionale e in alcune importanti manifestazioni della giurisprudenza internazionale fa sì che esso possa configurarsi, sul piano normativo, alla stregua di una forma di necessità sociale che richiede la sistematica integrazione di considerazioni ambientali nei processi decisionali e nelle politiche dello sviluppo e della regolazione del mercato. In quanto metodo, esso si realizza attraverso la sua integrazione in altri principi sostanziali e procedurali di diritto internazionale dell'ambiente completandone il contenuto e espandendone l'ambito di applicazione di pari passo con l'aggravarsi del degrado e dei rischi per l'ambiente che contiene la nostra vita.

A Theoretical Framework for Sustainable Development Law

Hanne Birgitte Jensen¹

"A Theoretical Framework for Sustainable Development Law" sounds a bit more solid and authoritative than is justified by the emerging ideas that I am going to introduce. The presentation is based on the findings of my thesis, "From Economic to Sustainable Development – Enlarging the Concept of Law." More precisely, the title should perhaps be "The Concept of Law as a Theoretical Framework for Sustainable Development", because one interpretation preconditions the other. Hence this brief outline of a complex argument is most of all an invitation to engage in a debate about theory and method in relationship to sustainable development and law under the present conditions of globalization.

Introduction

My principal argument is that the policy of sustainable development can be understood as an 'erkenntnis' theoretical concept,² and as such it contains the empirical material for giving effect to an evolving wider epistemic shift, which can be evidenced within all areas of society. The shift is characterized by acknowledging interdependence and the implied complexity and uncertainty as a fundamental human condition and it means that we – the global community at large – understand the world differently today than 60-50 years ago when the global institutional infrastructure, i.e. the United Nations and the Bretton Woods institutions, was first established. So far, however, we have not been able give effect to the shift and change our theoretical framework also for law and politics in accordance with what we know to be true empirically. This is so because according to the prevailing globally institutionalized epistemology, on which our professional concepts and methods are based, there is no explained relationship between the underlying 'erkenntnis' paradigm and knowledge and normativity, thus there is no point of entrance: the system is closed and cannot be accessed with available tools and methods. All attempts to develop more adequate theoretical foundations can therefore not get beyond aggregation, compensation, critique, speculation or prescription.

Based on my investigations of the empirical material regarding the policy of sustainable development and its relationship to law under conditions of globalization, which include concept analysis, integration analysis and theorizing, I now suggest that the policy of

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² Erkenntnis is a term of art in philosophy and can be translated into 'cognition'. For further elaboration see e.g., <<http://de.wikipedia.org/wiki/Erkenntnis>> which in translation to English becomes <<http://en.wikipedia.org/wiki/Cognition>> which in turn becomes <<http://de.wikipedia.org/wiki/Kognition>> when translated into German.

sustainable development embodies a concrete instance – in Kuhn's words: a gestalt – which can enable us to understand the equation underlying the relationship between Erkenntnis, rationality and normativity.

In this presentation, I will focus on the interpretation of the theoretical implications of sustainable development. In my thesis, however, I, in summary, provide: first, an analysis of the policy of sustainable development as a concrete model disclosing a fundamental normative structure of the relationship between 'Erkenntnis', rationality and normativity. Second, I outline the abstract model, which is valid for all policy systems and can be useful analyzing and understanding also the economic development model, where this structure is implicit. Third, I propose the idea of unfolding the concept of law, in so far that I suggest that what has been disclosed through interpretation of the process of developing the sustainable development policy is that we can hypothesize that physiologically it is necessary to make rules as a basis for establishing a relationship between the I and the world. This can be understood as an unfolding of the origin of law. Conceptualizing the structural relationship between this mechanism and social rules and positive law, the understanding of the mechanism can be transported into the social and institutional sphere through expanding the concept of law to include a set of tertiary rules. Finally I suggest that such an expansion of the concept of law will provide a way of talking coherently about the individual as both author and addressee of law under conditions of globalisation.

Sustainable development as an 'Erkenntnis' theoretical concept

Sustainable development³ was launched as a global policy concept in the 1987. The Brundtland Report⁴ contains the authoritative characterization of the concept: "sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." However, since its inception, the policy concept has been perceived as vague, ambiguous and inherently conflicting. Analytically the debates over the meaning of the term can be seen as revolving around three general questions: Is sustainable development about integrating environmental considerations into the economic development process, or is it about a development process of a different quality? Is sustainable development fundamentally a political, legal economic or environmental/ecological concept? Is the concept inherently conflicting and what is the nature of the contradiction?

The perceived conflicts have created problems for policy implementation and have been addressed by subordinating the idea of sustainable development to the conceptual

³ The background for the evolution of the policy was a growing awareness of the environmental deterioration caused by the economic development process as it was preached and practiced after the Second World War combined with the political tensions created by the growing disparity between North and South. The challenges and conflicts relating to the environment have been addressed within the framework of the United Nations at three major conferences: Stockholm 1972, Rio 1992 and Johannesburg 2002.

⁴ *Our Common Future* - The report of the World Commission on Environment and Development (WCED) (Oxford University Press, 1987), at 43. The report is commonly referred to as the Brundtland report named after the Chairperson of the Commission, Gro Harlem Brundtland.

machinery of a particular discipline, for example, economics.⁵ Now in order to develop a more adequate analytical framework for studying the relationship between law and sustainable development, I have undertaken a concept analysis⁶ of the policy. Based on this analysis, I propose that the meaning of the policy has developed over time, and I conclude that philosophically speaking sustainable development is no longer only about integration of environmental considerations into the economic development process. It is about a development process of a different nature. The core meaning of this process includes:

Recognition of the science-supported knowledge of global environmental and social interdependence and the related strategy of integration;

The necessity for upholding the biosphere and satisfaction of basic needs; and

The process of participation, which philosophically reflects the reality of interdependence and of the power and vulnerability of individual agency.

So the policy is an empirical entity implying a certain kind of constitutive ideas, but it lacks a theoretical framework in which to specify these ideas, in particular their internal relationships – is there a hierarchy or how to express the unity of the idea in an operational way? The policy itself points to integration as a strategy for change. Therefore, in what follows I turn to integration theory. As explained in *Social Science Concepts -- A Systematic Analysis*⁷ the term 'integration' refers to a highly complex concept. According to the author Henry Teune integration is also a relatively precise logical concept:

Integration belongs in the class of concepts that relate to the very core of what we believe we know about the social world. It directly involves the age-old problem of "can the whole be more than a sum of its parts?" ... The concept of integration says that indeed the whole is more than the sum of its parts in particular ways and that answer implies ideologies.

It is also a general concept, which can be applied to a wide variety of phenomena, because:

Despite the apparent diversity of meaning of the term integration, there is a core one. The basic idea of integration is old: it is part of the concept of a system: "The root idea of system is that of structure or organization, of integration into an orderly whole that functions as an organic unity" (Rescher, 1979). So conceived, integration is a property of relationships among components or parts of a system A core idea of system is structure and structures determine some range of behavior of a system. To define and explain political, social or economic behavior requires defining the structures of systems that condition their behavior. Conditions are structural if they are determined largely by factors other than the integrations processes themselves.

⁵ See, e.g., Pearce, David and Edward Barbier, *Blueprint for a Sustainable Economy* (Earthscan, 2000), at 26, where the notion of "needs" is translated into preferences and "participation" into consumer sovereignty with no further explanation.

⁶ Regarding concept analysis and reconstruction see G. Sartori, "Guidelines for Concept Analysis", in G. Sartori (ed.), *Social Science Concepts. A Systematic Analysis* (Sage, 1984).

⁷ H. Teune, "Integration", in Sartori, *Social Sciences Concepts. A Systematic Analysis*, n. 7 above, at 235-264

Further, Teune says that:

Because it is a "connection", integration can refer to both a state and to a process by which things come together, or indeed, are taken apart (disintegration). ... Knowing the state of something at one point in time does not necessarily say anything about the past and future states. And, as will be discussed, this is a source of conceptual confusion, for what must be known to define a state of a system is different from that to define a system process. The first requires a language for measurement the latter a theory of change.

I suggest that this dual meaning of integration, referring to both state and process, is creating not only conceptual confusion but also difficulties in the concrete implementation of the sustainable development policy, where there is an emphasis on taking action towards achieving a measurable state of sustainable development while leaving the fundamental core – the basic assumption – underlying the development process barely recognized, let alone explicitly addressed.

According to the same source, it is well known that mistakes in integration exercises happen because we cannot identify the correct system to address. Now, according to sustainable development, we must integrate because we now know we are interdependent. Therefore, I propose that it is our system of knowledge and not the system of, for instance, governance and institutions nor ecology, environment or economics we have to address. Science has led us to understand the fact of interdependence, but it is policy, which articulates the implications and the meaning of these facts, thus it is the knowledge underlying politics, which has to be addressed. The knowledge paradigm underlying politics is embedded in the worldview, which embodies the understanding of the relationship between the I and the world and how we can know about it. Therefore, I propose that the theoretical insight embedded in the policy vision of sustainable development is related to our knowledge of "what is", i.e. to the ontological starting point for our perception of the nature of reality and how we can acquire knowledge about it. Consequently, the unit of analysis for integration at the conceptual level – i.e. for constructing a common denominator that can capture the defining characteristic of the composite concept of sustainable development – is our broadest system of knowledge as it relates to the fundamental perception and cognition of the world and the human condition.

The policy captures the insight that the global development process is conditioned on the absolute fact of interdependence. We can change the way we deal with this fact about our material condition, but it is a commonality we cannot escape. Interdependence is thus a condition determined by factors other than human processes and, applying Teune's theoretical framework for integration as defined above, it is a structural condition.

Integrating the elements of the concept into a rationality of its own thus implies that sustainable development is a development with an objective to sustain the biosphere and satisfy basic needs, and that, in order to do so, the process must acknowledge and respect interdependence as a structural condition for cognition, communication and action. This is seen as opposed to an aggregation of economic development rationality with sustainable development activities as is the prevailing approach to the integration strategy. Such a construction, which designates and makes explicit the worldview as a structural condition for the generation of knowledge and policy at the core of a

conceptually integrated understanding of sustainable development explains knowledge as created in a relationship between an absolute fact about our material condition and a collective and individual interpretation of this fact.

The change required is radical, because the challenge that we are faced with is a transition from a mechanical to a dynamic paradigm - from a binary to a many-valued conception of reality. Although there is agreement among academia and practice on the fact of interdependence and the implied complexity and uncertainty, there is no agreement on how to conceptualize and theorize its implications. Instead each discipline extrapolates from within its own conceptual machinery and is not able to capture the implied whole, nor the nature of the process establishing the relationship to the parts.

Therefore, the question is how to translate the implications of the epistemic shift represented by the policy into practice. This is an abstract, theoretical and a practical problem. Addressing here the abstract aspect of the problem, it is necessary to theorize and start asking "of what is this an instance?" When applied to the challenge of transporting the implications of the epistemology of the policy into practice, policy can be seen as an instance of normativity and practice can be seen as an instance of human conduct. Normativity and human conduct are instances of mind, and thus it is fundamentally required that the epistemology be embedded in individual agency, i.e. in the very standard of what constitutes knowledge and rational and legitimate behavior. Institutionalizing or transporting into practice via particular disciplines or concrete rules and institutions will not suffice.

Rules and the concept of law as integrator also at the abstract level

In the previous section, I have argued for an interpretation of the policy of sustainable development as an epistemic shift and indicated how such a shift could be developed into a new paradigm of knowledge, where the awareness of the human condition is understood as an inherent condition for cognition, communication and action individually as well as institutionally. However, the most difficult question is how to give effect to a new paradigm based on the theoretical implications of the insight from the policy.

In my thesis, I have described how the traditional concept of positive law as applied to the global level, effectively does not capture the situation, which is facing us, and therefore, more explorative approaches are promoted. For instance, in "Elements of an Interactional Theory of International Law"⁸ it is proposed that law might be evaluated by the influence it exerts rather than by formal tests of validity rooted in normative hierarchies. It is suggested that we should stop looking for the structural distinctions that identify law and examine instead the processes that constitute a normative continuum bridging from predictable patterns of practice to legally required behavior. This approach recognizes that there is no radical discontinuity between law and non-law, and that the process of building legal normativity requires many of the same building blocks as other forms of social normativity.

⁸ J. Brunnee and S.J. Toope, "Elements of an Interactional Theory of International Law," 39 *Columbia Journal of Transnational Law* (2000): 19.

The debate further posits that communication is potentially generative of international institutions and that the central purpose of law is to facilitate communication. Such arguments naturally link any research on the role of law and the challenge of global governance tightly to ideas of deliberative democracy, communicative rationality and proceduralisation theory. However, the brevity of this paper prevents me from including references to the ensuing debate over conditions of polity building through law. Instead, I suggest that in order to get beyond the categories formed on knowledge and a worldview, that we know no longer to be completely true, it is necessary to theorize the empirical material provided by practice, but also the conceptual machinery we apply to understand this practice. Therefore, I park the existing taxonomy as a point of departure and turn to the most generic definition we have of law. In its most general and comprehensive sense, law signifies a rule of action and it is applied indiscriminately to all kinds of action: whether animate or inanimate, rational or irrational. In its more confined sense, law denotes a rule of action, not of actions in general but of human action.

I propose that the first rule of human action is concerned with what constitutes the rule for reaching valid conclusions about what is. It is the *sine qua non* that human beings can act and communicate beyond the instinctual level. Therefore, we must address the question of what underlies our rule of validation. Looking at law from this level of abstraction transcends our present distinctions, and we can explore other differentiations and new terminology that might more accurately capture today's world.

Now, the fact of interdependence, which has been identified by sustainable development as defining the human condition *de facto*, integrates all individuals into a community – i.e. a group of people with common interests living in a particular area – of the biosphere. The question is, however, how an awareness of this fact can be translated into political identity and shared commitment. Interdependence is a fact that cannot be changed by human conduct and the political development process. It is a shared reference point common to all. Therefore, I suggest that perhaps we can understand community not as being bound by a common past but by a common future. In political philosophical terms community can thus be conceptualized as constituted in the relational space between mutual respect for vulnerability and for power of agency and enabled by a rule that articulates awareness of interdependence of what is, as the fundamental human reality. Articulating and elaborating such a rule might enable entering a path where integration and motivation of the community of the biosphere into a polity or a political community based on and acting in accordance with the rule can evolve. This is an avenue that today is conceptually closed by the prevailing binary logic.

In order to connect the findings concerning the insight from sustainable development with the analysis of law and community, normativity can be linked to knowledge through the theory of change underlying sustainable development – we know we are interdependent and therefore we must act so as to protect the biosphere. In this way, the policy tells us that it is the system for knowledge and not necessarily the system of values, such as freedom, social cohesion and material well being, which is a deciding field of analysis to address, in order to explain legitimacy of law and integration and motivation of people into community.

The system of knowledge can be described as involving the known, the knower and the process of knowing. I propose that this system and process of knowing the human condition and the role it plays in cognition and conduct can be investigated as scientifically knowable. I further suggest that the system of knowledge can be integrated into the social sphere if understood and expressed as a set of rules: including the rule of cognition, rules of orientation, rules of inference and rules of representation in language structure. According to the proposed hypothesis, these rules are systemically related and necessary because of the physiological need for cognition. However, as indicated in the previous section the form and content of the rules can differ in accordance with the underlying worldview.

According to the hypothesis advanced in this paper, there is a scientifically knowable rule-based machinery of cognition – consisting of the world view template created by the culturally mediated awareness of the human condition – which structures the process of processing information for action in accordance with the teleological implications of the world view, thus becoming inherent to the institutional structure and the socially expressed communication and action. In order to make this understanding of the function of individual awareness theoretically accessible for explaining and understanding conduct and political action, I suggest that we can expand on Hart's classical *Concept of Law*.⁹ Specifically, we can conceptualize law as embedded in a horizontal cultural layer consisting of the cognitive system and expressed as a "constitution of the mind" with a set of what we can term tertiary rules outlining the constitutive limits for discourse and action embedded in the worldview. This conceptualization linking law and sustainable development through knowledge opens a new field of inquiry concerning meta-theory, normativity and the creation of rationality.

As indicated in this paper the potential implications of the theoretical insight that we can derive from the sustainable development policy are radical. To give effect to the worldview of sustainable development as a true paradigm shift containing a rationality of its own will require contribution from all disciplines and a willingness to enter uncharted waters, because the changes required are deeply seated in conceptions of reality, self and languages.

Conclusion

In conclusion, I underline first that the contribution of the sustainable development policy is that it enables us to articulate a hypothesis about a constitutive or systemic relationship between cognition, normativity, languages and reason and thus to investigate the possibilities for articulating a meta-theoretical framework capturing the reality of globalisation – a framework that has so far not been available. The policy provides the empirical material and the insight to conceptualize the particular field to be addressed. It is the field of the knowledge system as based on awareness of the human condition and not the system of values, ecology, economics or any other particular field. In short, the policy shows the way.

Secondly, I suggest that to the extent that the hypothesis about the cognitive framework is plausible, law can provide a necessary toolbox for integrating nature with culture and

⁹ H. Hart, *The Concept of Law* (Oxford University Press, 1961).

the individual with community, because the connection between the known and the knower is a construction, which cannot be established from within science with its claim to objectivity, nor from within speculative philosophy with its reduction of reality to thought, nor from within revelation, which is perceived as subjective experience. Instead, if we expand the understanding of the concept of law as being embedded in a horizontal culturally mediated cognitive layer, we can give effect to the acceptance of the scientific truth and the political choice of interdependence as a universal vantage point from where to view a world far too complex to grasp and to give effect to the implied responsibility for individual conduct as an integral part of the human condition.

Tutela dell’Ambiente e Sviluppo Sostenibile:

Il Principio di Integrazione

Stefano Grassi¹

1. L’affermazione del principio dello sviluppo sostenibile, sia nelle dichiarazioni internazionali, sia nelle norme comunitarie e nelle norme delle Costituzioni nazionali, si collega, come noto, alla necessità di conciliare le opposte esigenze della crescita connessa con lo sviluppo tecnologico e gli equilibri delle risorse naturali. L’ampiezza delle relazioni diacroniche cui danno luogo i valori e gli interessi connessi con la tutela dell’ambiente, rende necessario stabilire un principio che tenti di coordinare i tempi accelerati dello sviluppo tecnologico con i tempi ormai non più sufficienti della naturale rigenerazione e bonifica (o capacità di diluizione) che le risorse naturali hanno a fronte del loro sfruttamento ed inquinamento.

Data l’ampiezza dell’obiettivo, il principio dello sviluppo sostenibile non ha una chiara definizione giuridica ed assume di volta in volta le caratteristiche sia di un obiettivo programmatico sia quello di un criterio procedurale per la formazione delle decisioni politiche dirette a tutelare gli interessi ambientali. In questo mio intervento, ritengo opportuno sottolineare tre aspetti del principio dello sviluppo sostenibile, che possono permettere di riconoscerne il valore giuridico di principio guida nell’affrontare i profili giuridici della tutela dell’ambiente. Si tratta di tre profili che confermano la difficoltà di una definizione chiara ed univoca, ma che sottolineano la novità dei problemi e delle tecniche di soluzione che i giuristi si trovano ad affrontare per rispondere alle emergenze poste dalla “questione ambientale”.

2. In primo luogo, lo “sviluppo sostenibile” viene enfaticamente collegato, da tutti coloro che hanno cercato di svilupparne il contenuto, con l’esigenza di tutelare i diritti delle future generazioni.

È evidente che la teoria della “equità intergenerazionale” (secondo cui tutti i membri di ciascuna generazione di esseri umani che è possibile individuare, riceve un patrimonio naturale e culturale dalle generazioni passate, ed al tempo stesso ne fruisce, ma ha anche il ruolo di custode di tale patrimonio, per consentire il trasferimento di tale eredità alle future generazioni) implica non soltanto il diritto dell’attuale generazione di beneficiare e sviluppare il patrimonio culturale e naturale ereditato, ma anche il dovere di utilizzarlo in modo da consegnarlo alle future generazioni migliorato e non peggiorato. Si tratta di un principio che ha una dimensione etica e che è ispirato anche all’impostazione di molte confessioni religiose, ma che ha trovato sempre più frequenti affermazioni, anche sul piano giuridico, sia nelle dichiarazioni internazionali (v. per tutte le dichiarazioni di Rio e di Joannesburg; ma anche la Carta di Aalborg) sia in numerose convenzioni internazionali (v. per tutte, la Convenzione quadro sui cambiamenti climatici, la

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Convenzione di Montego Bay e la Convenzione sull'Antartide) ed ancor più nelle norme dei trattati comunitari (v. il preambolo e art. 2 del Trattato CE; v. anche il preambolo del Trattato che adotta una costituzione per l'Europa), con impliciti ed espliciti collegamenti con l'affermazione del principio dello "sviluppo sostenibile".

Anche nelle Costituzioni nazionali, ed in particolare in quelle del contesto europeo, si trovano formulazioni dirette ad affermare i diritti connessi con la tutela dell'ambiente, collegandoli anche con la tutela dei diritti delle future generazioni ed il principio dello sviluppo sostenibile (v. la chiara formulazione dell'art. 20 e della Legge fondamentale tedesca; art. 73 Cost. Federazione Svizzera; art. 110 b Cost. Norvegia; art. 5 Cost. Polonia; art. 9 Cost. Portogallo; art. 45 Cost. Spagna). In Italia questa tendenza si è manifestata, in particolare, negli Statuti delle Regioni di recente approvazione ed in particolare nelle dichiarazioni programmatiche di tali statuti (v. Statuti delle Regioni: Toscana – art. 4, lettere l, m, n; Puglia – art. 2; Marche – artt. 4 e 5; Piemonte – artt. 5 e 6; Emilia Romagna – art. 3; Liguria – art. 2, comma 2, lettera i; Lazio – artt. 7-8; Umbria – art. 11, comma 1); ma non è un caso che, anche con riferimento a queste formulazioni, la Corte costituzionale abbia per il momento affermato che si tratta di dichiarazioni programmatiche prive di una diretta efficacia giuridica (sentt. n. 2, 372, 378, 379 del 2004).

Le formulazioni utilizzate sono spesso generiche e lasciano in ombra la soluzione del problema se si possano attribuire alle future generazioni dei diritti ovvero se vi sia semplicemente da constatare la sussistenza di doveri attribuibili alle attuali generazioni. Sul punto, non si possono ricavare particolari contributi dai richiami giurisprudenziali che peraltro è possibile trovare frequentemente sia ai diritti delle future generazioni sia al principio dello sviluppo sostenibile.

Quello che si può constatare, sia nell'evoluzione della giurisprudenza costituzionale sia nella dottrina italiana, è una maggiore attenzione che, proprio a partire dal riferimento agli obblighi nei confronti delle future generazioni, si sta sviluppando a favore di una concezione della tutela dell'ambiente, sul piano giuridico, non in termini di diritto fondamentale all'ambiente, bensì in termini di doveri di solidarietà connessi con la tutela dell'ambiente come valore costituzionale (v. sentenze della Corte Cost. nn. 407 e 536 del 2002; 62 e 108 del 2005). Si tratta di un'impostazione che è presente anche nella elaborazione svolta a livello della comunità internazionale. Come noto, piuttosto che di *common heritage of mankind*, nell'elaborazione degli organi delle Nazioni Unite (risoluzione n. 43/53 del dicembre 1988 dell'Assemblea delle Nazioni Unite), si deve parlare di *common concern of mankind*. E ciò sottolinea il passaggio da una visione che presuppone la sussistenza di diritti nei confronti di un determinato patrimonio, all'individuazione di una responsabilità diffusa (una preoccupazione per gli interessi ambientali che coinvolge tutti i settori delle società e degli Stati) da costruire appunto in termini di doveri di solidarietà.

Sotto questo profilo, il rinvio dello "sviluppo sostenibile" ai diritti delle future generazioni implica l'introduzione di un principio di orientamento nella soluzione dei conflitti posti dalle problematiche ambientali: lo sviluppo sostenibile assume cioè la veste di criterio per la soluzione di tutti i più ampi conflitti che stanno alla base delle difficoltà attuali della Comunità internazionale, nell'affrontare coerentemente e razionalmente la "questione ambientale".

3. In secondo luogo, il principio dello sviluppo sostenibile permette di sottolineare una impostazione dei problemi giuridici connessi con la tutela dell'ambiente, che superi gli schemi tradizionali utilizzabili per la tutela dei beni giuridici (ivi compresi gli strumenti di tutela dei beni collettivi, ai quali sono anche riconducibili le risorse ambientali ed il loro equilibrio).

Non è questa la sede per ripercorrere le difficoltà che dottrina, giurisprudenza e legislazione hanno trovato nella definizione dell'ambiente, in un percorso che si è sviluppato (anche nell'evoluzione del diritto comunitario), dalla visione atomistica (delle singole risorse ambientali da tutelare e dei vari settori di disciplina giuridica che, con riferimento a ciascuna delle finalità ambientali, era possibile individuare: tutela della salute, tutela del paesaggio e governo del territorio; conservazione delle risorse naturali), per giungere alla necessaria visione unitaria delle problematiche ambientali, dettata dalla stretta correlazione che i vari interessi connessi con la tutela dell'ambiente presentano.

infatti, indispensabile una visione pluridimensionale del concetto di ambiente, come oggetto di tutela giuridica (riconoscendone sia la dimensione relazionale tra i fattori naturali ed i fattori antropici; sia la dimensione geografico-territoriale, che permette di fare riferimento sia alla biosfera sia singoli ambienti regionali e locali o ai singoli ecosistemi; sia la dimensione temporale o diacronica, che sottolinea la continua evoluzione delle relazioni e degli equilibri ambientali). La visione unitaria di questi problemi ben si esprime nelle affermazioni del diritto all'ambiente come diritto fondamentale dell'ambiente, riconducibile nell'ambito delle nuove categorie dei diritti della terza generazione. Ma lo schema del diritto soggettivo e del diritto fondamentale è troppo stretto per definire la dimensione giuridica dell'ambiente (l'oggetto della tutela non è determinato né predeterminabile ed il profilo dinamico dell'equilibrio ambientale impedisce il consolidarsi dello schema statico del diritto soggettivo). Si deve piuttosto costruire l'ambiente come diritto sociale o anche come valore. Ma soprattutto si deve constatare come l'ambiente, da un lato, venga a costituire un fine, un obiettivo verso il quale l'intero apparato dei poteri pubblici si deve rivolgere; ma, al tempo stesso, costituisca un limite, in termini di garanzia dai rischi che provengono dalla natura ed in termini di espressione di un principio di solidarietà nell'affrontarli, per l'esercizio concreto delle funzioni pubbliche.

Rispetto all'ambiente, lo stesso legislatore assume non più la veste di mero regolatore ed allocatore di risorse, ma diviene necessariamente propulsore, con i limiti che derivano dagli obblighi di solidarietà, verso gli obiettivi di qualità dell'ambiente che finiscono per essere in grado di legittimarne il potere.

L'ambiente, come presupposto ed obiettivo sia delle libertà e dei diritti sia dell'organizzazione pubblica ed in particolare della qualificazione di tale organizzazione come organizzazione democratica, esige quindi un metodo – anche sul piano degli strumenti giuridici – che incide soprattutto sulla definizione dei principi attraverso i quali vengono a stabilirsi gli equilibri tra l'uomo e la natura e tra i componenti di una collettività e delle risorse del territorio che hanno a disposizione. Di qui l'importanza ed il carattere essenziale che nella disciplina giuridica per la tutela dell'ambiente assumono i principi, (principi generali e costituzionali), che, non a caso, vengono affermati dalle dichiarazioni internazionali e dalle Costituzioni nazionali.

I principi hanno, infatti, la caratteristica di avere natura generale e di essere perciò in grado di garantire un'esigenza di coerenza del sistema. Al tempo stesso, i principi – dato il loro carattere indeterminato – possono essere in grado di coprire tutti i possibili casi che sono in grado di orientare. L'assenza di un collegamento diretto con fattispecie concrete inquadrabili a priori nei principi affermati, permette di utilizzare agevolmente gli stessi principi per orientare l'interpretazione del diritto vigente e per colmarne le lacune.

Nella tutela dell'ambiente, l'impossibilità di predeterminare con la puntualità e la tassatività tipica, per gli altri settori del diritto, gli obiettivi da perseguire ed i valori da definire, rende ancor più evidente la necessità di utilizzare i principi, come parametri indispensabili per effettuare il bilanciamento tra i valori da perseguire (che assumono ormai in tutti gli ordinamenti il carattere di valori costituzionali) ed i risultati raggiunti, nei quali le singole comunità vengono a confrontarsi ed a riconoscersi. Il principio dello sviluppo sostenibile si collega, in particolare, con la dimensione diacronica dell'ambiente che esige l'affermazione di principi che tengono conto di quanto incida il tempo nella dinamica ambientale e nella capacità di tutelare i valori ambientali e la sua affermazione in testi costituzionali, per i motivi sopra esposti, non è indifferente anche sul piano dell'effettività delle norme giuridiche per la tutela dell'ambiente.

4. In terzo luogo, il principio dello sviluppo sostenibile può essere meglio definito sul piano giuridico se si tengono distinte le sue caratteristiche duplici, cioè quella di definire obiettivi programmatici e quella di dare vita a criteri procedurali.

Nei numerosi richiami al principio dello sviluppo sostenibile si fa quasi sempre riferimento alla definizione ormai classica del Rapporto Brundtland (“uno sviluppo che soddisfi i bisogni del presente, senza compromettere la capacità delle generazioni future di soddisfare i propri”). Si possono citare, per il caso italiano, il recente decreto delegato 3 aprile 2006 n. 152 (art. 4, lettera a, n. 2); ma anche, per un'ipotesi di legge regionale, la significativa formulazione dell'art. 1, comma 2 della legge Regione Toscana n. 5 del 1995 (dove si definisce lo sviluppo sostenibile come “lo sviluppo volto ad assicurare uguali potenzialità di crescita e di benessere dei cittadini ed a salvaguardare i diritti delle generazioni presenti e future delle risorse del territorio”). Si tratta di obiettivi molto ampi e molteplici che implicano l'affermazione di un rapporto tra sviluppo economico ed ambiente da giudicare secondo un principio di equità sociale, in diretto collegamento con la definizione delle politiche e dei programmi della Comunità internazionale e delle singole comunità che a tale principio si rifanno. Si tratta di una concezione dello sviluppo sostenibile che tende ad espandersi, come può risultare dalle conclusioni della Conferenza di Johannesburg, che ha individuato per lo sviluppo sostenibile almeno tre pilastri (sviluppo economico, sviluppo sociale e protezione ambientale), la cui interdipendenza ed, al tempo stesso, la cui complessità danno conto della difficoltà di una più puntuale precisazione dei criteri e degli specifici obiettivi connessi all'affermazione del principio.

La ricerca per un uso razionale delle risorse, per stabilire principi di equità intergenerazionale e di equità intragenerazionale - e quindi di tutela sociale - può dar luogo a punti di equilibrio meramente difensivi e di compromesso, raggiunti sulla base di valutazioni effettuate dai soggetti politici (con prevalenza dei più forti anche sul piano economico).

Anche gli obiettivi, che pure vengono articolati in modo dettagliato nei programmi comunitari e nei programmi nazionali e locali, restano enunciazioni generiche, sulla cui efficacia rimangono ampi spazi di incertezza. Si possono citare obiettivi come: la riduzione al minimo del consumo delle risorse naturali (in particolare di quelle non rinnovabili o rinnovabili lentamente; la riduzione al minimo della produzione dei rifiuti, ricorrendo alle forme di riuso e riciclo dei materiali; la riduzione al minimo dell'inquinamento dell'aria, del terreno e dell'acqua; l'aumento del numero delle aree naturali e della biodiversità).

Restano egualmente troppo ampi e generici anche gli obiettivi globali, come quelli, a lungo termine, di stabilizzare le concentrazioni dei gas effetto serra nell'atmosfera, di limitare ai 2 gradi centigradi l'aumento globale massimo della temperatura, sviluppare il funzionamento dei sistemi naturali degli habitat naturali, della flora e della fauna. Ed ancora gli obiettivi assumono maggiore ampiezza e genericità quando fanno riferimento a risultati di natura sociale, come il miglioramento del benessere della popolazione, la promozione dell'eguaglianza e dell'integrazione sociale.

L'esemplificazione e l'individuazione degli obiettivi potrebbe essere ulteriormente ampliata e molteplici potrebbero essere le citazioni dei programmi comunitari e dei programmi nazionali (per l'Italia, v. il programma di cui alla delibera CIPE 2 agosto 2002, n. 57) nonché locali (v. i numerosi, ma altrettanto generici, programmi di attuazione dell'Agenda 21 adottati dalle Regioni e dagli enti locali), per constatare come si possano individuare una grande quantità di obiettivi sostanziali, rispetto ai quali non vengono precisate le indispensabili tecniche di programmazione, capaci di rendere più dettagliate e cogenti le iniziative connesse con lo sviluppo sostenibile. Peraltro, proprio l'ampiezza e la complessità degli obiettivi cui fa riferimento l'affermazione programmatica dello sviluppo sostenibile rende indispensabile una chiara definizione ed applicazione dei criteri procedurali che lo stesso sviluppo sostenibile suggerisce.

Il concetto fondamentale che esprime lo sviluppo sostenibile è, infatti, quello di rendere indispensabile l'integrazione tra sviluppo economico, sviluppo sociale e protezione ambientale. Sotto questo profilo, il concetto di sviluppo sostenibile assume un carattere essenzialmente procedurale ed introduce un metodo indispensabile per definire lo stesso spazio della tutela dell'ambiente nei vari sistemi giuridici. Non è un caso che, nell'ambito della Carta dei diritti fondamentali, proclamata a Nizza dall'Unione europea (e ripresa nella formulazione nella seconda parte del Trattato che istituisce una Costituzione per l'Europa: art. 37 della Carta di Nizza; art. II-97 del Trattato) il tema della tutela dell'ambiente sia stato affrontato non tanto in termini di diritto fondamentale all'ambiente quanto attraverso l'affermazione del principio che sintetizza tutti gli altri principi di azione, e cioè il principio di integrazione (già enunciato, come principio generale, nell'art. 6 del Trattato comunitario).

Da un lato, l'affermazione della necessità della tutela dell'ambiente sia per le presenti che per le future generazioni, implicita nel concetto di sviluppo sostenibile, ben si collega al tema dei diritti fondamentali, perché alcuni di tali diritti sono direttamente strumentali e funzionali alla tutela dell'ambiente (come il diritto all'informazione o il diritto di partecipazione). Ma il principio di integrazione nelle politiche comunitarie costituisce la prima conseguenza, rilevante sul piano giuridico, dell'obiettivo definito sia nel preambolo che nell'art. 2 del Trattato comunitario, relativo al livello elevato di tutela dell'ambiente ed al miglioramento delle sue qualità (cui fa riferimento la

formulazione dell'art. 37 della Carta dei diritti fondamentali). In realtà, l'affermazione del principio di integrazione implica l'affermazione della primarietà delle esigenze ambientali, in modo che la loro considerazione influisca sia nella fase di formazione delle norme sia nella fase della loro applicazione. Il principio di integrazione non implica quindi il riconoscimento di un diritto all'ambiente, quanto l'affermazione di un rapporto necessario tra le politiche direttamente finalizzate alla tutela dell'ambiente e tutte le altre politiche di settore. Rapporto che dovrà concretamente essere realizzato non solo attraverso una più razionale configurazione del riparto di competenze nell'ambito degli organi politici amministrativi, ma anche attraverso un ruolo rafforzato e trasversale da riconoscere in ogni processo decisionale agli organi che abbiano il compito di rappresentare gli interessi ambientali.

L'altro principio che permette di chiarire il contenuto, anche giuridico, dello sviluppo sostenibile è quello del bilanciamento, che permette di sottolineare come il plusvalore da riconoscere all'ambiente non implica una **sovraordinazione** aprioristica rispetto agli altri interessi, ma rende necessaria la garanzia che l'interesse ambientale non venga mai pretermesso e venga sempre adeguatamente ponderato in tutti i processi decisionali. Occorre effettuare una completa valutazione ed una sintesi tra la pluralità delle scelte possibili, un armonico coordinamento tra le conoscenze ed i dati acquisiti attraverso l'esperienza e gli elaborati dalla comunità scientifica, da un lato, ed i molteplici valori ed interessi che interferiscono con i dati di conoscenza. Un bilanciamento che può essere tra il valore ambiente e gli altri valori ad esso pari ordinati (bilanciamento esterno) ma che può anche essere un bilanciamento diretto a comparare e ponderare gli interessi ambientali in condizioni di reciproca interferenza (bilanciamento interno).

Si tratta di un criterio che implica l'attivazione di procedure decisionali, capaci di garantire non solo la trasparenza e la pubblicità, ma adeguati meccanismi di controllo democratico. In questo senso si possono citare le procedure di valutazione di impatto ambientale, di valutazione ambientale strategica e di autorizzazione integrata ambientale, che hanno la loro efficacia, non soltanto nel porre a disposizione tutti i dati scientifici e consentire la misurazione di ogni effetto che sull'ambiente possono produrre le decisioni da adottare, ma soprattutto sono ispirati agli altri fondamentali principi di tutela dell'ambiente che sono costituiti dal diritto all'informazione ambientale e dal diritto di partecipazione (enunciati in modo pregnante e dettagliato dalla Convenzione di Aarhus).

Infine, un ulteriore corollario del principio di sviluppo sostenibile, connesso con la tutela delle future generazioni, è da ritrovare nello stesso principio di precauzione che, ancor più di altri principi diretti alla tutela dell'ambiente, dimostra la necessità di superare le tecniche tradizionali di tutela giuridica, e di individuare procedure di decisione, che tengano conto del grado di incertezza legato ai risultati della valutazione delle informazioni scientifiche disponibili, stabilendo quale sia il livello accettabile del rischio per la società. Il principio di precauzione, rivolto come è a determinare un approccio strutturato dell'analisi del rischio, che comprende sia la valutazione, sia la gestione, sia la comunicazione del rischio, è particolarmente indicato per sottolineare la novità dei criteri con i quali si può dare applicazione al principio dello sviluppo sostenibile.

Come ha sottolineato la Commissione nella nota comunicazione del 2 febbraio 2000, la precauzione va collegata con i criteri generali di azione comunitaria (come il principio

di proporzionalità; il principio di non discriminazione; il principio di coerenza; il principio dell'adozione di misure sulla base dell'esame di potenziali costi e benefici dell'azione o dell'assenza di azione; il principio della revisione alla luce dei nuovi dati scientifici e del principio di inversione dell'onere della prova), che dimostrano l'importanza che, in relazione alla tutela dell'ambiente, assumono i criteri procedurali direttamente connessi alle esigenze di solidarietà che lo sviluppo sostenibile presuppone.

In conclusione, è evidente come questi principi procedurali determinino il contenuto essenziale del concetto di sviluppo sostenibile, determinando, attraverso l'applicazione di questi criteri, il contenuto sostanziale degli obiettivi di tutela anche per le generazioni future.

Sectoral Dimension of Sustainable Development

Sustainable Development and the Climate Change Regime

Massimiliano Montini¹

The concept of sustainable development is a multi-faced, multi-meaning and complex concept that has attracted the attention of several scholars dealing with international law since its first appearance in the public debate, in the last twenty years.

It is almost impossible to provide a clear and comprehensive definition of such a concept, which may encompass in a single framework its broad and far reaching constitutive elements. Due to its vagueness and the often perceived irreconcilable nature of its basic pillars, namely the economic, environmental and social dimensions, the concept of sustainable development is still denied the recognition of a “legal principle” by most scholars and by the relevant international practice of States, although this does not render its role less pivotal in the process of development of plans and programs aimed at reconciling its conflicting dimensions at the international, European and national level.

It is not the aim of the present contribution the discussion on the legal nature and the possible implications of the concept of sustainable development for the progressive development of international law, but what is certain is that the best starting point for an analysis of its role in a specific sector, such as in our case the one of climate change, is the recognition that it should not be defined as a “legal principle”, which points to a specific and certain direction, but as a complex policy objective, which is composed of several more specific principles, somehow variously related to the three pillars which compose it, namely the economic, the environmental and the social dimension. In such a context, the present contribution mainly aims at presenting a framework for the analysis of the concept of sustainable development as it is interpreted and applied in a specific sector, namely the climate change one.

The interplay between sustainable development and climate change: the climate change perspective

The two concepts of sustainable development and climate change both started to being debated and attracted much attention from experts and from the general public during the 1980s-1990s.

In fact, while the concept of sustainable development became popular with the report “Our Common Future” by the World Commission on Environment and Development, known as the *Brundtland Report* (WCED, 1987), climate change and related risks possibly associated with man-made global warming were firstly brought to attention of

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policymakers at a conference organized by the World Meteorological Organization in 1988. However, despite the similarities between the two concepts, they have been almost entirely separated the one from the other and running in parallel for several years. Moreover, until the beginning of the present decade, the two concepts were dealt with in different institutional arenas, the climate change debate being mostly natural science-driven, while the sustainable development debate was framed in a more social and human science-oriented approach.

In fact, in the decade that followed the Rio Earth Summit in 1992, which saw the adoption of Agenda 21 (UNCED, 1992), intended as a *manifesto* for the development of sustainable policies and practices to be implemented mainly at the national level by the UN Parties, and the United Nations Framework Convention on Climate Change (UNFCCC, 1992), conceived as an international legal framework for organizing more efficiently the fight against climate change, efforts to tackle sustainability and climate change issues were pursued in a quite isolated way and in fact parallel –rather than integrated or converging – agendas were pursued. On the one side, the debate about how to achieve sustainable development in practice basically did not touch upon climate change, which was dealt with in the framework of the UNFCCC only, and on the other side climate change initiatives were not planned to be framed in a broader sustainability context, despite an “inconclusive” reference to sustainable development contained in Article 3(10) of the UNFCCC.

A first step towards a partial convergence of the two issues was firstly made in the 1997 Kyoto Protocol on climate change, where sustainable development was mentioned as one of the objectives to be pursued with the implementation of Clean Development Mechanism (CDM) projects (Article 12 of the Kyoto Protocol)².

However, the Kyoto Protocol did not clarify how the realization of CDM projects could effectively contribute to achieving sustainable development, and such an issue was then addressed at the following meetings of the Conference of the Parties (COP) to the UNFCCC in the framework of the process for the determination of the modalities for the functioning of the Kyoto Protocol flexible mechanisms. Such a process started with the adoption of the Buenos Aires “Plan of Action” at COP4 (1999) and ought to be concluded at COP6 at The Hague (2000). Anyhow, since the Parties proved unable to reach agreement on the outstanding issues in that circumstance, the decision was finally shifted to a re-convened COP6 meeting in Bonn, in July 2001 (COP6 *bis*), where a first political agreement on the concrete functioning of the CDM and the other flexible mechanisms was reached.

Then, at the following meeting of the Parties, namely COP7 (2001), the rules and modalities for the realization of CDM projects were officially agreed upon by the UNFCCC Parties in the framework of the so-called “*Marrakech Accords*.” In the Preamble to the *Marrakech Accords*, it is in fact stated in clear terms that:

“it is the host Party’s prerogative to confirm whether a clean development mechanism project activity assists it in achieving sustainable development” (Decision 17/CP.7).

² See Article 12 of the Kyoto Protocol: “[...] 2. The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.”

This means, in other words, that the UNFCCC Parties decided that no general and always applicable criteria on how to judge the sustainability of the proposed CDM projects were to be defined once and for all at the international level, but it was to be left to the Parties the possibility to determine their own national criteria for sustainable development, taking into account their own economic, social and environmental objectives and priorities.

The interplay between sustainable development and climate change: the sustainable development perspective

The interplay between sustainable development and climate change may be also considered and analyzed from a sustainable development perspective. In fact, while in the framework of the implementation of the climate change regime, the Parties strived to give an effective and concrete meaning to the reference to the concept of sustainable development contained in the Kyoto Protocol on climate change, meanwhile, from a completely different point of view, the international community started to talk about setting climate change objectives in the framework of the progressive implementation of the concept of sustainable development in international law. In this respect, one may recall the importance attached to such a concept in the framework of the *UN Millennium Declaration* (2000), when the world's leaders gathered together stated that they were resolved to improve the quality of life of poor people through the achievement of global development objectives. To this effect, the *Millennium Declaration* dedicated a specific section to environmental protection issues, making an explicit reference to climate change, desertification, biodiversity, and forest and water management.

The definition of a set of goals, known as the *Millennium Development Goals* (MDGs), was the most relevant product of the *Millennium Declaration* and marked an epochal achievement in the history of the United Nations. The MDGs recognize the fundamental connection between energy, environment and sustainable development, by identifying seven main priorities:

“1) Eradicate extreme poverty and hunger; 2) Achieve universal primary education; 3) Promote gender equality and empower women; 4) Reduce child mortality; 5) Improve maternal health; 6) Combat HIV/AIDS, malaria and other diseases; 7) Ensure environmental sustainability; 8) Develop a global partnership for development.”

As one can see, a specific reference to the protection of the environment and in particular to environmental sustainability is contained in Goal 7. In such a context, in particular, to “ensure environmental sustainability” is meant primarily to achieve the following objectives:

- 1) integrate the principles of sustainable development into country policies and programs and reverse the loss of environment resources;
- 2) halve, by 2015, the proportion of people without sustainable access to safe drinking water;
- 3) have achieved, by 2020, a significant improvement in the lives of at least 100 million slum dwellers.

A further contribution to the affirmation of the central role of the concept of “sustainable development” and another concrete move towards the convergence of sustainable development goals and climate change objectives is then represented by the

2002 *Plan of Implementation* agreed at the *Johannesburg World Summit on Sustainable Development*, which further built on the achievements reached until then, promoting the widest possible application of the concept of sustainable development, as an instrument encompassing economic development, social development and environmental protection goals. To this effect, paragraph 38 of the *Plan of Implementation* states:

The United Nations Framework Convention on Climate Change is the key instrument for addressing climate change, a global concern, and we reaffirm our commitment to achieving its ultimate objective of stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner, in accordance with our common but differentiated responsibilities and respective capabilities [...].

Three years later, the 2005 *World Summit Outcome*, adopted by the UN General Assembly with Resolution 60/1, provided an impressive agenda for global action and reform, where sustainable development objectives were considered a priority. In particular, the UN General Assembly affirmed its own commitment to promote the integration of the three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforcing pillars, following the same line of reasoning of the *Johannesburg World Summit on Sustainable Development*, and explicitly stated the link among “tackling climate change, promoting clean energy, meeting energy needs and achieving sustainable development.”³

Sustainable development in practice within the climate change regime: the definition of sustainable development criteria for CDM projects

The real convergence among sustainable development and climate change is represented by the duty placed upon the Parties to the Kyoto Protocol on climate change wishing to host into their territory CDM project to develop at the national level specific sustainable development criteria, in order to fulfill the requirement contained in the COP7 decision cited above, according to which it is up to the host countries to determine whether a proposed CDM project may assist in achieving sustainable development in practice.

In this respect, the major source of inspiration for potential CDM host countries came from the guidelines published by UNEP, which were the output of a specific program for developing indicators for sustainable development sponsored by the United Nations. In the 2004 UNEP document named “*CDM Sustainable Development Impacts*”, a set of general and basic sustainable development criteria for CDM project screening are listed, which are grouped along the traditional three pillars of sustainable development:

- Social Criteria: Improve quality of life; Alleviate poverty; Improve equity;
- Economic Criteria: Provide financial returns to local entities; Result in a positive impact on balance of payments; Transfer new technology;

³ See “World Summit Outcome”, UN Doc. A/60/1, 24 October 2005, section on “Sustainable Development: Managing and Protecting our Common Environment”, paragraphs 48-56.

- Environmental Criteria: Reduce greenhouse gas (GHG) emissions and the use of fossil fuels; Conserve local resources; Reduce pressure on local environments; Provide improved health and other environmental benefits; Meet local renewable energy portfolio standards and other environmental policies.⁴

On the basis of such general and basic criteria, host countries should be able to identify specific sustainable development (SD) criteria (or SD sub-criteria) to be employed for operationalising SD at the project level context in the framework of the CDM. Such national criteria (or sub-criteria) should be designed so as to reflect major national development objectives and be operational at the project level context. In this respect, the UNEP document proposes a set of more specific SD criteria, which also pertain to the economic, social and environmental dimensions:

- Economic dimension: generate employment; reduce economic burden of energy imports; provide financial returns to local entities; positive impact on BoP (“*bottom of the pyramid*” people and communities); technological change; cost-effectiveness;
- Social dimension: increase equity; increase energy access; gender issues; education and training; health; alleviate poverty; legal framework; governance; information sharing;
- Environmental dimension: GHG emission reductions; local environmental benefits, (e.g. related to: air pollution, water, soil, waste); use of exhaustible resources; use of renewable resources; biodiversity).⁵

The UNEP proposed criteria have certainly represented a major source of inspiration for potential CDM host countries, when drafting their own national sustainable development objectives and guidelines, with a view to attracting foreign investments into the energy and environmental sector, while contributing to the concrete achievement of sustainability goals at the national level.

Among the most interesting experiences in this sense, one can recall here the sustainable development criteria adopted by the two most relevant host countries, both in terms of the number of CDM projects hosted and in terms of turnover generated by the investments related to those projects, namely China and India.

With regard to China, or more precisely to the Chinese People’s Republic, according to the “*Interim Measures for Operation and Management of Clean Development Mechanism Projects in China*” issued on 31 May 2004, an *ad hoc* entity, namely the *National Coordination Committee for Climate Change*, is responsible for drafting and implementing all CDM policies and measures, including the review of China’s national policies, criteria, and standards for the performance of CDM projects. In very brief terms, the most relevant sustainable development criteria so far identified are the following:

- Complement national economic and environmental strategy;
- Promote transfer of technology and financial resources;

⁴ See UNEP, *CDM Sustainable Development Impacts* (UNEP, 2004), found at <<http://cd4cdm.org/Publications/CDM%20Sustainable%20Development%20Impacts.pdf>>, particularly the chapter “Sustainable Development in Relation to CDM”, paragraph 4.

⁵ *Ib.*

- Ensure sustainable ways of energy production;
- Increase energy efficiency and conservation;
- Lead to poverty alleviation through income and employment generation; and
- Generate local environmental co-benefits.⁶

The experience of India in this context is even more interesting than the Chinese one. In fact, such a country, which is so far the major host country of CDM projects in the world, through the Climate Change Division of the Ministry of Environment and Forestry of the Government, has determined the basic criteria to be fulfilled by CDM project activities, which are very interestingly organized along four categories, instead of the traditional three ones. In fact, beside the traditional economic, social and environmental dimension, India has put a specific stress also on the technological dimension that CDM projects must possess in order to be effectively able to contribute to the achievement of sustainable development goals.

So far, the most relevant sustainable development criteria identified by India are therefore the following:

- Social well-being category: The CDM project activity should lead to alleviation of poverty by generating additional employment, removal of social disparities and contributing to provision of basic amenities to people leading to improvement in their quality of life.
- Economic well-being category: The CDM project activity should bring in additional investment consistent with the needs of the people.
- Environmental well-being category: The CDM project should take into account the impact of the project activity on resource sustainability and resource degradation, if any, due to the proposed activity; biodiversity-friendliness; impact on human health; reduction of levels of pollution in general;
- Technological well-being category: The CDM project activity should lead to transfer of environmentally safe and sound technologies with a priority to the renewable sector or energy efficiency projects that are comparable to best practices in order to assist in upgrading of the technological base.⁷

Conclusion: Can CDM projects contribute to achieving sustainable development?

In conclusion, there is a basic question which needs to be answered: through the adoption and implementation of sustainable development criteria, can CDM projects really contribute to achieving sustainable development in the CDM host countries?

⁶ See Y. Shengmin, *Institutional Structure, Procedures and Sustainable Development Criteria of CDM in China*, presentation at the Asian Region Workshop on “Capacity Development for the Clean Development Mechanism” (19-21 October 2005, Thailand), found at <http://cd4cdm.org/countries%20and%20regions/Asia/Fifth%20Regional%20Workshop/CMD-China_Shengmin.ppt>.

⁷ See the website of the Indian Designated National Authority (DNA) for CDM projects: <http://cdmindia.nic.in/host_approval_criteria.htm>

To address such an issue, one needs first of all to start from the consideration that all statistics show how many developing countries are nowadays growing at a very high annual rate, but often they cannot manage to pursue sustainable development objectives in the framework of their developmental policies. At the same time, climate change scenarios on projected increase of GHG emissions around the world in the next few decades show that developing countries GHG emissions may exceed industrialized countries emissions very soon, possibly already between 2010-2020.⁸

Meanwhile, industrialized countries which have agreed to limit, and in most cases effectively reduce, their GHG emissions by 2008-2012, pursuant to the Kyoto Protocol on climate change, now have a strong interest to perform CDM projects in developing countries in order to meet their Kyoto Protocol limitation and reduction commitments at lower costs.

There is therefore a great room in this context for finding effective synergies between sustainable development and climate change objectives, through the definition and fulfillment of SD criteria in the realization of CDM projects in developing countries.

CDM projects may in fact prove to be an excellent driver for economic growth in such countries, but with a little effort on host countries in devising SD criteria that also pursue, for instance, sustainable development goals and developmental objectives of local communities, may also prove a very valuable opportunity for developing countries to achieve sustainable development in practice.

In this sense, provided that SD criteria are correctly identified at the national level in CDM host countries and effectively enforced against potential investors, CDM projects may contribute to several sustainable development needs of such countries, such as:

- Increased energy efficiency and conservation;
- Transfer of technologies and financial resources;
- Local environmental benefits, e.g. cleaner air and water;
- Local environmental side benefits, such as health benefits from reduced local air pollution;
- Poverty alleviation and equity considerations through income and employment
- Generation;
- Sustainable energy production; and
- Private and public sector capacity development.⁹

In addition to that, host countries authorities may also use the opportunity stemming from CDM projects in order to contribute to the achievement of developmental objectives of local communities, for instance those related to rural development, energy security, education and capacity building, social and health services, and so on.¹⁰

⁸ See Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2001 – Third Assessment Report* (Cambridge University Press, 2002), also found at < <http://www.ipcc.ch> >

⁹ See UNEP, *op. cit.*, especially “The SD Perspective of the CDM”, paragraph 2.2.

¹⁰ *Ib.*

To this effect, in order to make the hosting of CDM projects really contribute in achieving sustainable development in practice at the national level, host countries should try to use SD criteria as a tool to promote, on the one side, synergies between developmental objectives, both at national and at local level, and to achieve, on the other side, social and environmental benefits. In such a way, CDM projects proposed by foreign investors could be designed and implemented so as to maximize gains for host countries, with respect to all the three dimensions of sustainable development, while at the same time helping industrialized countries pursue their specific objectives related to the implementation of the Kyoto Protocol, consisting in the reduction of GHG emissions, at lower costs, through the performance of CDM projects in developing countries.

Sustainable Development and Emerging International Standards for Corporate Accountability

Elisa Morgera¹

At the beginning of today's roundtable on sustainable development law, Prof. Dupuy challenged us with a thought-provoking question: Can we compare sustainable development to Italo Calvino's *Cavaliere inesistente*? Is sustainable development just an empty shell or rather a meaningful concept that remains difficult to define, yet has practical application?

This contribution attempts to answer these questions, focusing on one practical application of sustainable development: generating standards. To this end, I will concentrate specifically on the link between sustainable development and the concept of corporate accountability. First, corporate accountability will be defined as an element of sustainable development. Then, it will be argued that the principle of sustainable development contributes to the emergence of certain international standards for corporate accountability.

Corporate Accountability as an Element of Sustainable Development

Global environmental conferences have dealt increasingly with the role of business in fostering sustainable development. Already during the 1972 Stockholm Conference on the Human Environment, discussions took place with regards to the role of business in the global protection of the environment and on the necessity of including environmental concerns into corporate activities. The preamble of the Stockholm Declaration made a broad reference to the environmental responsibility of business in the following terms:

To achieve this environmental goal will demand the acceptance of *responsibility* by citizens and communities, and by *enterprises* and institutions at every level, all sharing equitably in common efforts (emphasis added).²

More debate on the role of private companies, sustainable development and environmental protection occurred at the United Nations Conference on Environment and Development in Rio de Janeiro in 1992. Indeed, the Rio Conference was the first international conference where industrial leaders participated along with diplomats and

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² Declaration of the United Nations Conference on the Human Environment, UN. Doc. A/Conf.48/14/rev.1, 1972, para. 7.

scientists in discussing the role of business in aiming at sustainable development.³ Interestingly, the Rio Declaration⁴ does not specify what the contribution of business to sustainable development should be. However, the emphasis placed in the Rio Declaration (Principle 16) upon the necessity of internalising environmental costs through economic instruments have some direct relevance for the private sector. The polluter-pays principle is in fact the basis for the international provisions on civil liability of the operator in the case of nuclear damage⁵ and oil pollution.⁶

Another outcome of the Rio Conference – Agenda 21 – makes more substantial references to the responsibility of multinational and other private companies in the area of sustainable development. Agenda 21 devoted a whole chapter (Chapter 30) to “Strengthening the Role of Business and Industry,” exhorting private companies to recognize environmental management among the highest corporate priorities and as a key determinant to sustainable development. Chapter 30 then focused on “promoting cleaner production and “promoting responsible entrepreneurship,” which requires the implementation of sustainable development policies by enterprises.⁷ According to some doctrine, what was expressed by Agenda 21 represent the explicit acknowledgement by the vast majority of States that the private sector should no longer avoid responding to the challenge of sustainable development.⁸

At the 2002 World Summit on Sustainable Development (WSSD), discussions on the role of the private sector were even greater than in the previous international conferences. A broad coalition of non-governmental organizations (NGOs) presented a proposal for a convention on binding corporate accountability, including provisions for corporate liability.⁹ The European Union also manifested its support to enhance corporate social and environmental responsibility at the international level. In light of protracted discussions on these themes, both final texts of the Summit refer to corporate accountability.

The WSSD Political Declaration¹⁰ includes two references to the role of business for sustainable development. Paragraph 27 refers to a “duty” of the private sector “to contribute to the evolution of equitable and sustainable communities and societies.” In addition, paragraph 29 asserts the need for private companies to enforce corporate accountability, which should take place within a transparent and stable regulatory environment. The WSSD Plan of Implementation¹¹ further refers to corporate accountability, in three separate instances, the most significant of which calls for

³ G. Thurdin, “Political Dimensions of International Environmental Governance Issues”, in M. Rolén, H. Sjöberg, and U. Svedin (Eds.), *International Governance on Environmental Issues* (Kluwer Academic Publishers, 1997), 1-6.

⁴ Rio Declaration on Environment and Development, UN. Doc. A/CONF.151/26, 1992 (Vol. I), 1992.

⁵ Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963), Arts. I(1)(k) and II(1).

⁶ Brussels International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969), Arts. II and III(1).

⁷ Agenda 21, UN. Doc. A/CONF.151/26, particularly paras. 30(17-30) and 30(18)(b).

⁸ D.M. Ong, “The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives”, 12:4 *European Journal of International Law* 2001, 685-726.

⁹ Friends of the Earth, *Towards Binding Corporate Accountability*, Position paper for the WSSD, January 2002.

¹⁰ WSSD Political Declaration, UN. Doc. A/CONF.199/20, 2002, Resolution 1, Annex, 2002.

¹¹ WSSD, Johannesburg Plan of Implementation, UN. Doc. A/CONF.199/20, Resolution 2, Annex, 2002, paras. 18 and 140(f).

“the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships and appropriate national regulations, and support continuous improvement in corporate practices in all countries.”¹²

Thus, WSSD embedded the concept of corporate accountability in the global action plan for achieving sustainable development, as a fundamental element underpinning the idea that private sector actors are necessary to achieve global goals that governments are not capable to attain by themselves.

This approach has been reflected in other international initiatives focusing generally on corporate accountability. Both the Guidelines for Multinational Companies of the Organization for Economic Cooperation and Development (OECD),¹³ and the Norms on the Responsibility of Transnational Corporations and Other Business Entities¹⁴ of the UN Sub-Commission on Human Rights call upon the private sector to contribute to the wider goal of sustainable development.

Sustainable Development Standards for Corporate Accountability

In most instances, international environmental law calls upon States to regulate the behaviour of non-State actors that are the source of environmental harm, while it hardly ever mentions expressly business companies. The implementation of international environmental provisions does not envisage a special role for private companies, but rather provide for States to enact the necessary legislation to direct and control the conduct of these actors in their territory and under their jurisdiction. Standards for corporate accountability, therefore, contribute to translate international environmental inter-State obligations in clear and operative normative benchmarks for private companies.

The first legal study on the international environmental law and its consequences for private companies concluded that, already in the early 1990s, when international environmental law was fast developing but far from the level of sophistication that we know today, international environmental standards relevant for multinational companies, such as the sustainable use of natural resources, could be identified and considered applicable directly to private companies, if adopted voluntarily by companies themselves.¹⁵ The UN and the OECD have also singled out the sustainable use standard with reference to the expected conduct of multinational companies and other business. In more recent years, corporate environmental accountability standards based on the concept of sustainable development have been repeatedly invoked by international NGOs, leading academics and victims of corporate environmental harm before human rights monitoring bodies and national judges.

In order to highlight the role of sustainable development as a generator of international standards for corporate environmental accountability, the following sub-sections will

¹² *Ib.*, para. 49.

¹³ *OECD Guidelines for Multinational Enterprises*, DAF/IME/WPG(2000)15/FINAL, 31 October 2001, Section V.

¹⁴ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, Section G.,

¹⁵ Ph. Sands, *Emerging Trends and Implications for Transnational Corporations in International Environmental Law* (UN Department of Economic and Social Development, 1993).

briefly analyze the recent practice of the International Finance Corporation (IFC) and of the Convention on Biological Diversity (CBD) in relation to two related standards based on sustainable development: environmental integration and the sustainable use of natural resources.¹⁶

a) International Finance Corporation

The IFC is the “private sector arm” of the World Bank Group: it is the largest multilateral source of financing for private sector projects in the developing world. The IFC launched in 2006 its revised environmental performance standards that are clearly based on international environmental law and sustainable development. These IFC standards are essential for private companies to receive and retain IFC funding: they are necessary to manage IFC-funded projects and sometimes are embodied in the loan agreement between the IFC and the private borrower as contractual environmental conditions.

Two of the eight Performance Standards of the IFC are based on sustainable development. First, there is a general, cross-cutting requirement on environmental assessment and management system (Performance Standard 1). Both tools translate the concept of environmental integration necessary to attain sustainable development for private companies. The IFC specifies that private companies should undertake an environmental impact assessment to: identify impacts, risks and opportunities from early stages of the project; facilitate effective community engagement and consultation through disclosure of project-related information; and support the company’s management of its environmental performance throughout the life of the project and respond to anticipated negative environmental impacts on an ongoing basis. On the basis of the impact assessment, private companies are further expected to put in place an environmental management system for mitigating possible environmental harm and improving environmental performance.

The second, sustainable development-related standard (Performance Standard 6) calls upon private companies to manage natural resources sustainably. The IFC translates the idea of sustainable use as the development and protection of resources in a way or at a rate that enables people and communities to provide for their present social, economic and cultural well-being, while also sustaining the potential of those resources to meet the reasonably foreseeable needs of future generations and safeguarding the life-supporting capacity of the air, water and soil ecosystems.¹⁷

b) Convention on Biological Diversity

Also in 2006, the eighth Conference of the Parties to the Biodiversity Convention adopted its first decision on private sector engagement, which highlights the need to

¹⁶ Prof. Sands argued that the concept of sustainable development embodies not only environmental integration and sustainable use of natural resources, but also intra-generation and inter-generational equity. See Ph. Sands, *Principles of International Environmental Law* (Cambridge University Press, 2003).

¹⁷ IFC, *Performance Standards on Social and Environmental Sustainability*, adopted by the IFC Board on 21 February 2006, with implementation starting on the 30 April 2006, available online at <<http://www.ifc.org/sustainability>>.

enhance both voluntary and regulatory means for the private sector to support implementation of the Convention objectives.¹⁸ In particular, the decision identified “internationally agreed standards on activities that impact biodiversity” as one of the mechanisms to facilitate the private sector’s contribution to the Convention implementation and achievement of the 2010 target.

Although the parties to the Biodiversity Convention seem, for the time being, to prefer voluntary solutions for identifying and better defining biodiversity standards for the private sector, the Secretariat has also indicated that the most promising approach could be that of building upon the principles and guidelines that have already been elaborated under the Convention and have the potential to act as international standards for business.¹⁹

Although it is still early days to predict the final input of the Biodiversity Convention in terms of international standards for corporate accountability, it can be argued that on the basis of its existing guidelines and principles the Convention could greatly contribute to further define standards based on sustainable development for the private sector. To this end, three documents can be referred to:

- The Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment (hereinafter, Akwé: Kon Guidelines).²⁰ These provide guidance on the incorporation of cultural, environmental, and social considerations of indigenous and local communities into new or existing impact assessment procedures. Their purpose is to support the full and effective participation and involvement of indigenous and local communities in a screening, scoping and development planning exercise, and take into account properly their cultural, environmental and social concerns and interests. They can therefore be particularly relevant to private companies as the proponents of development;
- The International Guidelines for Activities related to Sustainable Development in Vulnerable Ecosystems and Habitats of Major Importance for Biological Diversity and Protected Areas (hereinafter, Biodiversity and Tourism Guidelines).²¹ These provide guidance for engaging the private sector and local and indigenous communities in making tourism and biodiversity more mutually supportive. They thus provide a framework for addressing what the proponent of new tourism investment or activities should do to seek approval, as well as providing technical guidance to managers with responsibility concerning tourism and biodiversity, with the private sector potentially involved in both cases; and

¹⁸ Convention on Biodiversity Diversity Conference of the Parties, *Decision VIII/ on Private Sector Engagement*, UN Doc. UNEP/CBD/COP/8/11, 30 March 2006.

¹⁹ UN Doc. UNEP/CBD/WG-RI/1/INF.5, 2005.

²⁰ CBD, *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments proposed to take place, or which are likely to impact on Sacred Sites and Lands and Waters Traditionally Occupied or Used by Indigenous People and Local Communities*, Montreal: CBD Secretariat, 2004.

²¹ CBD, *International Guidelines for Activities related to Sustainable Development in Vulnerable Terrestrial, Marine and Coastal Ecosystems and Habitats of Major Importance for Biological Diversity and Protected Areas, including Fragile Riparian and Mountain Ecosystems*, Montreal: CBD Secretariat, 2004.

- The Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (hereinafter, Sustainable Use Principles),²² which aim at providing a framework for advising, among others, the private sector on how to avoid that its use of biodiversity components will lead to the long-term decline of biological diversity, in other words, not a manner in which ecological processes, species and genetic variability remains above the thresholds needed for long-term viability.

Both the Akwé: Kon Guidelines and the Biodiversity and Tourism Guidelines offer a translation for business of sustainable development as environmental integration. According to the former, the development proponent should negotiate an agreement with the indigenous or local community that traditionally occupies certain sites, to cover the procedural aspects of the impact assessment, including options of no-action alternatives, setting out rights, duties and responsibilities of all parties and address measures to prevent or mitigate any negative impacts of the proposed development. According to the latter, tourism developments proponents are expected to: identify the various stakeholders involved in or potentially affected by the proposed project, assess the potential impacts of the proposals; provide information on these potential impacts through a notification process, undertaking and funding necessary studies, and involve indigenous and local communities in the assessment.

Finally, the Sustainable Use Guidelines translate sustainable development as “adaptive management”, i.e. a scheme for private companies to: respond quickly to unsustainable practices; design monitoring systems on a temporal scale sufficient to ensure that information about the status of the resource and ecosystems is available to inform management decisions for the conservation of the resource; and, when using traditional and local knowledge, ensure prior consent of the knowledge holder. In addition, these guidelines suggest that the spatial and temporal scale of management should be compatible with ecological and socio-economic scales of use and its impacts, enabling full public participation in preparation of management plans to better ensure ecological and socio-economic sustainability. Private companies, as users of biodiversity, should also seek to minimize waste and adverse environmental impacts, and optimize benefits from users, in order to comply with the sustainable use standard.

Conclusions

There has been a growing recognition at the international level that attaining sustainable development is not only a task for governments, but requires the involvement of other, non-State actors, particularly the private sector. At the 2002 World Summit on Sustainable Development, the concept of corporate accountability has been incorporated in the international agenda on sustainable development as a means to ensure a growing contribution of the business community to the fulfilment of global goals for the protection of the environment, among other things.

²² CBD, *The Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity*, Montreal: CBD Secretariat, 2004.

As international environmental law is framed in terms of obligations for States, increasingly international organizations, together with NGOs, business associations and academics, translate international environmental principles and objectives into standards for corporate environmental accountability. Sustainable development has functioned as a generator of some of these standards, in particular those related to environmental integration and the sustainable use of natural resources. The definition of these standards by the International Finance Corporation and possibly by the Biodiversity Convention is, however, only a first step in ensuring an environmentally sound conduct of the private sector: the challenge to put sustainable development standards into practice still lays ahead.

Risk Management, Natural Disasters and Sustainable Development:

The UN Approach

Laura Zanotti¹

After the end of the Cold War, the United Nations (UN) increasingly devoted attention to natural disasters management. The World Organization declared the years from 1990 to 1999 the “Decade for Natural Disaster Reduction.” In 1994 the UN held in Yokohama, Japan, the first Conference on Natural Disasters; in 2002 the UN prescribed the integration of disaster prevention into sustainable development in the Johannesburg plan; and in the immediate aftermath of the Tsunami, the United Nations held a conference in Kobe, Japan, where the connections between risk management and development were at the center of the debate on prevention.²

In this short paper, which includes the preliminary results of an ongoing research project, I argue that in the last fifteen years the conceptual frameworks adopted by the United Nations for coping with natural disasters and international security converged. Issues that were previously seen as separate were progressively linked, leading towards an increasing integration and to the emergence of consensus about linkages between security, development and disaster management.³

After the end of the Cold War, the United Nations’ understanding of its core mission progressively moved away from guaranteeing the stability of the Westphalian system and harked back to the goal stated in the preamble of the Charter: to provide security to people. In this contest, natural disasters and international conflicts have been seen as similar and connected issues, to be tackled through an integrated “risk management approach.” Environmental degradation became part of the agenda of international security as one of the elements contributing to the multifarious and unpredictable configuration of threats to the world populations that the United Nations must endeavor to manage. Conversely, approaches to human vulnerability adopted in the context of international conferences for the management of natural disasters have been reflected in recent debates on the role of the UN as a collective security organization. Finally, sustainable development is increasingly seen as the remedy for a broad typology of

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² First World Conference on Natural Disaster Reduction (Yokohama, Japan, 1994); World Conference on Disaster Reduction (Kobe, Japan, 2005).

³ Ernst Haas has argued that the study of regimes is “a way of mapping the ontogeny and phylogeny of consensual thought about interactions between man, culture, and nature: it is a way of conceptualizing a shared notion of what really exists – a reality that includes more than the familiar political conflicts among States”. Regimes for Haas change through the creation of consensus about linkages. See E. Haas, ‘Words Can Hurt You; Or, Who Said what to Whom about Regimes’, 36:2 *International Organization* (1982), 207-243. This paper embraces Haas research program and explores the creation of new ways of understanding international risk and the role of the international organizations in the context of complex vulnerability.

threats, be they “natural” or “man-made”. In the pages that follow, I will map some of these convergences and highlight the ongoing shifts in the understanding of the nature of international threats, of the role of international organizations and of the referents of international security. In the conclusions, I will briefly outline the possible effects of these shifts for the Westphalian-based international security regime.

Reframing threats to security

In the post-Cold War era, the conceptual frameworks adopted by the United Nations for understanding and addressing man-made and natural threats converged. The Under Secretary-General for peacekeeping operations, Jean-Marie Guehenno, argued that meteorology and chaos theory provide the most adequate tools for understanding the international world. For Guehenno,

The interdependent world looks more and more like the weather system described by chaos theory; influenced by millions of variables, its causality does not follow a linear model, and consequences are not proportionate to causes...The idea that an individual or a human community could determine long-term goals and develop a strategy to attain them may become increasingly unrealistic: too many factors are beyond our control, and there are too many unknowns.⁴

Threats are multifarious, causality is not linear, strategy is impossible and unpredictability and undeterminacy are the conditions for action.

In 2004, the High-level Panel on Threats, Challenges and Change included environmental degradation as a threat to international security.⁵ The Panel broadened the notion of international threat to include “any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system.”⁶ More specifically, international threats include six types: Economic and social threats (poverty, infectious disease and environmental degradation); Inter-State conflict; Internal conflict, including civil war, genocide, and other large-scale atrocities; Nuclear, radiological, chemical and biological weapons; Terrorism; and Transnational organized crime.

In the Panel’s definition of international threats populations emerge as a referent for international security equally (if not more) important than States. Throughout the 1990s, the notion “human security,” which was first developed in its institutional version within the UN Development Programme (UNDP)⁷ has become a holistic tool for analyzing international threats and vulnerabilities and all menaces to human life.

⁴ J.-M. Guehenno, ‘The Impact of Globalization on Strategy’, in C. a Crocker, F. Osler Hampson, and P. Aall (eds.), *Turbulent Peace. The Challenges of Managing International Conflict* (United States Institute for Peace, 2001), 83-95.

⁵ The panel was nominated by the United Nations Secretary-General to devise a new role for the United Nations as a collective security organization. See the United Nations General Assembly Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565, 2004.

⁶ *Ib.*

⁷ See UNDP, *Human Development Report 1994: New Dimensions of Human Security* (Published for UNDP by Oxford University Press, 1994). The Report introduces a new concept of human security, which identifies people as the main referent for security and focuses on development as the main tool to achieve it.

The convergence of the conceptual frameworks for addressing natural and man-made disasters in conjunction with a shift on the referent of security from States to populations, prescribes a transformation in the selection of instruments for addressing vulnerability and managing risk. In a world where it is increasingly difficult to control all variables, security depends upon the reduction of the sources of risk, through integrated prevention at the State and at the international level, information sharing and the proliferation of regulatory and monitoring mechanisms as an instrument of “governance.” In this context sustainable development is increasingly seen as a key instrument for protecting and enhancing human security. The linkage between disaster reduction and development was included in Agenda 21, ensued from the 1992 Earth Summit.⁸ The “Rio de Janeiro Platform for Action towards Johannesburg 2002” reinforced this orientation even further, by devising a strategy for reducing vulnerability based on land planning.⁹ And in Johannesburg (2002), the UN requested action for integrating disaster risk into sustainable development, and made it an imperative priority to include disaster management into the sustainable development agenda.¹⁰

The connection between risk reduction and sustainable development was fully unpacked in the 2004 UNDP report “Reducing Risk, a Challenge for Development.”¹¹ The report elaborated a comprehensive analysis of the connections between natural disasters, development, local governance and global economic policies; it proposed a certain number of indicators to assess risk; and devised development-based strategies for prevention. The report recognized the “multifaceted nature of risk” and emphasized that populations that are vulnerable to natural hazards are also vulnerable to hazards from other sources, i.e. economic and political.

According to the report, economic globalization contributes to creating new geographies of risk. Uncontrolled urbanization and rural livelihood in marginal lands are two main factors of vulnerability. Globalization also entails gaps between those who take economic decisions and those who bear the consequences. Decisions that create hazardous conditions in “marginal” areas are taken at international level, with scarce consideration or knowledge of the interests of populations affected.¹²

The report maintains that disaster management is twofold. It includes both prospective disaster risk management, which requires the integration of disaster risk considerations into sustainable development planning, and compensatory disaster management, which requires better planning for preparedness and response. Sharing national and international responsibilities through governments’ initiatives and international efforts are key factors for success in both regards.

⁸ Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, 3-14 June 1992.

⁹ Regional Preparatory Conference for the World Conference on Sustainable Development (Johannesburg, South Africa, 2002), Rio de Janeiro, Brazil, 23-24 October 2001.

¹⁰ World Summit on Sustainable Development (Johannesburg, South Africa, 2002); see UN Doc. A/CONF.206/6, 2002, para. 37.

¹¹ UNDP, *Reducing Risk: a Challenge for Development* (United Nations Development Programme, 1994).

¹² A case in point is global warming. While greenhouse gases are mostly produced in the developed world, the impact of extreme weather that these emissions contribute to cause is mostly felt in developing countries and rural areas. Furthermore, rush for economic growth can trigger haphazard urban development, which, if unmanaged, may increase vulnerability to earthquakes.

The notion of shared responsibility was officially spelt out as a tool for managing natural disaster risk at Yokohama in 1994. The conference outcome document underscored that States and international organizations share responsibility for disaster prevention. Thus, while the primary task to protect citizens from natural disasters falls on States, the international community must contribute to this endeavor by mobilizing financial scientific and technological resources and by promoting knowledge dissemination. The Yokohama outcome document prescribed an integrated local/global approach to disaster reduction that included the involvement of international institutions in promoting knowledge dissemination and of local governments and communities in devising and implementing prevention strategies.

Furthermore, at Yokohama the notion of common vulnerability, which is one of the central elements for a collective security strategy elaborated ten years later by the High-level Panel, was made central to the UN approach to risk management. The High-level Panel based the need for a UN-led collective security system on the ground that in the current international configuration all are equally vulnerable, regardless of relative strength. Similarly, the outcomes of the Yokohama 1994 UN Conference highlighted that vulnerability is mutual, uneven and man-made. In other words, while disasters are natural, the level of impact they have on a specific community is largely the result of human activity.

By the time of the 2002 Conference on Financing Development, the themes of States' responsibility and good governance had converged in what has meanwhile become known as the "Monterrey Consensus." Although the focus of the Monterrey Conference was development, it was neither trade, nor capital transfers, but "responsibility" which was identified as the decisive factor to this end. The primary responsibility for economic and social enhancement rests with each State's government. Development, similarly to international peace and democracy, results from the implementation of good governance practices. Good governance is

essential for sustainable development...Sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth (para 11).

Developing countries are expected to mobilize domestic financial resources and attract international business by establishing a stable and predictable investment climate, by fighting corruption, by enhancing respect for property rights, pursuing sound macro-economic policies, securing fiscal sustainability, strengthening domestic financial sector, and reinforcing capacity-building initiatives especially with regard to education, public administration and health. However, in an interconnected world, individual States' responsible behavior must be accompanied "by an enabling international economic environment."

The conceptual frameworks adopted at Yokohama and Monterrey were adopted and adapted by in the 2004 High-Level Panel Report and in the proposals for UN reform presented by the UN Secretary-General at the 2005 World Summit.¹³ The High-level Panel based the need for a UN-led collective security system on the understanding that

¹³ Report of the UN Secretary-General for Decision by Head of States and Governments in September 2005, *In Larger Freedom: Towards Security, Democracy and Human Rights for All*, UN Doc. UN Doc. A/59/2005, 2005.

in the current international configuration all are equally vulnerable, regardless of relative strength. In this context, the Panel prescribes sharing responsibility and reinforcing international monitoring, rules and regulations for preventing crises. The three main freedoms identified by Kofi Annan as the goal of the United Nations in the new century – freedom from want, freedom from fear, and freedom to live in dignity – in the Secretary-General's view can only be achieved through a cooperative and integrated approach that encompasses development, peace making and human rights.

The notion that States and international organizations do share responsibility in managing international risk and in protecting humanity, which emerged in the context of development and disaster management, in the beginning of the new millennium has been linked with discourses on security and on the new role of the World Organization. In this context, the reconceptualization of the role of the United Nations along the lines of complex vulnerabilities and population protection not only entails a revision of the useful means and relevant actors for taming risk. It also bears jeopardizing consequences for the Westphalian international regime based upon State sovereignty. States are no longer seen as the only repository of the responsibility to protect populations nor sovereignty is the outer, inviolable limit to international intervention.

Conclusion

This brief review of UN documents on international security and risk management shows that starting in the 1990s the United Nations increasingly embraces a holistic approach to these issues. The leading concepts here are human security, mutual vulnerability, and integrated approaches to prevention. In a situation of unpredictability, risk reduction can be achieved by reinforcing international regulatory and monitoring mechanisms as well as local governments and communities' strategies for minimizing risk.

The referent of security changes and "the responsibility to protect" populations from risk – be it natural, man-made or a combination of both – is increasingly shared between local governments and international organizations. Questions remain open on how these shifts affect the post-Cold War international regime.

Øle Waever argued that securitization leads to the reinforcement of State-centered, militarized approaches.¹⁴ However, the internationalization of the responsibility to protect population and the aspiration of international organizations to increasingly intervene in processes of monitoring, controlling and engineering societies in order to manage risk seems to suggest that in the post-Cold War era governance is increasingly seen as a shared endeavor and that State sovereignty becomes increasingly porous. Security is pursued as part of a holistic project of international governance that aims at reducing chaos by making factors of risk domesticated and predictable.

¹⁴ See Ø. Waever, 'Securitization and Desecuritization', in R. D. Lipschutz (ed.), *On Security* (Columbia University Press, 1998), at 6.

Le Principe de participation publique en matière d'environnement :
La dimension procédurale du développement durable

Patricia Quillacq¹

Les instruments adoptés en Juin 1992 pendant la Conférence de Rio de Janeiro sur l'Environnement et le Développement ont éperonné le calendrier de la politique environnementale, et donné une nouvelle orientation à la protection de l'environnement, celle du développement durable. La déclaration finale de Rio énonce 27 principes fondamentaux pour réaliser un développement durable sur la Terre. Parmi ces principes, le dixième proclame le principe de participation du public dans les affaires environnementales (ci-après PP10) :

« La meilleure façon de traiter les questions d'environnement est d'assurer la participation de tous les citoyens concernés, au niveau qui convient. Au niveau national, chaque individu doit avoir dûment accès aux informations relatives à l'environnement que détiennent les autorités publiques, y compris aux informations relatives aux substances et activités dangereuses dans leurs collectivités, et avoir la possibilité de participer aux processus de prise de décision. Les Etats doivent faciliter et encourager la sensibilisation et la participation du public en mettant les informations à la disposition de celui-ci. Un accès effectif à des actions judiciaires et administratives, notamment des réparations et des recours, doit être assuré. »

L'objet de notre exposition est de partager quelques réflexions au sujet de ce principe du droit de l'environnement, à la fois sur son apparition et sa formation, mais encore sur sa nature en tant que norme juridique.

I. La formation d'un nouveau principe de droit : trois décennies bien distinctes

1. Avant même que la problématique de l'environnement n'émerge comme un domaine de la politique publique, et afin que puisse prendre pied l'idée de participation des citoyens dans ce domaine, certains paramètres basiliars de la vie d'un Etat démocratique doivent être en place, certains droits civils et politiques pleinement effectifs. On trouve donc des postulats essentiels du PP10 dans les instruments qui sont adoptés après la deuxième guerre mondiale : la Déclaration Universelle des Droits de l'Homme de 1948, la Convention Européenne des Droits de l'Homme en 1951 et les Pactes relatifs aux Droits de l'Homme de 1966. Dans l'intervalle 1948-1966, se manifeste en outre un activisme croissant de la société civile, le répertoire d'action des citoyens s'enrichit, ceux-ci ne se contentent plus seulement du vote comme moyen de participation aux affaires publiques. Cette évolution, couplée à l'analyse sociopolitique (qui éloigne toute irrationalité dans ces nouveaux comportements), et à l'accélération

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des changements qui affectent l'Etat et son administration, favorise l'idée et l'opportunité de nouveaux modes de participation citoyenne dans la vie publique et dans l'action administrative. Les individus seuls ou organisés participent en fonction de leur capacité *active civitatis*, c'est-à-dire, en tant que membres d'une communauté, idéalement dans la poursuite d'un intérêt «*utis civis*», et non un intérêt strictement personnel (cette distinction n'est cependant pas évidente et la difficulté à distinguer les deux types d'intérêts a été soulignée par les juridictions constitutionnelles et la doctrine). Avec l'émergence de l'environnement dans l'agenda politique, l'idée de la participation du public trouve un terrain de prédilection sur lequel s'épanouir. À la fois la participation et l'environnement deviennent des objets du droit. 1972 est une date repère que l'on peut prendre comme point de départ pour distinguer trois vagues normatives qui vont conduire à la cristallisation juridique du PP10 au niveau international.

2. Le parcours normatif du PP10 débute dans la décennie soixante-dix, tout au long de laquelle les documents déclaratifs internationaux prennent acte de *l'idéologie participative* qui doit guider la conduite des affaires publiques et environnementales. La déclaration finale de la Conférence des Nations Unies sur l'Environnement de 1972, indémodable, assoit le concept d'*écocitoyenneté* – la conviction que la défense de l'environnement est une responsabilité partagée par les citoyens et les pouvoirs publics. Ce concept est la vraie épine dorsale du PP10. L'autre idée forte inscrite à Stockholm est celle du principe d'intégration de la préoccupation environnementale dans la planification, qui conduira à la généralisation des techniques d'études d'impact sur l'environnement – incluse l'idée de la consultation du public. Finalement, comme le formule Peter H. Sand, Stockholm marque l'entrée en lice des organisations non gouvernementales (ONGs) dans la diplomatie environnementale : on assiste au début de la « sommitologie ». ² Quasi immédiatement, divers traités adoptés après Stockholm prévoient la participation d'acteurs non gouvernementaux dans les systèmes de mise en œuvre et de suivi des obligations. ³ On assiste aussi à la mention de thèmes clés de la participation publique en matière d'environnement dans de nombreux instruments de droit mou, concernant par exemple le *moment adéquat* de la participation, *le rôle des ONGs*. Parallèlement, au niveau national comme au niveau européen, on met l'accent sur la nécessité de garanties vis-à-vis des pouvoirs discrétionnaires de l'administration, en particulier au regard de la prise d'actes décisionnels, donnant pied à des droits participatifs, au départ dans un esprit défensif, mais qui sera le prélude à l'utilisation de ces droits dans un esprit proactif. ⁴

3. Bien que la rhétorique sur la participation auprès de l'administration s'effiloche quelque peu au niveau national au profit de la modernisation et de la transparence de l'administration, les instruments des années quatre-vingt témoignent néanmoins

² P.H Sand, "Environmental Summitry and International Law" Yearbook of International Environmental Law, Vol. 13 (2002) pp.21-43

³ Convention concernant la protection du Patrimoine Culturel et Naturel (Paris, 16.XI.1972), Convention relative à la conservation de la vie sauvage et du milieu naturel en Europe (Berne 19.XI.1979), Convention sur le Commerce International des Espèces de Faune et de Flore Sauvage menacées d'extinction (Washington, 3.III.1973), Nordic Environmental Protection Convention (Stockholm, 19. II.1974)

⁴ Par exemple la mise en place des médiateurs, l'adoption de lois concernant l'accès aux documents administratifs; voir aussi la Résolution (77)31 du Conseil de l'Europe concernant les principes généraux sur la protection de l'individu au regard des actes de l'administration.

clairement de l'enrichissement du concept de participation publique, qui s'affirme et se précise sous forme de norme juridique et de droits participatifs. En premier lieu, des documents déclaratifs de grande portée, tels la Stratégie Mondiale de la Conservation de la Nature, relayée par la Charte Mondiale de la Nature affirment la nécessité de la participation publique.⁵ En 1986 : la Déclaration sur le droit au développement⁶ devance de peu le Rapport Bruntland dans l'établissement du lien entre développement et participation. Le Rapport énonce en réalité le principe sans l'identifier.⁷ Au niveau communautaire, la Directive Seveso met en place dès 1982 l'obligation d'informer le public spontanément, régulièrement et de maintenir à disposition du public les informations concernant les risques industriels. Tout aussi cruciale sera l'adoption de la Directive 85/337/CEE qui généralise l'obligation de prendre en compte l'environnement dans la réalisation de certaines activités et d'inclure le public dans ce processus, en lui conférant le droit d'être consulté. Les catastrophes environnementales des années quatre-vingt, de Seveso à Tchernobyl, en passant par Bhopal, réveillent l'opinion publique et confirment que l'environnement ne peut être un domaine opaque de la gestion publique. On constate une standardisation des références à la participation du public dans tous les domaines : la participation est en phase de devenir un principe juridique, une dimension du phénomène juridique qui sera par la suite identifié comme "procéduralisation."⁸

4. La décennie quatre-vingt dix voit la consécration du PP10. Dès 1990, la Directive 90/313/CEE affirme un droit individuel d'accès à l'information environnementale, sans aucune nécessité de justifier un intérêt pour exercer ce droit, réel dépassement de la conception régaliennne du droit. En 1991, la Convention d'Espoo transpose au niveau international la technique de l'évaluation d'impact environnemental⁹ et en 1992, le Sommet de la Terre donne un libellé au principe de participation et définit les contours du principe, qui apparaît dans sa tridimensionnalité : l'accès à l'information, la participation au processus décisionnel et l'accès à la justice. La cristallisation de ce principe doit beaucoup aux positions des pays occidentaux lors des négociations de Rio, mais tout autant à la société civile très favorable à l'affirmation d'un principe qui leur reconnaît une fonction essentielle et leur confère des droits dans la protection de l'environnement.¹⁰ Encore une fois, les instruments adoptés après ce sommet mondial environnemental font une part croissante au PP10.¹¹ Commence aussi l'analyse scientifique du principe et s'affirme une volonté politique de donner corps au principe, qui aboutira en particulier à l'adoption des Lignes Directives de Sofia en 1995.¹² Ces Lignes Directives, bien que non contraignantes, sont primordiales dans le chemin vers la

⁵ Charte de la Nature des Nations Unies, A/RES/37/7, 28.X.1982 (Points 16 et 23).

⁶ Déclaration sur le Droit au Développement, Assemblée Générale des Nations Unies, Res. 41/128 du 4 .XII.1986, (Art. 1, 2.1., 2.-3, 8.2.)

⁷ "Towards Common Action: Proposals for Institutional and Legal change", World Commission on Environment and Development, in *Our Common Future* (Oxford University Press, 1987).

⁸ Sur ce sujet, on recommande Lee M., *EU environmental Law : Challenges, Change and, Decision-Making*, Hart Publishing, Oxford (2005)

⁹ Convention sur l'évaluation de l'impact sur l'environnement dans un contexte transfrontière (Espoo, 25.II.1991), Art. 2.2., Art. 2.6, Art. 3.1., Art. 4.2

¹⁰ Voir Principe 22 de la Déclaration de Rio, et les Chapitres 24 à 32 de l'Agenda 21 global.

¹¹ Convention des Nations Unies sur la Lutte contre la Désertification, Res. A.AC.241/7 12.IX.1994, (Art.3, Art. 5, Art. 9).

¹² Lignes Directives pour l'accès à l'information sur l'environnement et la participation du public à la prise de décisions en matière d'environnement, Sofia, 23-25.X.1995.

positivation du PP10, car elles sont le document de départ des négociations dont l'objectif est la rédaction d'un instrument contraignant. En Juin 1998, la Convention d'Aarhus est adoptée,¹³ cristallisant le principe et balayant tout doute quant à sa valeur normative.

II. Les dynamiques actuelles

A. Expansion du PP10

5. Le principe est, depuis 1998, dans une période de développement. Cette avancée se traduit de trois manières: en premier lieu par une expansion géographique annoncée et certains parlent déjà de la « globalisation d'Aarhus »: la région asiatique s'est compromise à développer elle aussi des directives pour guider la révision ou l'élaboration de lois afin qu'elles soient compatibles avec Aarhus.¹⁴ Un deuxième aspect de ces progrès est un intérêt généralisé, officiel pour le PP10: partout se créent des réseaux pour l'application du principe de participation publique des groupes de travail et d'études.¹⁵ Peu à peu la participation publique devient l'objet d'une réelle politique publique, promue à la fois par les autorités et par la société civile. Logiquement, porté par ce courant favorable, le PP10 se voit confirmé normativement par son inclusion dans d'autres conventions internationales récentes, comme la Convention Européenne du Paysage¹⁶ ou le Protocole de Kiev sur les évaluations stratégiques.¹⁷ Le Protocole de Kiev insiste particulièrement sur la participation publique et si l'on compare les dispositions de Kiev à celles de la Convention d'Espoo, il s'agit véritablement d'un changement d'approche plutôt que d'un simple toilettage des dispositions d'Espoo: la participation est prévue à tous les stades de la procédure et donne un sens très complet au principe de participation publique.¹⁸ Remarquable aussi le commentaire général n°15 du Comité des Nations Unies sur les Droits économiques, sociaux et culturels concernant le Droit à l'eau qui reconnaît le principe de participation publique dans tous les aspects de la préservation de cette ressources naturelle,¹⁹ ou la Convention africaine

¹³ Convention sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement. Aarhus, 25.VI.1998.

¹⁴ Cette globalisation tarde cependant à se concrétiser, et la clause d'ouverture de la Convention (Art.19.3) n'a à ce jour pas été utilisée. On note cependant les développements en Amérique Latine avec l'adoption, dans le cadre de l'Organisation des Etats Américains de l'*Inter-American Strategy for the Promotion of Public Participatin in Decisionmaking for Sustainable Development* (2000), disponible sur le site de l'OAS, et le projet de l'ASEM (Asia-Europe Meeting) *Draft Document Towards Good Practices for Public Involvement in Environmental Policies*. Cependant, ce premier document n'a pas progressé, et le programme d'initiatives en cours (1997-2006) de l'ASEM ne mentionne pas le sujet.

¹⁵ Visiter par exemple les sites <<http://www.pp10.org/>> ; <<http://www.unece.org/env/pp/>>; <<http://www.participate.org/>> ; < <http://www.rec.org/REC/Projects.html>>; <<http://www.accessinitiative.org/index.htm>> ; < <http://www.iap2.org/index.cfm>> .

¹⁶ Convention Européenne du Paysage, Florence, 20.X. 2000 (art. 5).

¹⁷ UN/ECE Protocole à la convention sur l'évaluation de l'impact sur l'environnement dans un contexte transfrontière, relatif à l'évaluation stratégique environnementale, Kiev, 24.V.2003.

¹⁸ Articles 2, 3.2 (rôle du public général), 3.3 (rôle des associations), 5 (phase de cadrage), 6, 8, 10 (consultations transfrontières), 11.2 (notification de la décision), 12 (phase de suivi).

¹⁹ UN Committee for Economic, Social and Cultural Rights, *Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment n °15 - The Right to Water*, UN Doc. E/C.12/2002/11, 26 November 2002.

sur la conservation de la nature et des ressources naturelles,²⁰ qui adopte une conception procédurale du droit à l'environnement. Autre preuve de l'assise juridique du PP10 : la mise en place du mécanisme de respect des obligations de la Convention d'Aarhus en 2002.²¹ Cette affirmation positive du PP10 se retrouve aussi dans l'ordre juridique communautaire et dans les ordres domestiques. Dans l'Union Européenne, les plus récents développements proviennent de la Directive 2001/42/CE sur l'évaluation stratégique et du « paquet législatif » adopté en 2003 transposant les dispositions d'Aarhus,²² mais encore de la directive 2000/60/CE établissant un cadre pour une politique communautaire dans le domaine de l'Eau qui endosse le principe de participation publique de manière exceptionnelle, exigeant en son article 14 une réelle *planification de la participation*, ce qui représente encore une fois un passage qualitatif pour la mise en œuvre du PP10. Au niveau domestique, mentionnons par exemple l'élévation du PP10 dans le bloc de constitutionnalité français,²³ ou encore la loi espagnole 27/2006 du 18 juillet 2006 concernant les Droits d'information, de participation et d'accès à la justice en matière d'environnement.²⁴

B. Le PP10 et la gouvernance

7. Avant de conclure notre réflexion sur des questions quelque peu plus théoriques, on veut rapidement attirer ici l'attention sur certains liens parfois ambigus et encore incertains que la littérature noue autour des notions de participation publique. Les progrès du PP10 en tant que principe spécifique du droit de l'environnement se mêlent dans l'Union Européenne et dans l'arène mondiale à l'avancée d'un concept encore plus large que celui de la participation : la « gouvernance ». On ne peut nier qu'il existe des liens consubstantiels entre la bonne gouvernance et le principe de participation publique, l'une et l'autre ayant en commun la recherche de la légitimité et de la qualité des décisions, dans un souci d'efficacité et de démocratisation. Ces liens se nouent ainsi clairement autour du concept de « participation », mais encore autour des principes de transparence, d'efficacité, de cohérence, et de responsabilité des pouvoirs publics.²⁵ Ces liens se resserrent d'autant plus dans le domaine de l'environnemental, qui voit le concept de « gouvernance environnementale » envahir le devant de la scène en tant que

²⁰ Convention Africaine sur la Conservation de la Nature et des Ressources Naturelles, Maputo, 11.VII.2003, disponible en anglais sur le site <www.iucn.org/themes/law>.

²¹ Décision I/7, Mécanisme d'examen du respect des dispositions, disponible en ligne à <<http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.8.f.pdf>>.

²² Règlement 1049/2001 du Parlement et du Conseil du 30 mai 2001 relatif à l'accès du public aux documents du Parlement Européen, du Conseil et de la Commission ; Directive 2003/35 du Parlement et du Conseil, du 26 mai 2003 prévoyant la participation du public lors de l'élaboration de certains plans et programmes sur l'environnement, et modifiant en ce qui concerne la participation du public et l'accès à la justice, les Directives 85/3367 et 96/61; Directive 2003/4 du 28 janvier 2003 concernant l'accès du public à l'information en matière d'environnement et abrogeant la Directive 90/313 du Conseil.

²³ Loi constitutionnelle n°2005-205 du 1er mars 2005 relative à la Charte de l'environnement, JO 2/5/05.

²⁴ Ley 27/2006 de 18 de julio, por la que se regulan los derechos de acceso a la información, participación pública y de acceso a la justicia en materia de medio ambiente, BOE 19/7/2006.

²⁵ *Gouvernance Européenne: Un Livre Blanc*, COM (2001) 428, 25/07/2001, p.12; Convention d'Aarhus, supra, (considérants n°8 et 9).

cadre d'élaboration et de contrôle des politiques environnementale;²⁶ on constate aussi une volonté de juridiciser progressivement le principe de bonne gouvernance.

8. En cela, il est plausible que les discours sur la participation et la gouvernance se fassent toujours plus proches, mais il nous paraît clair que la bonne gouvernance ne peut être vue comme une source du PP10, mais que bien au contraire, le PP10 soutient la gouvernance. On a pourtant l'impression, que sous l'effet du rapprochement des deux notions, les documents inversent parfois les rôles. Le mémoire explicatif de la proposition du règlement de la Commission Européenne sur l'application de la Convention d'Aarhus affirme que «*les principes de la Convention d'Arhus ne sont rien d'autre que l'application de la bonne gouvernance au secteur environnemental.*» Aux vues des fortes critiques qui sont faites à l'approche actuelle de la gouvernance dans l'UE en termes d'apport démocratique à la prise de décision,²⁷ le principe de participation publique retient plus que jamais sa valeur.²⁸ La force contraignante des dispositions de la Convention d'Aarhus appliquées au fonctionnement même des institutions communautaires pourrait représenter un facteur similaire à celui que le droit communautaire de l'environnement a représenté pour le droit public national, un moteur de changement qui finit à la longue par modifier les habitudes des bureaucraties, et d'autant plus si l'on tient en compte les possibles synergies qui peuvent se créer avec d'autres conventions.

III. Quelques mots sur la nature du PP10

9. Il y aurait beaucoup à dire sur le PP10, sur son contenu normatif, sur son effectivité ou son efficacité. On laissera pourtant de côté ces aspects pour avancer quelques idées concernant la nature même du principe, sa qualification en tant que norme juridique, aspect qui est très rarement considéré par la doctrine au sujet du PP10. Cette lacune, dans le cadre d'une recherche plus large sur le PP10, méritait d'être prise en considération. Nous avons ainsi choisi de considérer le PP10 à la lumière des réflexions théoriques concernant les *Principes Généraux du Droit* (PGD).²⁹ Ce qui est intéressant à l'heure de mieux comprendre le principe de participation publique, c'est de voir s'il existe une structure interne, propre au PP10, qui nous permettrait de le qualifier, au-delà des différences dans chaque ordre juridique. Le débat théorique autour des PGD offre un cadre intéressant pour nous poser cette question. Cette possibilité nous a paru plausible étant donné que cette catégorie de norme est reconnue par le droit international, et trouve un écho dans la doctrine publiciste et privatiste de nombreux pays.

10. Certains pourraient émettre une objection dès le départ et nier la possibilité de qualifier un principe juridique qui s'applique au domaine de l'environnement en tant que principe général de droit. Nicolas de Sadeleer a récemment avancé que les principes qui

²⁶ M. Heldeweg, "Towards Good Environmental Governance in Europe", *European Environmental Law Review* (2005), pp. 2-24.

²⁷ E.O. Eriksen, 'Technocratic or Democratic Governance', in Joerges, Mény & Weiler, *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monet WP 6/01.

²⁸ Le document de position de l'Union International pour la Conservation de la Nature au regard de la gouvernance et du PP10 formule de manière précise et juste les liens entre les deux concepts : *IUCN and Governance for Sustainable Development*, Position paper for the World Summit on Sustainable Development, 16 May 2002.

²⁹ Il n'est pas lieu ici d'entrer en détail sur le concept des PGD. On renvoie à la bibliographie ci-dessous.

vertèbres du droit de l'environnement sont des principes du droit postmoderne, qui se détachent du concept plus familier de PGD.³⁰ Selon cet auteur, les principes du droit de l'environnement seraient l'archétype même des normes juridiques marquant l'irruption d'une nouvelle culture légale: ils seraient plus volatiles, moins pérennes dans leur essence, en constante évolution; il auraient perdu le caractère de généralité, de systématisme, d'autonomie, qui formaient avant l'essence même des PGD.³¹ Ce nouveau type de principes se distinguerait en premier lieu par le mode par lequel il se voient formulés. Contrastant avec l'opération déductive traditionnellement réalisée par le juge, de Sadeleer constate que les principes du droit de l'environnement résultent essentiellement d'une opération constructive réalisée au niveau international à partir de normes éparpillées dans une multitude de textes de droit.³² Considérant nos réflexions ci-dessus, nous sommes d'accord que ce modèle correspond à la genèse du PP10. Le deuxième critère qui distingue les principes de droit de l'environnement de la catégorie habituelle des PGD dérive des fonctions qu'ils accomplissent dans l'ordre juridique :

- susciter des politiques publiques nouvelles ;
- encadrer l'action de l'administration dans l'exercice des pouvoirs discrétionnaires ;
- être une référence pour l'interprétation judiciaire du droit ; et
- avoir un rôle déterminant dans la pondération des intérêts en jeu dans la société actuelle.

11. Il peut être intéressant de sonder le principe de participation publique à la lumière de ces idées nouvelles, et là encore on reconnaît que le PP10 rentre dans ces canons. Mais ces propositions rendent-elles invalide l'utilisation des contributions théoriques sur les PGD? Nous ne le pensons pas. Les fonctions traditionnellement attribuées aux PGD sont les suivantes:³³

- être une source du droit ;
- avoir une fonction d'information du droit ;
- représenter une valeur guide pour le législateur dans sa tâche d'élaboration des normes ;
- servir dans l'exercice du contrôle de la légalité des normes et le contrôle de la constitutionnalité des lois ; et
- avoir une fonction supplétoire dans l'absence de ou l'ambiguïté des textes applicables à des cas d'espèce.

12. Les fonctions reconnues à ces deux groupes de principes du droit de l'environnement loin de nous paraître antinomiques, semblent simplement s'inscrire dans une évolution naturelle qui démontre la nature dynamique de ces normes qui s'adaptent aux évolutions sociétales. Nous proposons ici d'utiliser la définition offerte par le Prof. Barile :

³⁰ N. De Sadeleer, 'Environmental Principles, Modern and Post-modern Law', in R. Macrory (ed.), *Principles of EC Environmental Law* (Europa Law Publishing, 2004), 225-237.

³¹ *Ib.*, at 227-228.

³² *Ib.*, at 229.

³³ J.-L. Bergel, 'Les Principes Généraux du Droit', in Bergel *Théorie Générale du Droit* (Dalloz, 1985) pp. 102-106.

« Col termine principi o principi generali si indicano quelle norme giuridiche che esprimono in forma sintetica il contenuto prescrittivi (o alcuni elementi del contenuto prescrittivi) di tutto un più ampio complesso di regole – già vigenti, oppure delle quali si prevede o si prescrive l’emanazione.»³⁴

Entre les conceptions jusnaturalistes et celles positivistes qui s’opposent quant aux PGD, il nous semble que trois modes principaux de formation des PGD peuvent être distingués.³⁵ Dans un premier cas de figure, et correspondant à une vision jusnaturaliste, il peut s’agir d’une règle générale de caractère non juridique d’où peuvent être déduites des normes juridiques précises. Il peut aussi s’agir d’une norme que les juges dégagent, constatent à partir d’un climat juridique donné.³⁶ Il s’agit dans ce cas-là d’une œuvre essentiellement prétorienne. Mais il peut aussi se traiter d’une règle établie par un texte en termes assez généraux, destinée à inspirer diverses applications et s’imposant avec une autorité supérieure, ou encore des éléments communs à une pluralité d’ordres juridiques.³⁷ Nous sommes cependant d’accord avec l’affirmation de Sergio Bartole, qui, parlant des différentes méthodes d’accouchement des principes généraux du droit, pense qu’elles consistent dans tous les cas à exiger : “*uno sforzo atto a ridurre a sintetica visione le sparse conoscenze che la separata considerazione dei singoli momenti dell’esperienza giuridica consente.*”³⁸

13. Œuvre prétorienne ou tâche législative, c’est donc principalement la généralité et la fonction des PGD qui caractérise le mieux leur définition et les distingue des simples règles de droit, avec lesquelles il ne faut pas les confondre.³⁹ Il existe entre un principe et une règle juridique « *non seulement une inégalité d’importance mais une différence de nature* ». ⁴⁰ La première de ces différences tient au fait qu’ils sont une source de droit, mais qu’ils informent aussi les autres sources du droit.⁴¹ Jusque-là, le PP10, tel qu’énoncé dans la Déclaration de Rio, rentre dans ces paramètres sans trop de difficultés. On peut considérer que le PP10 a informé l’adoption de législation et de la Convention d’Aarhus, qui, en 1998, a cristallisé une série de droits participatifs, mais qui ne fige pas le PP10 en tant que tel. D’autres droits sont déjà avancés par la doctrine ou demandés par la société civile. Ils pourront éventuellement être positivés dans le futur.

14. Mais s’il est vrai qu’un principe se distingue essentiellement par sa fonction ultime d’être pondéré à la lumière d’autres principes, alors qu’une règle juridique doit toujours être appliquée,⁴² certains doutes peuvent alors surgir. Le juge domestique n’a généralement pas anticipé la formulation du principe, il s’est contenté de défendre et de consolider certains droits qui peuvent à présent être clairement identifiés sous la houlette

³⁴ G. Barile, *I principi fondamentali della comunità statale ed il coordinamento fra sistemi (L’ordine pubblico internazionale)* (CEDAM, 1969), at 24.

³⁵ F. López Menudo, ‘Principios Generales del Procedimiento Administrativo’, in J. Barnes Vázquez, *El Procedimiento Administrativo en el Derecho Comparado* (Civitas, 1994), p. 100.

³⁶ Long, Weil *et al.*, *Les grands arrêts de la jurisprudence administrative* (Dalloz, 1999), pp. 508-513.

³⁷ G. Gaja, ‘Principi Generali del Diritto (Dir. Internaz.)’, *Enciclopedia del Diritto*, vol. XXXV (Giuffrè, 1986), pp. 534-536.

³⁸ S. Bartole, ‘Principi Generali del Diritto (Dir. Cost.)’, in *Enciclopedia del Diritto*, vol. XXXV, (Giuffrè, 1986), p. 495.

³⁹ Lopez Menudo, *supra*, p. 102.

⁴⁰ Bergel, *supra*, p. 97.

⁴¹ E. Merino Blanco, *The Spanish Legal system* (Sweet & Maxwell, 1996), at 43.

⁴² G. Winter, ‘The Legal Nature of Environmental Principles in International, EC and German Law’, in R. Macrory (ed.), *Principles of EC Environmental Law* (Europa Law Publishing, 2004), p. 16.

du principe. Et à présent que le principe existe formellement, peut-on dire que le juge l'utilise pour l'opposer à d'autres principes, environnementaux ou autres ? Il semble au premier abord que la nature procédurale du principe de participation publique le distingue des autres principes du droit de l'environnement sur ce point précis. En effet, le PP10 est une norme complémentaire des principes substantiels, nécessaire à leur efficacité juridique, et à ce titre on voit difficilement comment elle pourrait leur être opposée. Mais on peut éventuellement utiliser le concept que propose Jean Louis Bergel, lorsqu'il parle de principes *directeurs* et de principes *correcteurs*. Directeurs étant ceux dont l'ordre social en dépend, comme le principe d'égalité devant la loi, les libertés fondamentales. Correcteurs sont ceux qui permettent de corriger des solutions légales injustes ou inadaptées, comme par exemple le principe de bonne foi. Toutefois, précise Bergel

« de très nombreux principes sont alternativement des principes directeurs ou des principes correcteurs, selon les situations dans lesquelles ils sont invoqués et les autres principes avec lesquels ils sont confrontés : ils n'ont alors qu'un rôle directeur ou correcteur relatif ».⁴³

On peut penser que le PP10 joue, dans le droit de l'environnement à la fois une fonction directrice, qui doit informer toute la matière, mais il peut aussi jouer un rôle correcteur lorsqu'il est confronté à d'autres principes, environnementaux, ou être lui-même « corrigé » par d'autres principes (imaginons par exemple une situation d'urgence dans laquelle l'administration doit prendre une décision, elle pourrait invoquer le principe de précaution contre le principe de participation publique).

15. Un autre élément de réponse se dégage de l'origine du principe ; lorsqu'il s'agit d'un principe de droit international ou de droit constitutionnel il nécessite de la médiation de la loi pour acquérir un rôle et prendre place dans l'ordre juridique national.⁴⁴ Ceci nous amène à nous ranger à la position de Lopez Menudo pour qui la positivation d'un principe général de droit n'est pas une pathologie et n'ôte rien à sa qualité de principe : l'inscription du principe dans le droit est un moyen normal de s'intégrer dans l'ordre juridique.⁴⁵ L'étude de la genèse du PP10 porte à la conclusion qu'il appartient à la catégorie des principes dégagés et recueillis par le législateur, (dans un premier temps essentiellement le législateur international) se basant sur et synthétisant un ensemble de normes qui existaient déjà précédemment à sa formulation dans le droit national. Cela fait du principe de participation un principe de droit aux sources composites.

Conclusion

14. Le développement durable, ou (comme nous tendrions à le nommer de manière plus réaliste) un "développement moins insoutenable" en tant qu'objectif politique s'impose. Toutefois, à moins de choisir une voie autoritaire, ce développement durable apparaît comme un concept à réinventer continuellement, devant intégrer et équilibrer au mieux la justice économique, sociale et environnementale. La recherche de cet équilibre vital, parce qu'elle doit forcément se faire de manière démocratique, marque en soi un progrès dans l'histoire de la civilisation humaine, une nouvelle étape du *développement* des

⁴³ Bergel, *supra*, p. 105.

⁴⁴ Winter, *supra*, p. 17-18.

⁴⁵ Lopez Menudo, *supra*, pp. 112-113.

sociétés. C'est avec la conscience des risques environnementaux réels, pressants, que les sociétés (non seulement les gouvernements unilatéralement) présentes doivent faire leurs choix de futur. Le PP10 exprime cette nécessité, s'exprime sous forme de droits participatifs en matière d'environnement qui peuvent fortement contribuer à rejoindre le développement durable. Légitimant une participation et une implication accrue du public dans la gestion du bien collectif que représente l'environnement, le PP10 n'est pas une figure figée dans l'espace ou dans le temps. Il peut s'épandre comme rétrécir. Il peut prendre des formes très variables et ne véhicule pas un modèle unique de figures participatives. Il contient à sa fois non seulement un certain idéal, mais encore un réel besoin démocratique. Il est en cela indissociable un instrument indispensable du développement durable.

**GM Regulation in EC law and the Environment:
An Assessment of the Relationship between Science and the Public
in light of the *Upper Austria* Case**

Sofia de Abreu Ferreira¹

The aim of this contribution is to provide a critical analysis of the legitimacy and effectiveness of the law of the European Community (EC) on “Environmental Biotechnology” in light of the *Upper Austria* case-law.

1. Introduction

“Large-scale nuclear, ecological, genetic and chemical hazards break in at least three ways with the established logic of risk. In the first place, they involve global, frequently irreparable damage (...). Second, prior provision of the worst conceivable accident is out of the question (...). Third, the accident loses its (spatio-temporal) limitations, and thus its meaning; it becomes an “event” that is forever beginning (...).”²

This quote by Beck eloquently illustrates some of the problems underpinning the regulation of environmental applications of biotechnology (hereinafter “environmental biotechnology”), and, more concretely, for the purposes of this paper, the regulation of the deliberate release of genetically modified organisms (GMOs)³ into the environment in the European Union (EU).

“Environmental biotechnology” is, thus, a technology for manipulating genetic material of micro-organisms, plants and animals for diverse uses such as, for instance, the improvement of the quality and quantity of crops⁴ by enhancing their resistance to insect pests.

The first problem arising from “environmental biotechnology” is that scientific knowledge supporting it is still contradictory and uncertain insofar as environmental and other risks are concerned. The classical logic of risk, as understanding and predictability, is distorted.

¹ Researcher, European University Institute, Florence, Italy.

² U. Beck, *Ecological Politics in an Age of Risk* (Polity Press, 1995), at p. 109.

³ According to Article 2(2), EC Directive 2001/18, see *infra* footnote 5, “GMO means an organism, with the exception of human beings, in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination.”

⁴ For a praise of the benefits of biotechnology for environmental sustainability by a biotech lobby, see ENDS, Issue 1823, of 17 February 2005.

Secondly, this is a complex technology that may bring huge economic profits but also irreversible damage to the environment. So, who is (or should be) the legitimate authority, in a democratic society, such as the EU, to decide on the future of the “environment” as “common concern of mankind”?⁵ Also, how can we arrive at sustainable (balanced), effective decision in such a contentious area?

Lastly, “environmental biotechnology” is an area of conflict between different interests and values such as aesthetic, economic, social, ethical, religious and, obviously, environmental ones. How is it possible to balance a potential destruction of biodiversity (environmental and aesthetics considerations) with the fight against famine with genetically modified (GM) crops in developing countries (social and economic considerations)?

A practical illustration of these problems may be found in the application of the Deliberate Release Directive⁶ and Member States’ derogations to this Directive aiming at the establishment of “GMO-free zones” in the EU.

2. Directive 2001/18 on the Deliberate Release of GMOs: an Overview

The Regulation of GMOs in the EU is mainly covered by three pieces of legislation: a horizontal Directive – Directive 2001/18 on the deliberate release into the environment of GMOs – and two sector-specific Regulations – Regulation 1829/2003 on GM food and feed⁷ and Regulation 1830/2003 on traceability and labelling of GMOs⁸. As stated above, this paper will focus on the aspect of deliberate release into the environment of GMOs, so it will mainly look at the first of these legal instruments.

Directive 2001/18 (the Directive) entered into force on 17 April 2001 and was to be implemented into national law by 17 October 2002, according to, respectively, Articles 37 and 34.

Article 1 proclaims that the dual objective of this Directive is to protect human health and the *environment* when carrying out a deliberate release into the environment or placing on the market of GMOs. It established two sets of authorization procedures: one applicable to the deliberate release into the environment, the other to the placing on the market of GMOs.

The standard authorisation procedure for a deliberate release is laid down in Article 6. According to Article 6(1), “a person must, before undertaking a deliberate release into the environment, submit a notification to the competent authority of the Member State within whose territory the release is to take place.”

⁵ For an explanation of the “common concern concept”, namely as different from the “common heritage of mankind”, see F. Francioni, “International Law for Biotechnology: Basic Principles”, in F. Francioni *et al.*, *Biotechnology and International Law* (Hart Publishing, 2006), at 15-16.

⁶ Directive 2001/18/EC of the European Parliament and the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (hereinafter, Deliberate Release Directive), in OJ L106/1 of 17.4.2001.

⁷ Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on GM food and feed, in OJ L268/1 of 18.10.2003.

⁸ Regulation (EC) No 1830/2003 of the European Parliament and the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of feed and food products produced from genetically modified organisms and amending Directive 2001/18/EC, in OJ L 268/24 of 18.10.2003.

This notification, at the national level, will include a technical dossier with information on the intended deliberate release together with an environmental risk assessment [Articles 6(2) and 4(2)]. If the national authority considers that the notification complies with the regime of the Directive, it issues a favourable opinion on the release which is then communicated to the Commission, and, through it, to other Member States, in accordance with Article 11. When there are no objections to the release by the other Member States or the Commission, the competent authority will allow for the release to proceed.

Article 23 provides for a “safeguard clause”, which allows a Member State to ban the use of a GMO in its territory on the basis of *new scientific knowledge*. According to Article 23(1, *in fine*) this Member State would have to inform the other Member States and the Commission and provide for reasons, namely by supplying an environmental risk assessment. Article 23(2) sets out a time limit for the Commission to decide on the matter.

Lastly, with regard to “participation” of the public in the decision-making concerning the deliberate release of GMOs, the Directive mainly states, in Article 9, that *Member States* shall *consult* the public and, where appropriate, also groups. Furthermore, it establishes some requirements for this consultation, namely that it should take place within a reasonable time-period so that the consulted parties are given an opportunity to express an opinion. The public should, thus, be informed, in accordance with Articles 9(2) and 25(4), on, *inter alia*, the release of GMOs in their territory and on the supporting environmental risk assessment.

3. The Upper Austria Case⁹

In 2003, Austria notified the EC Commission with a draft law from one of its Provinces (Upper Austria) intending to establish in that area a “GMO-free area of farming” [under Article 95(5)]. The Commission asked for an opinion from the European Food Safety Authority (EFSA) on the probative value of the scientific evidence produced by Austria. EFSA considered that it did not constitute *new scientific evidence* to justify the ban.

The Commission, on the basis of EFSA’s Opinion, adopted a Decision¹⁰ rejecting the request for derogation under Article 95(5) of the EC Treaty (ECT). The Article reads as follows:

“(…) if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment (...) it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.”

The Court of First Instance (CFI) dismissed as irrelevant (one of) the claim(s) made by Austria and the Province of Upper Austria, which was grounded on the precautionary principle. CFI stated that the request for derogation under ECT Article 95(5) was a measure of preventive action within the meaning of ECT Article 174(2) (see §70-72, *Upper Austria* case). It specifically stated that considerations of a general nature, such

⁹ CFI, Joined Cases T-366/03 and T-235/04, *Land Oberösterreich and Republic of Austria v. Commission of the European Communities*, of 5 October 2005, in OJ C 296 of 26.11.2005, at 22.

¹⁰ Decision 2003/653/EC, in OJ L230 of 2 September 2003, at 34.

as “fear” of the presence of GMOs in that province, or the evidence produced related to the ecosystem of that province, were not sufficient to cast a doubt on the merits of the assessment of EFSA and the Commission (see §66 and 67, *Upper Austria* case).

The Court also dismissed the argument that the sub-national authority would be entitled to be heard by the Commission, under ECT Article 95(5), during the decision-making process (see §40, *Upper Austria*). Especially, because the procedure under ECT Article 95(5) was commenced by Austria, thus this Member State and Upper Austria could have submitted all the comments when they requested the derogation.

4. Concluding remarks

The CFI, as the Commission, relied heavily on the lack of new scientific evidence to dismiss Upper Austria’s request for a regional ban. Is this an appropriate approach to the management of such a contentious, complex issue?

The question here is not only whether this regional ban lacks sufficient scientific evidence to support it and, therefore, contravened the requirements put forward in ECT Article 95(5) on derogations to a harmonisation measure. It is also *how* the Commission should interpret the precautionary principle as a tool of risk management and *how* it could interpret the principle of high level of environmental protection.

The EC Treaty does not provide an interpretation of the precautionary principle in its Article 174(2). The Commission proposed, in a Communication on the Precautionary Principle,¹¹ a structured approach to the analysis of risk that entails three elements: risk assessment, risk management and risk communication.¹² There, the Commission claimed that risk management is *an imminent political responsibility* and that *public concerns* deserve a transparent answer¹³.

In this case, a *risk assessment* made by EFSA, a *scientific body*, considered that no *new scientific evidence* had been produced by Upper Austria. Therefore, the “fear of the presence of GMOs” which prompted this Province to draft this ban amounted to a “hypothetical risk” that is not an acceptable reading of the precautionary principle according to the CFI.

This is a reading well adapted to the concept of risk assessment, but not to that of risk management that should consider a procedural dimension to the precautionary principle and to the principle of high level of environmental protection (ECT Articles 2 and 174). By the procedural dimension of these principles, I am referring to the possibility for the Commission, as the competent institution for taking this political decision, to inform and consult further with the Province of Upper Austria as to their concerns.

The CFI ruled that the right to be heard does not apply to ECT Article 95(5) (see §40, *Upper Austria*), since Austria could have submitted all the comments when it requested a derogation under that Article. Still, there is nothing in the wording of ECT Article 95(5) that prevents the Commission from consulting with the authorities in Upper Austria and in Austria when taking its decision.

¹¹ COM (2000)1 of 02.02.2000, available online at < <http://www.ec.europa.eu>> (last visited 15 September 2006).

¹² *Ib.*, at 3.

¹³ *Ib.*, at 4.

It is already doubtful *de iure condendo* whether the Commission, a non-elected, regional institution, is the suitable democratic decision-maker to assess the risk posed by GMOs to the local interests of Upper Austria. Also, the current crisis of trust in both science and the EC itself (“no” votes to the Constitutional Treaty) would be additional reasons for the Commission to promote consultation and openness in this area, by providing a right to be heard to Upper Austria. It would broaden its decisional basis by considering another opinion, from a local authority with a different perspective than that behind the scientific assessment made by EFSA. Namely, it could see the economic reasons behind the ban (promotion of organic farming or, even, the non-production of “Frankenstein food”¹⁴ that seems to be more successful with consumers). Or, its underlying environmental/aesthetic considerations (fear that Upper Austria’s biodiversity/landscape would be lost/ruined by monoculture associated with GM farming).

A procedural dimension in the regulation of “environmental biotechnology” consisting of a right to information and participation in decision-making would be in line with the vectors of openness and consultation that are part of the so-called “good governance”¹⁵ policy of the Commission. It would provide democratic legitimacy to the Commission’s decision, as it would have taken into account the position of Upper Austria and its underlying reasoning (values). It would also probably increase this decision’s effectiveness and sustainability.

Moreover, it would be in accordance with the spirit of the recently agreed amendment – *Article 6bis* (public participation in decisions on the deliberate release and placing on the market of genetically modified organisms)¹⁶ – to the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (hereinafter the Aarhus Convention).¹⁷ This new Article establishes a legally binding public participation solution for the decision-making on the deliberate release and placing on the market of GMOs¹⁸.

The EC acceded to this regional instrument in February 2005.¹⁹ Still, so far it did not approve the proposal for regulation applying the “Aarhus Convention” to the EC institutions and bodies.²⁰ Also, it did not yet ratify the above-mentioned amendment, so it is not bound by it. Once the EC ratifies it, it will be interesting to see whether it would be possible to maintain an approach according to which the region of Upper Austria is not entitled to be heard during the decision-making process.

¹⁴ This is how NGOs imaginatively address GM food.

¹⁵ See *European Governance: a White Paper* (COM (2001) 428 final).

¹⁶ Amendment available online at

<<http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.2.e.pdf>> (last visited on 15.09. 2006).

¹⁷ Available online at <<http://www.unece.org/env/pp/documents/cep43e.pdf>> (last visited on 15.09.2006).

¹⁸ For further details on the “Aarhus Convention” and GMOs, see S. De Abreu Ferreira, “Procedural Environmental Rights and the Regulation of GMOs under the Aarhus Convention”, in EUI Environmental Law Working Group, *Selected Issues in International, EU and Comparative Environmental Law*, EUI Working Paper LAW 2006/1.

¹⁹ Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, in OJ L 124/1, of 17.5.2005.

²⁰ For an overview of the status of the co-decision procedure see <<http://www.ec.europa.eu/prelex>>.

**Sustainability and Sustainable Development:
Theory and Practice**

Algunas Reflexiones en torno a la Aplicación de los Sistemas de Estandarización de la Sostenibilidad¹

Mar Campins Eritja²

El concepto de desarrollo sostenible tiene un carácter multidisciplinar, siendo objeto de análisis desde diversas aproximaciones científicas y metodológicas. Como tal, forma ya parte del derecho internacional moderno³, debido a su amplia y generalizada aceptación por la comunidad internacional,⁴ y algunos autores han visto en él un principio “*définissant la perspective générale dans laquelle les principes déjà établis (...) doivent être resitués.*”⁵ La noción de desarrollo sostenible tiene hoy en día una relevancia innegable como principio de acción estratégico para la comunidad internacional, en la medida en que pretende inspirar la adopción de las normas internacionales y su implementación al nivel político, legal y judicial.

La definición que del mismo ofrece el informe Brundtland⁶ integra las tres dimensiones que lo sustentan: el desarrollo económico, el desarrollo social y el desarrollo ambiental, tres campos que tradicionalmente se habían abordado de manera fragmentada en los foros internacionales y que ahora requieren un tratamiento integral, encontrando su punto en común en la priorización de las necesidades de la sociedad en su conjunto y en la búsqueda de la equidad intergeneracional.

Sin embargo, la noción de desarrollo sostenible no deja de adolecer de cierta ambigüedad cuando se aborda su contenido preciso y las implicaciones que conlleva su aplicación práctica, ya que ésta carece aún de concretos elementos de referencia con la

¹ El presente trabajo recoge parte de las reflexiones resultantes del proyecto de investigación EVG1-CT2000-00031, financiado por el V Programa Marco de Investigación de la Unión Europea (EU) y en el que participaron investigadores del Departamento de Derecho y Economía Internacional de la Universidad de Barcelona, del Institute for Environmental Studies de la University of Amsterdam, y del Centro Interdepartamentale Ricerche sul Diritto delle Comunità Europee de la Università de Bologna.

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³ El concepto de desarrollo sostenible ha sido adoptado de manera explícita por Naciones Unidas (NNUU) en la Conferencia sobre Medio Ambiente y Desarrollo de 1992, y se refleja en diversos de los principios recogidos en la Declaración de Río. Igualmente, se recoge de manera expresa en los dos instrumentos jurídicamente vinculantes adoptados en 1992 en dicha Conferencia, la Convención Marco sobre el Cambio Climático y el Convenio sobre Biodiversidad. También se ha incorporado en el Convenio sobre Desertificación y el Convenio relativo a los cursos de aguas internacionales para fines no navegables, y ha constituido un elemento esencial de la diplomacia internacional desde hace un decenio, por ejemplo, en la Conferencia Mundial sobre Población y Desarrollo celebrada en El Cairo en 1994 o la Cumbre Mundial sobre el Desarrollo Social celebrada en Copenhague en 1995.

⁴ ICJ, 25 septiembre 1997, *Hungry/Slovakia (Case concerning the Gabčíkovo-Nagymaros project)*, en 95

⁵ P.-M Dupuy, “Où en est le droit de l’environnement à la fin du siècle?” *Revue Générale de Droit International Public* (1997) en 873, en 886.

⁶ World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987).

que puedan contrastarse las iniciativas individuales. El nivel de abstracción que subyace en el mismo exige una utilización cautelosa, principalmente, cuando se contraponen las agendas políticas de los países industrializados y de los países en desarrollo.

En el ámbito internacional, la fragmentación y la ausencia de un equilibrio real entre las tres dimensiones mencionadas tienen importantes consecuencias para la coherencia de las políticas de sostenibilidad. El desarrollo sostenible apunta a un equilibrio a largo plazo entre los procesos ambientales, económicos y sociales que afecta a la sociedad en su conjunto, pero con frecuencia no es posible determinar con exactitud lo que este equilibrio ideal supone para un determinado producto, un proceso productivo o un servicio,⁷ y tan sólo es posible identificar algunos de los “ideales” cuya consecución se persigue o los riesgos que se pretende evitar.

Desde este punto de vista, una de las vías para la promoción del desarrollo sostenible la constituye el recurso a los instrumentos que ofrece el mercado, y entre ellos, el del establecimiento de estándares voluntarios que contribuyan a la incorporación de la dimensión ambiental y social en los procesos de adopción de las decisiones que afectan a los operadores económicos. No obstante, hay diversos aspectos que afectan a la correcta implementación práctica del principio del desarrollo sostenible a través de estos estándares: su compatibilidad con el derecho internacional público, en particular con las normas de la Organización Mundial del Comercio (OMC); su compatibilidad con la aplicación de las reglas de la buena gobernanza; y el impacto de su aplicación con respecto de los países en desarrollo.

a) La compatibilidad de los estándares de sostenibilidad con las normas de la OMC

Existe actualmente un número ingente de normas internacionales que abordan los aspectos ambientales y sociales relacionados de un modo u otro con el comercio multilateral. Desde esta perspectiva, es necesario alcanzar el equilibrio entre dos objetivos aparentemente en conflicto: de una parte, permitir a los Estados suficiente autonomía regulatoria para proteger intereses legítimos vinculados con los objetivos de la justicia social y de la preservación y la gestión de los recursos ambientales; de la otra, garantizar que los procedimientos de estandarización y de evaluación de la conformidad de los productos / procesos y de los servicios no devengan obstáculos innecesarios al comercio multilateral.

El nivel de compatibilidad de un estándar determinado con las normas que regulan el comercio multilateral puede medirse a partir de diversas variables: la naturaleza del estándar, su carácter voluntario u obligatorio, y el grado de intervención de las autoridades públicas. Cuando estos estándares solo afectan a las características de productos que pueden considerarse similares y están directamente relacionados con sus procesos y procedimientos de producción (“*product-related production and processing methods*” – PR PPM), tienen un carácter voluntario y se desarrollan en un marco privado, o en su establecimiento no hay intervención de las autoridades públicas, suelen plantear relativamente pocos problemas de compatibilidad respecto a las normas de la

⁷ J. Pezzey, *Sustainable Development Concepts: An Economic Analysis* (The World Bank, World Bank Environment Paper n.2, 1992).

OMC,⁸ siempre que se atengan al principio que prohíbe las discriminaciones arbitrarias o injustificadas entre Estados cuando prevalecen las mismas condiciones al comercio multilateral (“*least trade-distorting measure*”) y sean acordes con el Código de Buenas Prácticas para la preparación, adopción y aplicación de estándares recogido en el anexo tercero del Acuerdo sobre Obstáculos Técnicos al Comercio (Acuerdo TBT).

Uno de los mayores debates, sin embargo, se ha suscitado en torno a los estándares que incorporan los denominados “*non product-related production and processing methods*” (“NPR PPM”). De acuerdo con las normas de la OMC, se permite a los Estados la adopción de medidas nacionales restrictivas cuando el método de producción deja un indicio o un rastro en el producto final; sin embargo, existe un desacuerdo importante respecto a la compatibilidad de las medidas nacionales que restringen la importación de bienes por razón de la utilización de métodos de producción que no dejan rastro alguno en el producto final.

En el contexto de la OMC, pues, la aplicación de estándares de sostenibilidad se ha relacionado con la admisión o no, dentro del ámbito de aplicación del Acuerdo TBT, de estos NPR PPM. En particular, los países en desarrollo sostienen que el Acuerdo TBT solo contempla las medidas técnicas directamente vinculadas con la naturaleza, las propiedades o las cualidades del producto en cuestión, mientras que los procesos o métodos de producción que no afectan al producto como tal no pueden ser traídos al ámbito de aplicación de dicho Acuerdo, por lo que resultan incompatibles con las normas de la OMC. De este modo, para estos países el sistema del comercio multilateral no admite las restricciones comerciales basadas en NPR PPMs, y el recurso a las mismas para impedir o limitar las importaciones procedentes de terceros Estados constituye una aplicación extra-territorial ilegítima de las políticas ambientales y sociales de los Estados de importación, únicamente con fines proteccionistas. Sin embargo, esta interpretación de las normas del Acuerdo TBT olvida la dimensión social y ambiental del proceso de globalización al que hacen referencia otros foros internacionales, la doctrina internacional, algunos de los Estados miembros de la OMC y en particular, su Órgano de Apelación en 1998 en la decisión *Shrimp/Turtle*.⁹

Desde la perspectiva del desarrollo sostenible, es difícil negar que los estándares de sostenibilidad incluyan tanto aquellos estándares relativos a las características de los productos y a los procesos y métodos de producción directamente relacionados con el producto, como aquellos que no lo están. No obstante, mientras que los primeros quedan claramente cubiertos por el Acuerdo TBT bien como regulaciones técnicas,¹⁰ bien en su calidad de estándares voluntarios,¹¹ respecto de los segundos (los NPR PPM) se produce una situación de incertidumbre jurídica en la que, paralelamente a la proliferación de los estándares de sostenibilidad, existe un gran vacío en relación a los requisitos estrictos que dichos estándares deben cumplir. Frente a esta situación, la estrategia de los países industrializados y en particular de la Unión Europea para superar la reticencia de los países en desarrollo ha consistido en valorar la admisibilidad de los estándares de

⁸ X.Fernández Pons-E. Baronccini, “The WTO Context for Sustainability Labelling and Certification”, en M. Campins Eritja (Ed.), *Sustainability Labelling and Certification* (Marcial Pons, 2004), 125, en 142.

⁹ Report of the Appellate Body of the World Trade Organization, 12 octubre 1998, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R.

¹⁰ Acuerdo TBT, Anexo 1, para. 1.

¹¹ *Ib.*, para. 2.

sostenibilidad no en cuanto a su carácter de PR PPM o de NPR PPM, sino respecto a la exigencia de garantizar la adecuada información a los consumidores, uno de los objetivos legítimos de la OMC incorporado a la lista abierta del Artículo 2.2 del Acuerdo TBT a raíz de la decisión *EC – Sardines*.¹²

A este respecto cabe entender que, de no estar cubiertos por el Acuerdo TBT, su eventual justificación también podría examinarse a la luz de los principios generales del *Acuerdo General sobre Aranceles Aduaneros y Comercio – GATT – 1994* (o del *Acuerdo General sobre el Comercio de Servicios – GATS –* cuando se trate de servicios), y en particular en las excepciones que pueden invocar los Estados en virtud de su Artículo XX (b, g).¹³ La jurisprudencia reciente del Órgano de Apelación de la OMC apoya esta tesis al ampliar el campo de aplicación de estas excepciones. Así, cabría acordar la legalidad de los estándares que se basan en NPR PPM conformes a las exigencias de la jurisprudencia de la OMC y con este objeto, a las normas del Acuerdo TBT. En particular, el llamado a la cooperación que se hace en sus Artículos 10 y 12, puede servir como parámetro para su justificación.

b) La compatibilidad de los estándares de sostenibilidad con la aplicación de las reglas de la buena gobernanza

Cada vez son más las iniciativas que conllevan la aplicación de estándares de sostenibilidad. Sin embargo, éstas tienen objetivos diversos, se producen en sectores distintos y sostienen enfoques en ocasiones divergentes, lo que ciertamente dificulta la valoración correcta de la legitimidad y la efectividad de dichos sistemas. En este contexto, es necesario recurrir a algunos criterios con los que la elaboración de dichos estándares pueda ser contrastada.¹⁴

El criterio de la transparencia, directamente relacionado con el derecho de acceso a la información sobre las características del producto, del método de producción o del servicio, debe valorarse cuidadosamente. El acceso a la información sobre los distintos estándares por parte de los productores y los actores interesados de los países en desarrollo (y en particular, en los Países Menos Desarrollados) no siempre se produce en las condiciones óptimas, y con frecuencia la información respecto de los estándares de sostenibilidad requeridos en el país de importación es insuficiente o distorsionada. Ello se debe por lo general a la capacidad limitada de los poderes públicos de estos países para transmitir la información de manera eficaz a los operadores económicos y a la relativa situación de aislamiento de dichos operadores económicos con respecto de las grandes redes de distribución de los productos que exportan.¹⁵

¹² Report of the Appellate Body of the World Trade Organization, 26 septembre 2002, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R.

¹³ X.Fernández Pons – E. Baronccini, “The WTO Context for Sustainability Labelling and Certification”, *op.cit.*, en 142 y 148.

¹⁴ Tales como los que se derivan de los “Principios para el desarrollo de estándares, directrices y recomendaciones en relación con el artículo 2, 5 y el anexo 3 del Acuerdo TBT”, Comité TBT, Doc. G/TBT/9, anexo 4, de 13 de noviembre 2000.

¹⁵ Organization for Economic Cooperation and Development (OECD), *Environmental Requirements and Market Access* (OECD Trade Policy Studies, 2005), en 23.

Vinculado con la transparencia, el criterio de la participación ha de permitir el acceso de los actores interesados a lo largo del proceso de preparación y adopción del estándar, así como en los procesos de certificación y acreditación. Esto debe producirse con un doble objetivo: permitir la toma en consideración de los distintos intereses o valores en juego de manera imparcial, y favorecer su aceptación por el mayor número posible de actores interesados, en aras de un amplio consenso.

No debe olvidarse que, siendo estas iniciativas mayoritariamente de carácter voluntario, tienden a estar diseñadas de acuerdo con los intereses propios de las organizaciones que las promueven, ya se trate de organizaciones no gubernamentales, organizaciones sindicales u organizaciones empresariales. Además, la mayoría de estos sistemas se desarrollan en el seno de organizaciones con sede en los países industrializados, con frecuencia sin contar con la participación efectiva, por diversas razones, de los productores de los países en desarrollo. Ello puede dar lugar a una cierta preeminencia de los intereses de los consumidores de los países industrializados con respecto a las dimensiones sociales o ambientales que supuestamente pretende gestionar el sistema, lo que ha generado una clara reticencia en los países en desarrollo cuando la participación en el diseño de los estándares es cerrada o semi-abierta, o cuando el peso de los intereses de la entidad que lo promueve es excesivo. Un ejemplo claro lo ofrece lo ocurrido con el esquema de sostenibilidad del “*Pan-European Forest Certification Scheme*” (PEFC), un sistema promovido por la industria forestal como respuesta al proceso de adopción del “*Forest Stewardship Council*” (FSC), dominado por varias organizaciones no gubernamentales encabezadas por la *World Wildlife Fund for Nature* (WWF), quienes, a su vez, decidieron no apoyar al primero.¹⁶

Por otro lado, debido a la globalización de los mercados y a la internacionalización de los productos y de los servicios, las iniciativas privadas en materia de estandarización de la sostenibilidad suelen ir por delante o paralelamente a las iniciativas públicas. De hecho, en la mayoría de los sectores en los que se promueven los estándares de sostenibilidad puede observarse un aumento muy significativo de la intervención de los actores privados. Esto plantea el doble interrogante, por un lado, de la legitimidad de dichos estándares en la medida en que tales organizaciones privadas no ostentan, formalmente al menos, ningún tipo de representación política; y por otro lado, de la necesaria interacción entre las iniciativas de carácter privado y las de carácter público, esto es, si las primeras se plantean como iniciativas complementarias o substitutivas de las segundas. En la práctica, de hecho, cada vez son más frecuentes las coaliciones y las alianzas entre actores diversos, privados y públicos, que han venido desarrollando estándares de sostenibilidad con un alcance transfronterizo.

Asimismo, es necesario garantizar la coherencia de los sistemas de estandarización de la sostenibilidad. En este sentido, debe producirse una interacción adecuada entre los estándares acordados en el ámbito internacional por las organizaciones internacionales competentes y los estándares promovidos por los actores privados en orden a evitar contradicciones o lagunas importantes en perjuicio de la credibilidad de estos sistemas. Por ejemplo, los estándares impulsados por el *Marine Stewardship Council* (MSC) han

¹⁶ X. Pons Rafols – V. Sánchez Sánchez, V., “Sustainability Labelling Certification Schemes on Forest Management”, en M. Campins Eritja (Ed.), *Sustainability Labelling and Certification* (Marcial Pons, 2004), 311, en 321.

sido criticados, justamente, por sus discrepancias y la falta de armonización con los principales instrumentos internacionales en materia de pesca.¹⁷

Con frecuencia, no obstante, los actores privados optan por incorporar estándares elaborados en el seno de organizaciones internacionales (por ejemplo, éste es el caso de los estándares en materia de comercio justo, muchos de ellos recogidos en los Convenios de la OIT), o por hacer una mención indirecta a ellos (por ejemplo, al Código de Conducta para una Pesca Responsable adoptado por la Organización para la Agricultura y la Alimentación). También podemos encontrar el fenómeno inverso, esto es, el recurso por parte de las organizaciones internacionales o de los poderes públicos nacionales a los estándares de sostenibilidad adoptados previamente por actores privados. Este es el caso por ejemplo, de la utilización de los estándares de la *Internacional Foundation for Organic Agriculture* (IFOAM) en las directrices desarrolladas por la Comisión del Codex Alimentario, así como por la propia Comisión de la UE en la preparación de las directivas relativas a la agricultura orgánica.¹⁸

Finalmente, la rendición de cuentas, que exige la plena confianza en el proceso de evaluación por parte de los actores interesados y que debe a su vez, ser plenamente aceptada por todos ellos, incluidos los productores, los prestadores de los servicios, y los consumidores. Sin embargo, éste suele ser el “talón de Aquiles” de muchos de estos sistemas de estandarización, principalmente cuando tienen lugar en un entorno privado. No se trata solamente de separar correctamente los procesos de certificación y de acreditación, sino también de garantizar un control suficiente y eficiente del sistema. En la práctica, los sistemas de auto-supervisión, mayoritarios en este ámbito, plantean un reto importante en cuanto a su credibilidad, pero tampoco los sistemas de evaluación externa están exentos de problemas, debidos por lo general, al coste económico de esta actividad.

c) El impacto de la aplicación de los estándares de sostenibilidad con respecto a los países en desarrollo

En determinadas circunstancias, los estándares de sostenibilidad pueden constituir auténticas formas de proteccionismo de los países industrializados que excluyan del mercado a los operadores que no pueden ofrecerlos, por lo general aquellos que operan en economías poco desarrolladas.¹⁹

Como ya se ha comentado, con frecuencia estos estándares dan respuesta a los intereses o, incluso, a la sensibilidad de las sociedades de los países industrializados y no atienden a aquellos aspectos que condicionan la capacidad de los operadores de los países en desarrollo para participar en los mismos. De tal manera que la consolidación de los estándares y su tendencia a globalizarse por efecto de las redes mundiales de distribución puede y *de facto* limita el acceso de los países en desarrollo al mercado

¹⁷ L. Brander, “Capture Fisheries”, en M. Campins Eritja (Ed.), *Sustainability Labelling and Certification*, (Marcial Pons 2004), 267, en 279.

¹⁸ N. Van der Grijp, “Agriculture: The Case of Fruits and Vegetables”, en M. Campins Eritja (Ed.), *Sustainability Labelling and Certification* (Marcial Pons, 2004), 285, en 290.

¹⁹ UNCTAD, “Environmental Requirements and Market Access for Developing Countries”, de 2 abril 2004, Doc.TD/(XI)BP/1.

internacional²⁰, con lo que se impide un correcto equilibrio entre los diferentes objetivos que persigue el desarrollo sostenible.

Sin embargo, y sin perjuicio de que a nivel microeconómico la aplicación de estándares de sostenibilidad pueda suponer para determinado tipo de operadores económicos una auténtica barrera para acceder al mercado internacional, en términos generales el impacto que supone su incorporación en las opciones de acceso al mercado para estos países puede no resultar tan excesiva como parece a simple vista.²¹ En la práctica, de hecho y siendo éste un debate de carácter cualitativo, resulta muy difícil cuantificar con exactitud el impacto de estos estándares en las exportaciones de los países en desarrollo.

Por un lado, el éxito comercial de los productos o servicios que incorporan estándares de sostenibilidad depende, en definitiva, de que la oferta se adecue a la demanda. Es necesario que a los productores les interese suministrar estos productos y que los consumidores estén dispuestos a adquirirlos. La práctica demuestra, no obstante, que la distribución y adquisición de tales productos está estrechamente vinculada a la existencia de niveles altos de renta y de educación y que estas cuotas de mercado, aún en los países industrializados, son relativamente pequeñas. En la medida en que tienen, en la mayoría de los casos, un efecto puramente marginal, su impacto desde el punto de vista de la sostenibilidad es aún muy limitado.

Por otro lado, existen en el sistema del comercio multilateral otros mecanismos que en la práctica obstaculizan en mayor medida si cabe el acceso al mercado internacional de los países en desarrollo. Pese a las reducciones de tarifas arancelarias obtenidas en el marco del GATT en la Ronda Uruguay y a la inclusión de una agenda para el desarrollo en la Declaración Ministerial de Doha, las cuotas a la importación de determinados productos siguen teniendo un efecto determinante en las exportaciones de los países en desarrollo (con aranceles que pueden ir por ejemplo del 14% para los productos agrícolas y el 8% para las manufacturas intensivas en mano de obra hasta el 3% en el caso de los productos industriales). Asimismo, los subsidios que los países industrializados ofrecen a determinados productos nacionales, o la protección de las exportaciones de aquellos productos donde los países en desarrollo tienen una ventaja comparativa diferente, impiden que las exportaciones procedentes de los países en desarrollo sean competitivas en el mercado internacional. También constituye una barrera muy importante la aplicación estricta de las medidas sanitarias y fitosanitarias que se imponen a las exportaciones de los países en desarrollo o la aplicación de barreras arancelarias más altas a los productos procesados, que dificulta la expansión de las bases de producción en actividades de fabricación en los países desarrollados.

A título de conclusión puede señalarse, pues, que el recurso a los estándares de sostenibilidad constituye innegablemente un desarrollo positivo para estimular la implementación práctica del principio del desarrollo sostenible. Sin embargo, debido a que no siempre garantiza la adecuada participación de todos los actores interesados, y a las fricciones que puede producir su aplicación práctica con las reglas del comercio multilateral y con los principios de la buena gobernanza, supone un auténtico reto para

²⁰ OECD, *Environmental Requirements and Market Access* (OECD Trade Policy Studies, 2005), en 43.

²¹ N. Van der Grijp y otros, "A Comparative Analysis of Cross-Cutting Issues", en M. Campins Eritja (Ed.), *Sustainability Labelling and Certification* (Marcial Pons, 2004), 372, en 380 y 382.

la comunidad internacional, que, en un contexto de globalización de las economías, tiene en sus manos articular el debate para definir el marco jurídico de las políticas de sostenibilidad de manera tal que ésta sirva realmente, también, para reducir las tensiones generadas por las asimetrías de todo tipo entre el Norte y el Sur.

**Sustainable use of Antarctic Resources:
Is it Compatible with the Status of Antarctica as a Natural Reserve?**

Patrizia Vigni¹

Preliminary Remarks

The concept of ‘sustainable use’ of biological resources is not easy to define.² Such definition becomes even more difficult with regard the use of Antarctica and its resources due to the peculiarity of this area both for its natural characteristics and legal status. Within the Antarctic Treaty System (ATS),³ the Consultative Parties have adopted the most protective approach as to the possibility of ‘using’ Antarctic living resources. One of the basic principles of the ATS is stated by Article 2 of the 1991 Madrid Protocol on Environmental Protection (hereafter Madrid Protocol),⁴ which affirms that Antarctica is a “natural reserve, devoted to peace and science.” The fundamental aim of States parties is, therefore, to preserve this area against the harmful impacts that can be caused by human activities. The evidence of the protective approach adopted by the ATS is also provided by the fact that the Consultative Parties established some requirements with which anyone must comply before carrying out activities in Antarctica. Among such obligations, one can mention the one imposing the duty to carry out prior environmental impact assessment (EIA) of any activity that is planned in Antarctica.⁵ In addition, Article 3 of the Madrid Protocol adopts the ecosystem approach, which compels those who carry out EIA to take into account the effects of human activities not only on the species that are subject to exploration, but also on the

¹ Researcher of International Law, University of Siena. This paper builds upon a previous publication of the present author. See P. Vigni, ‘Antarctic Bioprospecting: is it Compatible with the Value of Antarctica as a Natural Reserve?’, in F. Francioni- T. Scovazzi, *Biotechnology and International Law* (Hart Publishing 2006) at 111-145.

² ‘Sustainable development’ can be interpreted in different manners in order to underscore either its environmental or commercial nature. The authors that are most environmentally-concerned believe that biodiversity is a quasi-non-renewable resource. Thus, its utilisation must be severely limited. For this view, see Ch. Hunter, ‘Sustainable Bioprospecting: Using Private Contracts and International Legal Principles and Policies to Conserve Raw Medicinal Materials’ 25 *Boston College Environmental Affairs Law Review* (1997), 129-151, at 143. By contrast, most economically-oriented legal writers support the idea that ‘sustainable use’ must be maintained by means of new technologies of that are both environmentally-sound and economically effective.

³ This system originated from the Antarctic Treaty adopted in Washington on 1 December 1959: in 402 *UNTS* 5778.

⁴ Signed in Madrid on 4 October 1991; in *ILM* (1991) at 1455.

⁵ Article 8 of and Annex 1 to the Madrid Protocol.

entire ecosystem to which such species belong.⁶ Finally, the exploitation of Antarctic biological resources is only allowed under the issuing of permits for limited purposes. In fact, Article 3 of Annex II to the Madrid Protocol states that permits for the exploitation of Antarctic flora and fauna can be only issued for scientific studies and educational uses. Thus, at first sight, the ‘sustainable use’ of Antarctic resources, which is permitted by the ATS, only seems to consist in the activities that are aimed at achieving scientific knowledge in the interest of the international community.

Nevertheless, in the last decades, Antarctica has also attracted the attention of those who carry out activities either of commercial character, such as tourism, or leading to the exploitation of Antarctic resources for lucrative purposes, like bioprospecting. In particular, the latter activity is worth of a specific analysis in order to ascertain whether it is compatible with the ‘sustainable use’ of Antarctic resources and how it must be regulated. For this purpose, a definition of bioprospecting is necessary.⁷ In the present writer’s view, the form of bioprospecting that deserves particular attention, especially in relation to Antarctica, affects both environment and economic interests. In fact, on the one hand, bioprospecting is a research activity that involves world’s nature in all its aspects and components. On the other hand, the economic character of bioprospecting is significant in order to distinguish between such activity and other types of scientific research. In fact, bioprospecting can be divided in four phases: discovery, product development, manufacturing, and marketing,⁸ although it is not always easy to distinguish between research activities that have exclusive scientific purposes and bioprospecting because the economic value of scientific data can appear much time later than their actual discovery.⁹

Thus, the uncertainty on the nature of bioprospecting raises doubts on its compatibility with both the concept of ‘sustainable use’ and ATS basic rules. In order to clarify this uncertainty, this paper will, first of all, ascertain what concept of ‘sustainable use’ is most suitable for application to Antarctica. Moreover, we will examine whether bioprospecting activities is consistent with the basic rules of both the ATS and other international regimes. In this manner, it will be possible to understand if an economically-oriented activity, such as bioprospecting, can be considered ‘sustainable’ for the preservation of the integrity and peculiarity of the Antarctic area.

⁶ See the non-paper presented by Chile at the VI Meeting of the Committee on Environmental Protection (CEP), held in Madrid in 2003, ‘Notes on Bioprospecting and Antarctic Research’, Non Paper VI CEP 7, at para. 6.

⁷ Some authors state that bioprospecting is the “search for bioactive compounds in natural sources” in order to stress the fact that this type of research mainly concerns genetic resources (Hunter, *supra* note 2, at note 61). For this reason, bioprospecting is often related to the concept of biodiversity, which entails any research activity that is somehow connected with the environment. Other legal writers emphasise the economic purpose of bioprospecting by defining this activity as “the exploration of biodiversity for commercially valuable genetic and biochemical resources” (L. Glowka, ‘Bioprospecting, Alien Invasive Species, and Hydrothermal Vents: Three Emerging Legal Issues in the Conservation and Sustainable Use of Biodiversity’, 13 *Tulane Environmental Law Journal* (2000), 329-358 at note 2.

⁸ See the paper presented by the United Kingdom and Norway at the XXVI ATCM, held in Madrid in 2003, XXVI ATCM/IP 75 that consists in a scientific work by S. Johnston and D. Lohan, ‘The International Regime for Bioprospecting: Existing Policies and Emerging Issues for Antarctica’, (hereafter IP 75) at para. 19.

⁹ For example, a thermophilic *Bacillus* that was isolated during a scientific expedition in Antarctica in 1980 was sold to a private company and commercially exploited by it. *Ib.*, at para. 14.

Sustainable use of Antarctic Resources

A widely accepted definition of ‘sustainable use’ is provided by Article 2 of the Convention on Biological Diversity (CBD).¹⁰ Since CBD is a global agreement both in terms of geographic scope and participation of States and international organisations, there seem to be no reasons why this convention should not be applied to Antarctica. Nevertheless, such applicability must be ascertained in the light of some substantive requirements of this convention, such as its object and purpose, rather than its theoretically global character.

Since the purpose of CBD is to regulate the use of biological resources, access to resources must be allowed in the areas where this convention is applied. In fact, there is no use without access. We must ask ourselves whether or not Antarctic resources are accessible. The answer to this question is not as easy as it could appear. In the view of States parties to the ATS, living resources of the Antarctic continent can only be exploited for scientific purposes. Although ‘access’ does not exactly correspond to ‘exploitation’, one must point out that access to Antarctic living resources, although limited to carry out scientific research, frequently compels scientists to remove from the original ecosystem, or eliminate, the specimens investigated. In these cases, under the ATS, the access and, thus, the use of biological resources are confined to scientific purposes. In addition, one must ascertain if scientific utilisation can be considered a form of access according to CBD. Article 15(7) of CBD, determining the criteria for benefit-sharing, affirms that the relevant benefits are those “arising from the commercial and other utilization of genetic resources”. Thus, scientific use seems to be one of the ‘other utilizations’ of biological resources that are admitted by CBD. Nevertheless, under Article 15 of CBD, access to resources is evidently based on the principle of territorial sovereignty. This article recognises the power of States that enjoy sovereign rights over resources of regulating access to them. The criterion of territorial sovereignty does not find application in the ATS.¹¹ Thus, the norms of CBD relying on the principle of territorial sovereignty could not be suitable for application to Antarctica. However, some CBD norms also allow their application to the areas that are beyond State jurisdiction. In particular, Article 4(b) of CBD sanctions the application of this convention to “processes and activities, regardless of where their effects occur, carried out under (state) jurisdiction or control, within the area of...national jurisdiction or beyond the limits of national jurisdiction”. In the light of this article, States can exercise their control over their nationals even if they are out of State jurisdiction. Thus, a broad interpretation of the above-mentioned norms of CBD can allow the application of this convention to Antarctica. The concern over the application of the CBD regime to areas beyond national jurisdiction has recently increased. The Subsidiary Body on Scientific, Technical, and Technological Advice (SBSTTA), established by Article 25 of CBD, has suggested creating some protected areas within the high seas whose environment is particularly fragile in order to fix uniform obligations for all States and private

¹⁰ Article 2 defines ‘sustainable use’ as “the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological aspirations of present and future generations”.

¹¹ Although Article IV of Antarctic Treaty (AT) does not exclude the existence of claims to sovereignty over Antarctic territories, ATS norms have never adopted such criterion to attribute jurisdiction over the Antarctic continent.

operators.¹² The same approach could be adopted with respect to Antarctica, recognising its status of 'protected area' under the CBD regime.¹³

In order to determine to what extent the concept of 'sustainable development', as established by CBD, can be applied to Antarctica, one must ascertain if the purposes for which this convention was adopted are suitable for the management of a peculiar area, such as Antarctica. The three main objectives of CBD are the conservation of biodiversity, the 'sustainable use' of biological resources, and the equitable sharing of benefits deriving from the exploitation of these resources. With regard to the objective of conservation, both the regimes of the ATS and CBD seem to establish similar rules. Such regimes allow the utilisation of resources in an environmentally-sound manner. In fact, they acknowledge the power of control of States parties over their nationals and the right to adopt internal legislation implementing the general provisions of these regimes. The only conflict that can arise between the ATS and CBD concerns the extent of the utilisation of resources. On the one hand, the AT and the Madrid Protocol clearly establish a very strict regime that only allows the scientific use of Antarctic organisms. On the other hand, CBD does not prohibit any type of utilisation as long as it is carried out in an environmentally-concerned manner. Despite this apparent inconsistency, so far, no State, either party or non-party to the ATS, has invoked CBD norms in order to legitimise the commercial exploitation of the living resources of the Antarctic continent. In this regard, the possibility of a conflict between the ATS and CBD remains hypothetical.

'Sustainable use' is the second objective of CBD.¹⁴ In recent years, the CBD regime felt the need to specify the concept of 'sustainable use' in a more precise manner than Article 2 does, in particular as to the use of the resources that are outside State jurisdiction. For this purpose, Recommendation XI/8 of the SBSTTA, concerning the 'sustainable use' of genetic resources of the deep seabed,¹⁵ states that such use is ensured as long as it is carried out on the basis of the precautionary approach. For this purpose, the SBSTTA suggested adopting some prior measures that allow a most effective control over resource exploitation, such as environmental impact assessment, the issuing of permits for the use of most fragile resources, and the declaration of protected areas in zones where endangered species are located. Curiously enough, in order to stress the importance of these preventative measures, the SBSTTA made reference to the ATS as a positive example of a treaty regime that adopts these types of instruments to ensure the 'sustainable use' of biological resources.¹⁶

The third objective of CBD is benefit-sharing. Such objective involves the rights of both States and private operators. For this reason, CBD establishes a form of benefit-sharing that is based on the criteria of equity and mutual agreement. While equitable sharing

¹² See VIII Meeting of the Subsidiary Body on Scientific, Technical, and Technological Advice, March 2003, in <<http://www.biodiv.org>>. In the past, the SBSTTA had only highlighted the need to accord special protection to the maritime areas that were under state jurisdiction. For an overview, see Anton, *supra* note 2, at 358.

¹³ For this view, see IP 75, *supra* note 8, at para. 98.

¹⁴ One must observe that 'sustainable use' is not an abstract concept, but it must be achieved through concrete means such as technology transfer. See Glowka, *supra* note 7, at 332.

¹⁵ Recommendation XI/8, 'Marine and coastal biological diversity: conservation and sustainable use of deep seabed genetic resources beyond the limits of national jurisdiction', in <<http://www.biodiv.org/recommendations>>.

¹⁶ See Report of the SBSTTA, UN Doc. UNEP/CBD/SBSTTA/11/11, at paras. 54-56.

expresses “distributive and inter-generational justice”,¹⁷ mutual agreed terms demonstrate the contractual nature of CBD that is still strongly linked to the principle of State sovereignty.¹⁸ In fact, such approach can effectively work only when it is possible to conclude an agreement between the owner of resources (which is usually a State) and the owner of the appropriate technologies for the exploitation (including scientific knowledge and know-how). Thus, mutual benefit agreements cannot deal with problems concerning the benefit-sharing of the resources that are beyond national jurisdiction. In fact, there is no internationally recognised authority that can stand for the owner of resources outside State jurisdiction, such as the biological resources of the high seas and Antarctica. In order to resolve the problems concerning benefit-sharing, the Conference of the Parties to CBD adopted the Bonn Guidelines on the ‘Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization.’¹⁹ In particular, paragraph 22 of the Guidelines highlights the environmental concern of CBD with respect to scientific activities, since it invites States to allow only national programmes that take into account the conservation of biodiversity. Although the Bonn Guidelines are mainly based on the principle of State sovereignty, and, thus, are scarcely suitable for application to Antarctica, some of their provisions could be adapted to the peculiar status of this area. In particular, the system of national monitoring on the compliance with the environmental requirements, established by paragraphs 55-56 of the Bonn Guidelines, is suitable for application to the ATS. In fact, the AT and the other Antarctic instruments use monitoring as the primary form of control over operators. In recent years, the CBD regime has not only considered benefit-sharing as one of its objectives, but also as a means to accomplish ‘sustainable use.’ For example, Principle 13 of the Addis Ababa Principles on the ‘Sustainable Use of Biodiversity’²⁰ recommends that benefits deriving from the exploitation of natural resources must be partially invested to preserve the natural environment to which such resources belong.

In short, the issue of ‘sustainable use’ is dealt with by CBD in a quite complete manner. This convention provides most practical solutions that could be also useful to regulate the ‘sustainable use’ of Antarctic resources, although the majority of such solutions are applicable only to areas that are within national jurisdiction. Certainly, the ATS appears to be most environmentally concerned when it allows resource exploitation for scientific purposes only. However, both the ATS and CBD seem to be based on very similar basic rules that are enforced in different manners due to the different geographic scope to which the two treaty regimes are applicable.

¹⁷ For this expression, see Th. Cottier, ‘The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations in World Trade Law’, 1 *Journal of International Economic Law* (1998), 555-584, at note 23.

¹⁸ The CBD contractual approach can be observed in connection with several issues: Article 15 regulates access to resources requiring mutual agreement between the countries that are ‘donors’ of resources and the public or private prospectors that possess the appropriate technologies and knowledge to exploit and explore such resources; Article 16 establishes that technology transfer must be dealt with in terms of mutual agreement; and, finally, Article 19 promotes the participation of developing States in sharing the benefits deriving from biotechnologies based upon genetic resources.

¹⁹ Annex to Decision VI/24 adopted at the VI Conference of the Parties to CBD in 2002. During the IV Conference of the Parties to CBD, held in Bratislava in 1998, the Parties established a panel of experts on access and benefit sharing, which is now a permanent working group.

²⁰ Adopted in 2003, in <<http://www.biodiv.org/programmes/socio-eco/use/addis-principles>>. The SBSTTA reaffirmed the need to provide means to make the Addis Ababa Principles effective in Recommendation XI/13, in <<http://www.biodiv.org/recommendations>>.

Antarctic Bioprospecting

In order to ascertain whether or not bioprospecting can be considered a form of 'sustainable use' of Antarctic resources, one must examine if this activity is consistent with both ATS norms and other international provisions. Actually, bioprospecting as such is not contemplated by any Antarctic and international rule. However, since the Madrid Protocol is applicable to "all activities in the Antarctic Treaty area", nothing in it leads us to conclude that bioprospecting should not be included. At first glance, bioprospecting does not seem more harmful for the Antarctic environment and resource conservation than other scientific activities. In fact, the first phase of bioprospecting (discovery) that is carried out in the Antarctic area exactly consists in scientific research. Such research must be necessarily carried out in accordance with the same obligations that the ATS establishes vis-à-vis other Antarctic operators, such as the duty to carry out prior EIA and the obligation of exploiting resources in accordance with the ecosystem approach. Thus, the physical impact of bioprospecting activities on Antarctica seems to be effectively controlled through the enforcement of the obligations that are established by existing Antarctic legal instruments.

However, the ATS does not deal with the subsequent phases of bioprospecting that consist in the economic exploitation of the scientific data, which have been collected in Antarctica. Thus, we must, first of all, ascertain if an activity, which is primarily aimed at achieving financial revenues from the exploration of biological resources, can be considered compatible with the basic principles of the ATS.²¹

First of all, one must assess if bioprospecting can be carried out in an area, which is considered a natural reserve such as Antarctica. A clear description of the expression 'natural reserve' is provided by Article 3(1) of the Madrid Protocol. This article intends to promote the performance of those Antarctic activities that are particularly concerned with "(t)he protection of the Antarctic environment...and the intrinsic value of Antarctica, including...its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment". From the wording of this article one can easily gather that a natural reserve, like Antarctica, must be mainly preserved as such and used in the interest of the whole international community, in particular with the purpose of providing knowledge of the global environment. The concept of 'natural reserve' is strictly connected with the type of research that is permitted by ATS norms. Among these norms, one can mention Article II of the AT that establishes freedom of scientific investigation and Article III, which promotes international cooperation; and Article 3(3) of the Madrid Protocol affirms that "(a)ctivities shall be planned...so as to accord priority to scientific research." Moreover, Article 7 of the Protocol prohibits "(a)ny activity related to mineral resources, other than scientific research." Such research does not seem to correspond to bioprospecting since

²¹ Actually, the Consultative Parties have always attempted to avoid the proliferation of commercial activities of exclusive private concern in Antarctica. They had sought to deal with economic issues only once, with regard to Antarctic mineral activities, without any success. In fact, the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) was set aside shortly after its adoption. Signed in Wellington on 2 June 1988; in *ILM* (1988), 868 ff.. For example, Article 7 of the Madrid Protocol has established a strict prohibition on mining within the Antarctic area. One can also mention the recommendation through which AT parties agreed to avoid the collection and, consequently, trade of meteorites, found in the Antarctic continent. See Resolution 3(2001), in Annex C to the Final Report of the XXIV ATCM.

all these provisions intend to attribute a special status to those activities that are carried out to satisfy the scientific interests of the international community rather than the selfish economic profit of States or private operators.

The need to safeguard the global interest in preserving a natural reserve has also affected State legal orders with regard to the management of national parks. In these cases, some national courts considered the bioprospecting activities that had been carried out in national parks lawful on condition that the use of parks' resources was consistent with the purposes for which the parks had been created. For example, an agreement between bioprospectors and the administrative bodies of a park was deemed lawful since such agreement established that the financial return relating to bioprospecting on park's biological resources should be used to improve the conservation of the parks' biodiversity.²² Nevertheless, although this solution provides a good example of 'sustainable use' of resources that deserve special protection, it does not seem suitable for regulating bioprospecting carried out in Antarctica. In fact, there is no administrative authority over Antarctica that can conclude an agreement with bioprospectors in the interest of the conservation of Antarctic ecosystem like in the above-mentioned case. Thus, although the compatibility of bioprospecting with the status of Antarctica as a natural reserve cannot be absolutely excluded, one must admit that the performance of this type of activity in this area must be severely controlled in order to allow the 'sustainable use' of its resources.

Another aspect that makes bioprospecting doubtfully compatible with ATS norms is the recognition of exclusive rights over the scientific results deriving from such activity. Bioprospecting, performed in Antarctica, has permitted the discovery of new organisms or of unique characteristics of already known organisms for survival. But private companies, involved in such discoveries, have immediately applied for patents in order to achieve all property rights, including intellectual property rights (IPRs).²³ Nevertheless, the IPRs deriving from Antarctic bioprospecting are recognised only at State level. With regard to this matter, Antarctic bioprospecting appears to be relevant for both the ATS and CBD regime. The recognition of exclusive rights over Antarctic resources or their components raises several problems. First of all, copyrights relating to

²² See the Edmonds case relating to the lawfulness of an agreement, which was concluded between the management body of Yellowstone Park, the National Park Service, and Diversa Corporation, a biotechnology company, and that concerned the collection of biological tissues for potential financial sharing. The court concluded that the Yellowstone Park could be considered a natural laboratory that, under US law, can be used by private operators provided that such use is consistent with the purposes for which the laboratory was created. For this reason, the agreement between the National Park Service and Diversa was declared to be consistent with the statute establishing the Park. This decision of the court was strongly influenced by the argument of the defendant, according to which the financial return relating to bioprospecting activities of Yellowstone's biological tissues would be used to improve the conservation of the park's biodiversity. For a negative comment to this decision, see M. Wood, 'Are National Park Resources for Sale?: Edmonds Institute v. Babbitt', 21 *Public Land and Resources Law Review* (2000), 201 ff.

²³ In Germany, Henkel applied for patent relating to the green alga *Prasiola* whose extracts can be used for skin treatments. See the paper 'Industry Involvement in Antarctic Bioprospecting', presented by UNEP at the XXVII ATCM, held in Cape Town in June 2004, XXVII ATCM/IP 106 (hereafter UNEP IP), at 21. Unilever applied for patent in the United Kingdom for Plant antifreeze proteins for use in frozen confectionary. These proteins derive from Antarctic plants such as *Nothofagus antarctica*, *Deschampsia antarctica* and *Umbilicaria antarctica*, *ibidem*, at 24. An enzyme deriving from *Candida Antarctica*, a type of yeast, was patented by DSM NV in the Netherlands. This enzyme can help to prepare some pharmaceuticals such as benzothiazepines: *ib.*, at 26.

the scientific results of bioprospecting activities indisputably belong to scientists. By contrast, some problems can arise when the result of such activities consists in the extraction of some components of Antarctic living organisms. In this case, State law requires knowing to whom these organisms and, thus, their components belong in order to establish who has the right to benefit from the selling of such components.²⁴ In particular, one must ascertain whether or not such organisms can be subject to private appropriation. In fact, if Antarctic resources were considered 'global commons' due to the status of natural reserve of Antarctica, the private appropriation of such resources would be excluded and the benefits deriving from bioprospecting on these resources should be shared between all the members of the international community. This view does not seem to be in tune with the conduct of ATS parties. In the few examples of Antarctic commercial bioprospecting that already took place, States granted IPRs and patents to private operators disregarding the interests of Antarctica and the purposes of the ATS. The problem of ownership of Antarctic resources also affects third States with respect to the AT. Since these States are not bound by ATS norms, they might assume that the regulation of Antarctic scientific activities depends on international customary and treaty law relating to the exploration of resources located within areas outside State jurisdiction. With regard to this issue, CBD does not establish any specific rule. Although this convention allows the 'sustainable use' of the resources that are beyond State jurisdiction, recent trends of this treaty regime seem to invite States parties to cooperate in order to ensure that the exploitation of resources is carried out in the interest of the international community as a whole.²⁵

Another problem relating to the ownership of Antarctic organisms and their components concerns those who have the power to grant property rights (or intellectual property rights) over such organisms. International law recognises the power of sovereign States of attributing property rights over things that are under their jurisdiction. In addition, State sovereignty entails the power of control over the access to living resources. The ATS does not provide a definitive answer about who has this power in Antarctica, since Article IV of the AT does not establish any definitive rule on the recognition of sovereign rights over Antarctica. The same cannot be affirmed with regard to third States that consider this area as *res nullius* or, in the strictest view, as part of the common heritage of humankind. Thus, there is no internationally recognized authority that is so far allowed to manage Antarctic resources in the name and interest of the international community.

A further problem affecting the recognition of IPRs over the scientific results deriving from bioprospecting concerns the dissemination of such results to the international community. One of the most important obligations provided for by the AT is the duty to exchange information concerning research activities, carried out by Consultative Parties or by their nationals.²⁶ This obligation clashes with the fact that the results of bioprospecting, having commercial value, need confidentiality in order to preserve such

²⁴ For the view that bioprospecting, carried out in particular areas of the planet, raises issues of sovereignty and property rights see, Cottier, *supra* note 17.

²⁵ Principle 8 of the CBD Addis Ababa Principles.

²⁶ Article III(c) of the AT states: "the Contracting Parties agree that, to the greatest extent feasible and practicable:...scientific observations and results from Antarctica shall be exchanged and made freely available."

value.²⁷ That is why private operators, who have sponsored bioprospecting activities in Antarctica or bought the results of such activities, have taken care of obtaining a patent for the discovery of new organisms or the unique characteristics of biological resources. IPRs or patents allow their owners to disseminate information in return of financial compensation. Nevertheless, Antarctic norms do not establish any compensation in return of exchanged information. Thus, the imposition of such compensation could be considered inconsistent with the language and the spirit of Article III of the AT.²⁸ The same argument is also valid as to CBD. In fact, Article 16 regulating the issue of technology transfer expressly recalls biotechnology, which is strictly linked to bioprospecting. This type of technology does not only include technological equipment, but also scientific information and know-how. As affirmed above, such exchange is based on the criterion of mutual agreement, which does not, however, seem suitable for application to the resources outside State jurisdiction, such as Antarctica. In particular, with regard to the use of the biological resources of the deep seabed, the CBD regime has stressed the importance of the exchange of scientific information and has invited States to take into account the interests of developing countries in the transfer of technology.²⁹ Therefore, CBD itself seems to admit that the use of some resources, such as those which do not belong to any precise State, must be carried out in accordance with the common interest, by allowing free access to the information concerning such resources.

Finally, one of the most problematic issues that have been raised by the recognition of exclusive rights over scientific discoveries deriving from bioprospecting concerns the type of benefits that stem from this activity and the way in which such benefits are shared between all the members of the international community. Benefit-sharing can be based on two different approaches: on the one hand, monetary returns can be shared by all the States parties to the AT and used in the interest of preserving the Antarctic environment. On the other hand, States can recognise the IPRs and the exclusive economic rights of private operators. Although, so far, Consultative Parties have adopted the latter approach, their recent concern for the proliferation of bioprospecting activities in Antarctica makes us believe that the need to preserve the spirit of the ATS will lead, in the future, to reduce any form of commercial exploitation of Antarctica, including bioprospecting.³⁰ Useful suggestions for regulating the sharing of benefit deriving from Antarctic bioprospecting can be provided by the CBD regime.³¹ As an example, Section 2 of Appendix II of Bonn Guidelines provides for non-monetary benefits that can be included in bioprospecting agreements, such as the financing of training of scientists and transfer of technology that, as these guidelines specify, also includes know-how and scientific knowledge. These types of benefits seem to be the appropriate returns of

²⁷ The problem of the incompatibility between Article III of the AT and the need for confidentiality of commercial data has been highlighted by XXV ATCM/WP 43, presented by the UK at the XXV ATCM, held in Warsaw in 2002, at para. 13.

²⁸ This problem has been raised by K. Connolly-Stone, 'Patent, Property Rights, and Benefit Sharing', in A. Hemmings and M. Rogan Finnemore (eds), *Antarctic Bioprospecting* (Getaway Antarctica Special Publication Series, 2005), 69-97.

²⁹ Paragraphs 4 (d) and (i) of Recommendation XI/8 of the SBSTTA.

³⁰ Resolution 7 (2005), adopted at the XXVIII ATCM held in Stockholm in 2005.

³¹ For this view, see IP/75, *supra* note 7, at para. 91.

bioprospecting activities, carried out in an area of common concern such as Antarctica.³²

In short, specific rules are required to deal with both the issue of the access to resources and to establish what public or private entity is entitled to share the benefits deriving from bioprospecting.³³ With regard to the problem of benefit-sharing, one must observe that, although bioprospecting clearly deserves compensation, such compensation does not necessarily have to correspond to the economic advantage of few people. Compensation can include support for scientific projects or institutions, involved in bioprospecting activities. It may also embrace the establishment of a fund, aimed at the conservation of the Antarctic environment.³⁴ Similarly, with regard to the recognition of IPRs, although the legal acknowledgement of the 'paternity' of a discovery is a legitimate expectation of researchers, one must point out that the economic advantage stemming from such acknowledgment cannot be used so as to disregard the interests of Antarctica.

Conclusions

Although the ATS establishes a quite complete and severe regime that regulates the use of living resources, it has been recently facing some new challenges, such as the proliferation of bioprospecting activities. The same problem seems to affect other areas of our planet that are outside of State jurisdiction, such as the deep seabed and its biological resources.

While the physical impact of bioprospecting on the Antarctic environment is controlled by existing ATS norms, one cannot affirm the same with regard to the phases of bioprospecting that entail the commercialisation of the results deriving from the exploration of Antarctic resources. Indeed, there are no specific provisions, within the ATS, dealing with this issue.³⁵

Although bioprospecting, as a form of scientific research, is a lawful activity that cannot be banned within the Antarctic area, its commercial nature seems to conflict with the

³² The usefulness of the application of the CBD regime to the Antarctic area also seems to be suggested by some recent decisions of the Conference of the Parties of this convention. See Decision VII/19 adopted in Kuala Lumpur in 2004, in <<http://www.biodiv.org>>. Such decision expressly establishes that the Working Group on Access and Benefit-Sharing must take into account existing international treaty systems, including the AT, in order to create an international regime regulating the distribution of benefits deriving from the exploitation and exploration of genetic resources. See Paragraph (d)(xxiii) of the Annex to Decision VII/19, 'Terms of Reference for the ad hoc open-ended Working Group on Access and Benefit-Sharing'. In this manner, this decision should strengthen the application of Bonn guidelines in domestic law, regional organisations, and at international level.

³³ For this view, see A. Graham, 'Environmental, Ethical, Equity Issues', in Hemmings and Rogan Finnemore, *supra* note 28, 41-68.

³⁴ For the view that some royalty could be established on market products in order to create an international fund, managed by an international authority and aimed at enhancing the protection of the environment, see Hunter, *supra* note 1, at 173. For the need for different forms of compensation on account of the diverse situation in which bioprospecting is carried out, see J. Potts, 'At Least Give the Natives Glass Beads: An Examination of the Bargain made between Iceland and deCODE Genetics with Implications for Global Bioprospecting', 7 *Virginia Journal of Law and Technology* (2002), 8-47.

³⁵ S. Johnston and D. Lohan, *The International Regime for Bioprospecting: Existing Policies and Emerging Issues for Antarctica* (United Nations University, 2004). The same paper was presented by the United Kingdom at the XXVI ATCM, held in Madrid in 2003, as IP 75, see *supra* note 7.

character of natural reserve of Antarctica, which is recognised by ATS instruments. Moreover, one must recall that scientific research enjoys a privileged status within the ATS that could lead bioprospectors to take advantage of this favourable position with the purpose of satisfying their selfish economic interests. Therefore, even if the performance of bioprospecting is allowed in Antarctica, it must be strongly limited by the provisions of the ATS that promote the exploitation of this area in the interest of the international community as a whole.

Other problems affecting the regulation of bioprospecting arise from the peculiar legal status of Antarctica. This area, like other zones beyond State jurisdiction, is not governed by any internationally recognised authority that can negotiate the terms of access to and benefit-sharing of Antarctic resources with private bioprospectors. As affirmed above, although the recognition of the ‘paternity’ of the discovery is a legitimate expectation of scientists, it is not reasonable to admit that a natural reserve, such as Antarctica, can be used for the exclusive advantage of private operators. An equitable benefit-sharing system is necessary as the CBD regime seeks to achieve. For example, non-monetary benefits can be established in return of the exploitation of biological resources together with economic revenues.

In view of this, some specific provisions appear to be necessary to deal with the commercial aspects of certain activities, such as bioprospecting. Some important suggestions for the creation of the future Antarctic regime on bioprospecting can be inferred from other international regimes like CBD.

The concept of ‘sustainable use’, which must be applied to Antarctica, therefore seems to be more stringent than the one applied to other geographic contexts. ‘Sustainable use’ of Antarctic resources does not only entail the environmentally concerned exploitation of such resources. Such exploitation must be also consistent with the moral destination of Antarctica that the entire international community recognises. Therefore, as long as States parties to the ATS do not adopt specific provisions, bioprospecting and other activities of commercial nature should be minimised in Antarctica. In fact, the absolute freedom of carrying out such activities could seriously undermine the fragile political balance, which the ATS has preserved for forty years and that has allowed managing this unique area of our planet in a peaceful and cooperative manner.

La sostenibilità dal punto di vista di un'associazione ambientalista

Massimo Migani¹

Il mio non rappresenta un contributo scientifico a quest'interessantissimo seminario; vuole essere solo una breve riflessione non tanto sullo "sviluppo sostenibile", ma sull'influenza che l'elaborazione del concetto di sostenibilità ha avuto nell'ambito della riflessione teorica e politica di un'associazione ambientalista come *Legambiente*, una associazione che ha, come propria caratteristica costitutiva, un approccio scientifico ai problemi ambientali e, al tempo stesso, la determinazione a "fare politica", a voler cioè incidere direttamente sui processi di formazione degli indirizzi strategici che il decisore politico è chiamato ad assumere, attraverso azioni di pressione sia di natura "lobbistica" che diffusa e popolare.

Siamo, infatti, assolutamente convinti che il concetto di sviluppo sostenibile, così come si è venuto a definire a partire dagli anni '80 ad oggi, rappresenti sia un approccio sistemico generalmente valido per qualsiasi analisi di natura politica, sia un vero e proprio principio ispiratore di ogni prassi politica. La forza dirompente di questo principio sta, per un verso, nella sua facilità di comprensione, dall'altro nella sua necessitata radicalità applicativa.

Operare concretamente, come opera *Legambiente*, in un contesto locale e temporalmente definito non può mai, neanche per un momento, farci perdere di vista i riferimenti dell'ampio e complesso contesto storico-geografico, oltre che politico, in cui ci muoviamo. E' oramai diventato banale, oggi, affermare che viviamo in un mondo globale. L'affermazione è fuorviante; globali, cioè con validità "erga omnes", sono forse i diritti, la giustizia, l'accesso equo alle risorse? Evidentemente nessuno potrebbe sostenere ciò. Globale, o meglio tendente alla globalizzazione, è solo il mercato, che non mira esclusivamente a pervadere il campo dell'economia con regole autodichiaratesi universali (tentativo – condivisibile o meno – al quale potrebbe essere anche riconosciuta una patente di legittimità), ma mira a pervadere ogni ambito della società: da quello sociale, a quello culturale, a quello ambientale, creando un modello di sviluppo insostenibile e inapplicabile all'intero mondo pena il collasso della biosfera.

Il modello di benessere del Nord non è quindi capace di assicurare equità sociale e giustizia, non può essere assunto come modello di riferimento per uno sviluppo che si possa definire sostenibile. E' a tutti noto, credo, l'esempio della famosa quota 100: il 20% della popolazione consuma l'80% delle risorse. E' forse esportabile e diffondibile un modello simile? Abbiamo una seconda o terza terra davanti a noi per arrivare a quota 200 o 300...??? Ciò significa che gli attuali modelli di consumo, nonostante tutti gli incrementi di efficienza consentiti dalle nuove tecnologie, sono in aperto conflitto con le capacità dell'ecosistema terrestre di sopportare ulteriori impatti ambientali e ulteriori prelievi di risorse dal capitale naturale. Siamo di fronte ad un sistema economico che da

¹ Membro della Segreteria Regionale di *Legambiente* Toscana.

un lato elimina sempre più le barriere fra le Nazioni ma dall'altro, a livello sociale, erige nuove barriere, interne ai paesi "globalizzati."

Il fallimento oramai conclamato delle aspettative sorte a seguito della Conferenza di Rio, ha reso evidente come la divisione Nord-Sud oggi non separi più le Nazioni, ma divida piuttosto ogni singola società: da una parte i "ricchi" globalizzati, dall'altra i "poveri" localizzati; da una parte una minoranza "globalizzata" dall'altra una maggioranza emarginata.... A livello economico la globalizzazione, mentre cerca di travolgere le norme nazionali di regolazione dei mercati, dall'altra crea un nuovo tipo di protezionismo: quello a favore di società multinazionali diventate gli unici soggetti sovrani all'interno dello spazio globale, esenti da ogni legittimazione democratica (il Fondo Monetario Mondiale e l'Organizzazione Mondiale del Commercio sono veri e propri governi ombra di molti paesi).

Questo assetto economico di carattere transnazionale s'incrocia necessariamente con un altro assetto, anch'esso transnazionale: quello ambientale. Tali assetti, però, sono oggi in aperta contraddizione tra loro, in un'inconciliabile finalità di intenti: sfruttamento delle risorse naturali/mantenimento del capitale naturale; crescita economica/accettazione dei limiti naturali; potere delle società multinazionali/sovranità delle comunità sopranazionali (Nazioni Unite, Unione Europea, ...). L'esternalizzazione dei costi, nel tempo e nello spazio, dello sfruttamento intensivo delle risorse naturali, oggi è arrivata al capolinea: i costi stanno ritornando – sempre più velocemente – da dove erano stati espulsi (alluvioni, siccità, migrazioni di massa...) vanificando qualsiasi politica di "tutela ambientale" realizzata a valle dei processi.

Sul concetto di tutela ambientale occorre però fare chiarezza. Da tempo gli ambientalisti sostengono la necessità di una transizione verso una società sostenibile, a basso consumo di risorse. Le motivazioni erano quelle legate per lo più a considerazioni etiche "amore e rispetto per la natura", o di tipo utilitaristico "migliore qualità della vita." Oggi tali motivazioni, di per sé assolutamente legittime e condivisibili, non sono più sufficienti. Oggi la necessità della "tutela ambientale" è resa stringente da ineludibili aspettative di giustizia e di equità: giustizia tra i popoli e tra gli individui, equità nell'accesso alle risorse, garanzie dei diritti fondamentali dell'uomo. Questo significa che l'ambientalismo non può essere un capitolo aggiunto all'agenda politica dei vari governi, ma un elemento che attraversa, integra e, a seconda dei casi, stravolge, con un proprio approccio sistemico, tutti i programmi di governo: locali, nazionali e internazionali. Se così non è, la "politica ambientale" si trasforma in un sistema truffaldino nel quale i produttori possono tranquillamente esternalizzare i costi ambientali che il ciclo produttivo produce, in quanto è lo Stato, con fondi pubblici, che si occupa, ex post, di mitigare queste esternalizzazioni.

Oggi ogni battaglia ambientalista, e quindi di giustizia e di equità, sia infragenerazionale che intergenerazionale, presuppone non tanto e non solo l'innalzamento del tenore di vita dei meno abbienti, ma, prima e soprattutto, il ridimensionamento di quello delle classi più abbienti.

Ciò significa che questa battaglia deve essere prima di tutto combattuta qui, nel Nord, all'interno del nostro modello di vita. E' il Nord che necessita di grandi cambiamenti strutturali tali da consentire redistribuzione di ricchezze, ridefinizione dei modelli di produzione e di consumo. (Come è noto, occorre ridurre di 10 volte il livello attuale dei

consumi nei prossimi 50 anni ... il nostro sistema industriale riduce in fumo, in un anno, tanti combustibili fossili quanto la terra ne ha immagazzinati in un milione di anni...)

Che fare dunque? Due le direzioni sulle quali l'azione politica di Legambiente si è concentrata: da un lato si è battuta per la democratizzazione della "globalizzazione", per globalizzare i diritti, l'accesso alle risorse, la giustizia, per creare organismi internazionali, democraticamente configurati, che arrivino a governare i processi di sviluppo. In questo senso, fin da subito, sia una riforma delle Nazioni Unite, sia un'Europa portavoce di un "nuovo umanesimo", che sappia creare e diffondere strumenti concettuali capaci di responsabilizzare gli uomini e, soprattutto, gli abitanti – e i Governi – del Nord del mondo, con un ruolo fondamentale da giocare.

Dall'altro lato, a livello locale, nelle città, nelle comunità locali, dove si manifestano in maniera evidente e tangibile tutte le contraddizioni oggettive e soggettive del sistema di vita che conduciamo e dove davvero possono concretizzarsi politiche mirate alla sostenibilità, devono prendere forma percorsi partecipativi di "governance" delle città, capaci di avere forza critica, di rompere equilibri consolidati, di innescare processi virtuosi di partecipazione alla definizione di nuovi modelli di sviluppo locale, che abbiano a fondamento l'integrazione delle politiche in un quadro di sostenibilità (Agenda 21 Locale).

Non è dato di avere un agire locale senza un pensare globale, come non può esserci un agire globale che non sia ancorato ad analisi locali. Il noto economista Giacomo Becattini, studioso delle realtà economiche locali, sostiene, con un'affermazione molto efficace, che occorre territorializzare la storia e storicizzare la geografia.

La nascita di un "nuovo umanesimo" non può che affondare le proprie radici in un processo culturale e formativo capace di incidere sugli attuali modelli mentali dominanti e, conseguentemente, sui comportamenti individuali e collettivi. Da questa consapevolezza nasce l'impegno di un'associazione di volontariato come Legambiente, nell'ambito della formazione e dell'educazione ambientale, rivolta sia alle giovani generazioni che all'intera collettività. Dalla partecipazione al sistema nazionale INFEA (Informazione, Formazione, Educazione Ambientale) del Ministero dell'Ambiente, alla realizzazione dei progetti annuali rivolti alle scuole (denominati "Lavori in corso" e "Capaci di futuro: scuole in rete per la società sostenibile"), alla creazione della rete nazionale dei CEA (Centri di Educazione Ambientale), situati per lo più nei parchi e nelle aree protette. D'altra parte, le numerose Agende 21 Locali che, con alterno successo, sono sorte in questi anni anche – e soprattutto – per lo stimolo e l'impegno dell'associazionismo ambientalista, vedono Legambiente partecipare a pieno titolo, da protagonista, a quei processi di "governance" locale che rappresentano, ad oggi, il momento più importante per la costruzione di una prospettiva di sviluppo sostenibile.

La sfida che noi abbiamo davanti è dunque chiara: dobbiamo essere in grado non di vedere il futuro partendo dall'oggi ma vedere – e quindi costruire – l'oggi, partendo dal futuro.

ANNEX :

Programme of the Roundtable and Participants List

12 MAY 2006
ROUND TABLE/JOURNÉE
Reflections on Sustainable Development Law
Teatro, Badia Fiesolana

Morning Session (9.30-13.00)

- *Opening of the session*

Co-chairs: Prof. Francesco Francioni and Prof. Mar Campins

Sustainable Development Law: Framework and Substance

- **(9.30-9.45) Prof. Pierre-Marie Dupuy, EUI**

Le Droit du Développement Durable et le Droit International de l'Environnement

- **(9.45-10.00) Dr. Hanne Birgitte Jensen, EUI**

A Theoretical Framework for Sustainable Development Law

- **(10.00-10.30) Prof. Michel Prieur, Université de Limoges**

Le Développement Durable et le Droit dans les Pays Européens

- **(10.30-10.45) Prof. Avv. Stefano Grassi, Università di Firenze**

Principio di Integrazione e la Promozione dello Sviluppo Sostenibile

- **(10.45-11.15) Discussion**

Sectoral Dimension of Sustainable Development

- **(11.30-11.45) Prof. Massimiliano Montini, Università di Siena**

The Climate Change Regime and Sustainable Development

- **(11.45-12.00) Elisa Morgera, Researcher, EUI**

Corporate Accountability as an Element of Sustainable Development

Programme of the Roundtable and Participants List

- **(12.00-12.15) Laura Zanotti, Jean Monet Fellow, EUI**
Risk Management, Natural Disasters and Sustainable Development: The EU and the UN Approach
- **(12.15-12.30) Patricia Quillacq & Sofia de Abreu, Researchers, EUI**
The procedural dimension of Sustainable Development. Theoretical insights about the “Principle of public participation” and some thoughts about participatory rights in science-driven decision-making
- **(12.30-13.00) Discussion**

Afternoon Session (14.30-17.00)

Co-Chairs: Prof. Pierre-Marie Dupuy and Prof. Michel Prieur

Sustainability and Sustainable Development: Theory and Practice

- **(15.00-15.30) Prof. Mar Campins, Universitat de Barcelona**
Some Key Controversies about Sustainability Standards
- **(14.30-15.00) Prof. Francesco Francioni, EUI**
Can Development be Sustainable? Sustainable Development and Ecosystem Protection in Antarctica
- **(15.30-16.00) Prof. Patrizia Vigni, Università di Siena**
Sustainable use of Antarctic Resources: Is It Compatible with the Status of Antarctica as a Natural Reserve?
- **(16.15-16.45) Massimo Migani, Legambiente Toscana**
La sostenibilità dal punto di vista di un' Associazione
- **(16.45-17.00) Prof. Michel Prieur, Université de Limoges**
L'Expérience Française: le Conseil National sur le Développement Durable
- **(17.15-18.00) Discussion and Concluding Remarks**

Roundtable Participants

Sofia de Abreu Ferreira, IUE
Hanne Birgitte Jensen, IUE
Hélène Boussard, IUE
Bruce Broomhall, Université de Québec
Mar Campins, Universitat de Barcelona
Louise Doris, IUE
Pierre-Marie Dupuy, IUE
Francesco Francioni, IUE
Francesco Grassi, Università di Firenze
Paolo Meranese, Università di Firenze
Massimo Migani, Legambiente Toscana
Massimiliano Montini, Università di Siena
Elisa Morgera, IUE
Emanuela Orlando, IUE
Riccardo Pavoni, Università di Siena
Michel Prieur, Université de Limoges
Patricia Quillacq, IUE
Eva Maria Rubio, Universidad de Murcia
Aphrodite Smagadi, IUE
Patrizia Vigni, Università di Siena
Francesca de Vittor, IUE
Laura Zanotti, IUE
Clara Marsan, IUE