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Towards new models in natural resources protection?

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OUTLINE

TEXT

This paper is the result of research carried out in the context of the project *PRIN2022 PNRR From BEaches to Coasts: towards an Integrated PROtection of COASTS* (BeProCoasts). (Codice del progetto: P2022WCTEW, CUP: F53D23012100001, Finanziato dall’Unione europea—NextGenerationEU).

1. Introduction

1 The contribution questions the relationship between the environment and state property. It investigates the capacity of the environmental interest, a transversal value of constitutional importance,[1] to affect the effectiveness of the protection of natural resources according to the domain model.

2 The research question stems from the realisation that new forms of protection based on assumptions distinct from those of public property are becoming increasingly widespread in Europe and beyond.

3 At the European level, in keeping with the Green Deal perspective,[2] environmental interest is acquiring a growing capacity to shape and direct the definition of economic development. The achievement of

the objectives of climate neutrality, zero land consumption and construction of a circular economic system require the use of techniques and instruments useful for achieving the ecological transition and reducing both the appropriation of natural resources, both their use for entrepreneurial purposes when unsustainable.

4 This perspective was most recently taken up in Regulation (EU) 2024/1991, the so-called *Nature Restoration Law*, [3] which aims to implement the European Biodiversity Strategy. [4] This act imposes ambitious objectives on members States to restore the quality of terrestrial, coastal and freshwater ecosystems and habitats and defines related planning and action obligations. Achieving the goals set out in the *Nature Restoration Law* will entail the adoption of repair measures that will also affect agricultural and forest ecosystems. These measures will therefore touch the economic activities carried out in the affected areas.

5 Consequently, members States will have to redefine new balances in the use of their *res naturalis*. However, in systems where the legal regime of natural resources is defined according to the domain model, the resources are qualified as public goods: the implementation of European law will therefore affect the fullness of the regime of public property, which presupposes the full availability of the goods by the owner-State.

6 At the international level, the push towards the introduction of new models of natural resource protection appears, if possible, even more evident.

7 At the heart of the debate is the assertion of a "new ecocentric legal paradigm" [5] that is promoting the possibility of a different foundation for the function of protecting natural resources. In the domain model, this foundation has an "objective" character and is based on anthropocentric legal rules. In the new model, it assumes a "subjective" character and find his justification in the existence of nature and of its individual components ("ecosystem matrices", according to European law).

8 Representative of this perspective is the theory of *Earth jurisprudence*, which integrates elements of legal philosophy with principles and tools of environmental law. This theory proposes

to reconstruct the relationship between humans and Earth according to a "*holistic, integral, or systemic approach because it views human governance systems within the context of natural systems of order*". [6] The aim of *Earth jurisprudence* is to question the anthropocentric view of the relationship between men and "nature" and to reorient it towards an ecocentric perspective. It thus aims to disseminate the use of legal techniques for the protection of natural resources that can foster a balance between the assertion of human rights and the responsibility of the community to maintain the integrity of the Earth-ecosystem. [7]

9 The trends mentioned, at European and international level, have two elements in common.

10 Firstly, they propose forms of natural resource protection that are distinct from the domain model. Then it arises the problem of understanding the relationship between public property and the new forms of natural resource protection. Do the two models operate without mutual contamination? Or does a modification or integration of the typical features of the domain model is necessary?

11 Secondly, although from different points of view, the cited cases refer to the protection of "nature" as a set of natural resources. From the legal perspective, this shows a connection with the notion of "ecosystem" contained in the cited Regulation (EU) 2024/1991, which refers to a "*dynamic complex of plant, animal, fungi and microorganism communities and their non-living environment, interacting as a functional unit, and includes habitat types, habitats of species and species populations*". [8]

12 But if this is the case, then the objective sphere of reference of the protection function is different in public property and in the *Earth jurisprudence*. The powers of protection that can be exercised according to the domain regime are, in fact, referred to individual natural resources (e.g., the order to demolish an unauthorised building in a protected natural area) or to categories of natural resources (e.g., Forest Law). The different basis of protection could therefore correspond to a greater or lesser effectiveness of the administrative power exercised in the two models. This is a second question to which attention must be paid.

13 In this context, the underlying question of this contribution is whether "nature" can represent a paradigm capable of fostering the establishment of a new model of ecosystem protection. A model additional to the domain model and capable of guaranteeing greater effectiveness of public policies for environmental protection.

14 Based on these premises, the paper will be developed as follows.

15 First, some cases of domain intervention in natural resources will be considered. These show how the power to dispose of the resources, if exercised according to the domain model, does not guarantee their protection. At the opposite, instead appears conditioned by the political orientation of the context of reference.

16 Secondly, the analysis of the cases will be used to demonstrate that the "reinforced" qualification of environmental interest, expanding the territorial scope of protection from individual *res naturalis* to ecosystems, shows the inadequacy of the domain model. The protection offered by public property is, in fact, based on the close connection between State sovereignty and natural public goods. But the protection of an ecosystem can affect sets of environmental matrices located on more than one State. This takes on transnational and global value.

17 The analysis will then turn to the examination of some cases emerged in the context of *Earth jurisprudence*. The choose to focus on this profile and not also on *Nature Restoration Law* is based on two reasons.

18 First, at the time of writing, *Earth jurisprudence* has a sufficient degree of diffusion in different areas of the globe, makes use of established jurisprudential guidelines and is supported by a rich theoretical analysis formulated by legal doctrine. Regulation (EU) 2024/1991 is, however, still in the implementation phase: the expected effects it will produce can only be investigated in the coming years. In addition, the selected cases concern the different instruments that *Earth jurisprudence* uses to ensure the protection of nature and its components. Show, at the same time, the different protection techniques (judicial and extrajudicial) employed.

19 Finally, some preliminary conclusions will be developed and possible prospects for further and subsequent in-depth studies on the subject

will be outlined.

2. Cases, problems, trends

20 Towards the end of the 1960s, *The Walt Disney Company* presented plans to build a large ski complex in the *Mineral King Valley*, a mountainous area in the *Sierra Nevada*. The facility would have led to the construction of numerous new infrastructures and an impetuous tourist development of the natural area. The *Sierra Club*, an environmental association with long-standing roots in the area and very active in its conservation, appealed against the deeds of approval for the project issued by the *U.S. Forest Service*. In the first instance, the courts held that the *Sierra Club* had standing to appeal, even though it was not immediately provable that it would suffer direct harm from the construction of the plant and granted the request for an injunction to suspend the construction work. On appeal, however, a contrary view was upheld, which led to the resumption of construction work on the complex. In 1971, the *Sierra Club* appealed to the U.S. *Supreme Court*, which upheld the rejection of the application and confirmed by a majority vote that the plaintiffs lacked standing. Despite the unfavourable outcome for the association, Justice *Douglas*' dissenting opinion gave the *Sierra Club vs. Morton case* considerable media resonance across the country. *Douglas* had, in fact, based his favourable ruling on the idea of being able to recognise the legal personality of the natural area affected by the transformation and thus allow it an autonomous and additional legal standing in court in addition to that of the *Sierra Club*. [9] The debate that arose convinced *The Walt Disney Company* to abandon the project so as not to suffer reputational damage. Moreover, in 1978, thanks to the *Sierra Club*'s insistence, the entire *Mineral King Valley* area was included within the *Sequoia National Park* and subjected to a special environmental and landscape protection regime. [10]

21 In the *Sierra Club vs. Morton case*, the issue of the legal representation of nature and its elements emerges for the first time in an environmental judgement. This profile will be returned to later.

22 However, the case is relevant because it highlights the ability of natural resources to take the form of a centre of conflicting interests. In this context, a fundamental role is reserved for administrative law,

responsible for enforcing the laws and ensuring the balance of the relationship between natural resources and individual and collective prerogatives.

23 Over the last thirty years, this relationship has become increasingly important due to the progressive depletion of ecosystem matrices caused by climate change and the increase in world population. [11] The affirmation of environmental interest has favoured the introduction of an increasing number of rules and administrative instruments. They are aimed at favouring the sustainable exploitation of natural resources or their preservation through the exclusion of appropriation activities. These policies have not, however, been sufficient to limit the occurrence of dysfunctions, the ineffectiveness of legal rules and, consequently, the failure to achieve a balance between the interests to which the rules tend.

24 Further examples confirm this thesis.

25 In the Chilean region of *Valparaiso*, the overuse of groundwater due to intensive avocado monoculture has drastically reduced the availability of potable water, contributing to drought levels in the area. In 2019, the Chilean government qualified the area as a "*zona de catastrophe hidrica*". As of 2020, measures have been taken to quota the resource for human consumption and domestic use and a tanker transport service for drinking water has been started. This is charged to public expenditure. In a report of the same year, the *working group* of independent experts appointed by the UN *Office of the High Commissioner for Human Rights* (*OHCHR*), under the leadership of the *Special Rapporteur on the human rights to safe drinking water and sanitation*, stated that economic development projects based on the further increase of avocado cultivation would foster violations of the right of access to water and other related rights. [12]

26 In 2017, the board of management of *Uluru-Kata Tjuta National Park*, located in *Australia's Northern Territory*, unanimously passed a resolution banning all forms of climbing on the Australian mountain, considered sacred by the Aboriginal people. It also ruled that this activity qualified as a violation of the *Environmental Protection and Biodiversity Conservation Act 1999* (*EPBC*) [13] and the *Environmental Protection and Biodiversity Conservation Act Regulation 2000* (*EPBC Regulation*). [14] It therefore provided for

appropriate sanctions. The decision prompted the resumption of a heated debate in the country between the Aboriginal people, "owners" of the headland and supporters of the need for its spiritual and environmental protection, and the tourism companies, for whom the climb was an important element in offering *loisirs* services. [15]

27 Since 2018, following a change of direction in the Brazilian government's environmental policies, deforestation has experienced a renewed rate of growth. The conflict between environmental associations, agricultural business groups and government institutions has been reignited. Data collected within the PRODES project (which uses satellite images to track deforestation in the Amazon area) show that 2021 is the year with the largest deforested area in the last decade. [16] The increase in deforestation was favoured by amendments to *lei no. 12651 de 25 maio 2012*: the measure revoked *lei no. 4771 de 15 setembro 1965* (the so-called *Codigo florestal*), introducing an amnesty for penalties related to areas illegally deforested before 2008 and reduce penalties for deforestation on small land parcels. [17]

28 The reported cases highlight how a profound change is underway in the relationship between administrative law and natural resources.

29 For the whole of the last century, this relationship was based on appropriation for the purposes of economic development, also helped by the abundance of resources. The domain model has contributed to this disproportion: the choices of use of natural public goods, left to the discretion of the owner administration, have favoured economic valorisation instead of their protection.

30 Since the mid-1950s, first at the international level and then at the national level, it has been recognised that increase in world population, excess consumption activity and climate change have caused a rapid decrease in the availability of *res naturalis*. The lack of available resources encouraged an increase in conflicts between States, territorial administrations, citizens and economic operators.

31 Reversing the effects of appropriation policies quickly is, moreover, not possible: unlike artificial goods, natural goods tend to be irreproducible or they are partially reproducible but at a very high cost and over a long period of time. [18]

32 In this context, the integration of environmental concerns into natural resource protection policies can offer a different perspective of investigation.

33 First, the application of the principle of sustainable development, accepted in international treaties and in European law, requires States to adopt rules that don't hinder the generative capacity of natural resources. This perspective emerges, as mentioned, in the Constitutions, in European and national legislation and, as will be seen, is accepted by case law.

34 As a result of this approach, States adopted legal rules aimed at protecting natural public goods that contribute to constructing a legal regime parallel to the public property regime.

35 The way in which they intervene is twofold. On the one hand, they aim at a "conservative" protection, providing for useful instruments to preserve the original condition of the natural heritage (the "good state" referred to in *Nature Restoration Law*). One example is the regime of protected natural areas. On the other hand, they offer "active protection" by reducing or prohibiting uses that lead to irreversible changes in natural resources. Examples are the limits imposed on deforestation or atmospheric pollutions. [19]

36 As anticipated, the relationship between the two categories of rules is unclear and should be investigated.

37 In public property, *res naturalis* are qualified as public goods. They are protected by different instruments from those applicable to private property. These resources are *res extra commercio*, may be subject to State police powers and restrictions may be placed on their use because the administration to which they belong disposes of them as owner. Decisions on the permissible use also lie with the owner administration which, at least in most European countries, is the State.

38 The elements of inalienability and of the limits on access to natural resources are common to public property and the public trust. This is a legal model particularly widespread in countries that have embraced principles and institutions typical of common law where public property is a marginal category compared to private property. [20] At the basis of the public trust model is the idea

that public administrations must safeguard the natural resources of which they are "custodians" (as *trustees*) by guaranteeing their care and conservation. So, it is possible to enjoy them not only in the present but also in the future. The powers of protection are, therefore, justified in the benefit that these resources bring to the community. Consequently, if the administration goes along with the exploitation of *res naturalis* rather than their protection, any citizen is legitimised to take legal action to defend the community's rights of access and use. [21]

39 Despite their common elements, public domain and public trusts are not overlapping models: they have ontologically different foundations and generate different legal effects. [22]

40 For our purposes, the most important distinction is the correlation between the protection of natural resources and the protection of future generations. This link is not evident in the domain model where protection powers are activated in response to current events (in the form of administrative police powers) or following the acknowledgement of environmental damage (conservation measures).

41 This is a perspective present not only, as mentioned, in public trusts. It also emerging in climate litigation. [23] Once again, in this case the protection of natural resources is not based on property but on a functional criterion. Specially, the legitimacy of protection is based on the capacity of environmental matrices to guarantee the realisation of fundamental rights. In climate litigation, the effects of judicial protection are broadened. In addition to claims for compensation or restoration of damaged natural elements, performance complaints are made against States to adopt rules to limit the environmental damage. [24]

42 The "subjective" perspective accepted in climate cases thanks to the reference to future generations makes it possible to broaden the categories of possible claimants. Traditionally, in fact, in European systems protection for environmental damage is allowed for injured parties and environmental protection associations. In climate litigation representatives of "future generations" can bring claims even if they are not immediately injured by the facts. [25] Thus, the guarantee of rights is assessed by the courts not only with respect to the current damage but to its possible future projection.

43 The public trust and the protection of intergenerational rights accepted in climate cases show the presence of alternative models of protection of ecosystem matrices to public property. They also confirm the perspective indicated by *Nature Restoration Law*, although from different starting points. In both cases, the paradigm of reference changes: the protection of natural resources is not legitimised by public ownership, but protection depends on the ability of resources to satisfy the rights of present and future citizens.

44 The indicated perspective is also present, as will be seen, in *Earth jurisprudence* where the "subjective" inversion takes on an even more marked connotation through the "anthropomorphisation" of natural resources.

3. Natural resources as *res* of planetary interest

45 The cases described relate to very different natural resources. But they have one thing in common. They are hypotheses in which the changes induced by climate change and human activities assume a "global" relevance. Their effects, while occurring immediately within the owner-State of *res naturalis* concerned, generate consequences that impact beyond national borders. Often, we are dealing with natural resources with transboundary physical extension where any change directly affects several legal systems.

46 The case of large rivers is representative.

47 River basins that cross at least two States fall into this category. Globally, it is estimated that 261 rivers have this characteristic, affecting about 145 States on each continent, with Europe coming first, followed by Africa. [26] The incidental effects on the planet's freshwater reserves are therefore, for the most part, of transnational significance. The emergence of conflicts is frequent.

48 One example is the dispute that affected the Rio Grande in the late 19th century. The course of this river runs between the United States and Mexico, passing, for a long stretch, over land dedicated to agriculture. To increase their water supply, a group of farmers living on the banks on the American side altered the natural course of the

river basin. This resulted in a considerable decrease in the water quota available for the Mexican territory downstream of the diversion. In 1895, the then Attorney General of the United States, Judson Harmon, adopted an opinion in which he considered the intervention to modify the riverbed to be legitimate due to the principle of absolute sovereignty of states over their territory and the natural resources located therein. Considering this criterion, Attorney Harmon also considered actions capable of restricting (when not inhibiting) the use of the shared natural resource by neighbouring States to be justifiable. [27] Within this framework, the United States and Mexico nevertheless agreed in 1906 to adopt a bilateral convention, still in force, aimed at ensuring the equitable distribution of water for the portion of the river. [28]

49 Two considerations can be drawn from the Rio Grande case.

50 The first is the shift from the idea of absolute State sovereignty over natural resources to the orientation that States, by intervening in them, cannot cause environmental damage to territories beyond their borders.

51 In the European context, this principle translates into the balancing act between the autonomy left to member States to determine the ownership regime of their property and the obligation to respect the principles of environmental law. At the international level, the same principle was first accepted by the 1972 *Declaration of the United Nations Conference on the Human Environment*. After found legitimacy with the adoption, in 1992, of the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (the *so-called UNECE Water Convention*) [29] and, in 1997, of the *Convention on the Law of the Non-navigational Uses of* International Watercourses (*the so-called UN Watercourses Convention*), according to which the use of international watercourses for non-navigational purposes must be carried out in a cooperative, fair and reasonable manner. [30]

52 The second consideration is that at a time when climate change has made evident the reduction in the availability of water resources or has abruptly caused their “forced” redistribution, favouring greater drought in some areas and increased flooding in others, the control

of water has generated the emergence of "wars" between States with much greater frequency than previously. [31]

53 The resolution of conflicts over the management of large rivers has made it essential to strengthen cooperation between the States involved. [32] At the same time, has led to an increase in supranational acts aimed at regulating the governance of "shared" rivers and regulating the instruments and models of public intervention in transboundary river basins based on the principles mentioned above. This process is challenging the role of national disciplines for river management as states sharing transnational natural resources tend to create "*communities of interest in which the rigidity of national boundaries is diminished (or at least attenuated)*" and which take on a "regional" significance. [33]

54 The trend discussed does not only affect river basins.

55 In international law there are, in fact, acts aimed at the protection of entire ecosystems.

56 For example, the *Antarctic Treaty*, signed in Washington on 1 December 1959, [34] while others are dedicated to the protection of forests, such as the *Non Legally Binding Instrument* on *all Types of Forest* (c. d. Forest Instrument), adopted by the UN General Assembly in 2007, the United Nations Strategic Plan for Forests 2017-2030, adopted by the UN General Assembly in 2007, [35] the *United Nations Strategic Plan for Forests 2017-2030* [36] or, at European level, the Communication COM(2021) 572 final *New EU Forest Strategy 2030*. [37] There is also the *Agreement under the United Nations Convention on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction* (the so-called *Law of the Sea*), signed on 19 June 2023 by the United Nations General Assembly and to which the European Union acceded on 24 April 2024. [38] At a general level, there is the UNESCO World Heritage Site. [39]

57 The "planetary" dimension recognised by international law (but also, although to a lesser extent, by European law) to natural resources makes it necessary to pay attention to the contaminations between multilevel regulations as well as to the ways in which, even in the absence of specific binding positive regulations, *soft law* acts

influence national rights. The integration of protection's rules in the described way entails the establishment of relations not always linear between the subjects involved. The relational systems take on a reticular character and the traditional paradigms of interaction between administrations and between administrations and private individuals decline in favour of flexible and dynamic modules. Institutions with different structures and powers interact with each other and with civil society within a structure of legal systems in which the "bipolar paradigm" leaves room. This is substituted by a dimension in which the positions of subjects are not prejudiced a priori and where relations are not defined in a stable manner. [40] In other words, institutional relations are no longer rigidly defined by territorial boundaries but are articulated according to the physical development of the shared *res naturalis*.

58 The recognition of the transnational value of natural resources also encourages a second reflection. Is it possible to hypothesise the existence of a set of assets "*so important for the future of mankind that their protection and valorisation cannot be left to individual states, while the application of a regime that is as uniform as possible worldwide*" is considered indispensable? [41]

59 The debate on the "common heritage of mankind" [42] brings with it the issue of the legal regime possibly recognisable to the assets in question. If the idea of the existence of a "planetary" public property were to be accepted, however, there would be a risk to conclude that the principle of absolute State sovereignty over natural resources would be dissolved. From the perspective of national law, it would also be necessary to ask whether, like the emergence of the environmental interest, the gradual consolidation of transnational forms of protection of natural resources can undermine the unity of the protection model offered by domain regime.

4. The Earth jurisprudence

60 Recognition of the global value of natural resources has its highest value in *Earth jurisprudence*. This model of protection makes use of three legal instruments.

61 The first is the recognition of rights to "Nature" (also called "Mother Earth" by *Earth jurisprudence* theorists) to allow for the equality of all "ecological beings", animate and inanimate. Through this process, all the categories mentioned would be imputed with fundamental human-like prerogatives that, as such, could not be violated without adequate justification.

62 The second instrument is the recognition of legal personality to individual "ecological beings". Thus, they become legal subjects with rights and duties and are endowed with the legitimacy to prosecute in their own name to protect themselves against disproportionated human actions.

63 The third is the imputation of human-like rights to an "ecological being", thus endowed with inalienable prerogatives. One thinks, for example, of the right to exist and to have a suitable habitat for the development of its existence. This mechanism may or may not be used in conjunction with the recognition of legal personality. [43]

64 The doctrine of *Earth jurisprudence*, which has so far found application mostly in non-European legal systems, [44] is spreading rapidly as demonstrated by the cases collected in the database of the *Harmony with Nature* project promoted by the United Nations. [45] The programme is developing in the wake of the resolutions adopted, starting in 2009, by the General Assembly. At this moment, member States expressed the common need to find new forms of balance between economic, social and environmental needs to safeguard present and future generations. On this basis, the action of the United Nations intends to promote the reconstruction of the relationship between man and "nature" in non-anthropocentric terms. [46]

65 The cases that are examined below show what effects the different instruments have on the effectiveness of protection and what critical elements emerge.

4.1 The recognition of rights to "nature"

66 In Ecuador, a heated debate on 'environmental constitutionalism' has been ongoing for some time, leading this country to adopt an important constitutional amendment. [47]

67 The Ecuadorian Constitution was approved in 2008, in the historical and social context established after the collapse of the dictatorial regime, one of the characteristics of which was the desire to strengthen the welfare state. Articles 71 and 72 of this Charter, included in the *Capítulo séptimo* rubricated *Derechos de la naturaleza*, recognise "nature" ("Pacha Mama", in the Quito language) a veritable catalogue of rights, first and foremost respect for its existence, its life cycles and its evolutionary processes. Furthermore, "nature" is endowed with a general "*derecho a la restauración*": this is the right to the restoration of its original conditions when altered by natural or anthropic events. The guarantee of the "*derecho a la restauración*" is independent of any obligations of compensation provided for by the rules adopted to compensate others damage to natural systems. [48] The guarantee of natural rights can be activated from the public authority by any individual or by a community. [49] The effectiveness of the right to *restauración*, on the other hand, requires an intervention by the State. It is responsible for adopting the necessary instruments to prevent the occurrence of events likely to have a serious or permanent environmental impact, among which are the anthropic actions of exploitation of non-renewable natural resources. [50]

68 The cited constitutional principles have been applied by the Ecuadorian *Corte Constitucional*.

69 One of the most significant cases submitted to this court concerns a protective action brought by two foreign nationals to protect the *Vilcabamba* River from the improper accumulation of excavated material from the construction of a new road. The deposit had the effect of increasing the river's flow rate and caused extensive flooding and damage on the applicants' land. The appeal sought to have the town planning project approved by the Provincial Government of *Laja* declared illegitimate under Article 71 of the Constitution because it was not accompanied by an environmental impact study. In *Loja v. Río Vilcabamba* case, the Corte Constitucional rejected the request for condemnation, considering the actions taken by the local authorities involved in the reclamation of the area adequate to the right of the river to be restored. [51]

70 A partially similar model to Ecuador was configured in Bolivia. Here "nature" (or "Pachamama" according to the idiom of the aboriginal

peoples) was recognised as a rights-holding subject by the *Ley de 21 de diciembre de 2010 no. 71*, entitled *Ley de derechos de la Madre Tierra*.

71 The 2009 Constitution of Bolivia does not expressly refer to "nature" rights. It does, however, dedicate two articles to environmental law in the section regulating social and economic rights. Specially, Article 33 enshrines the right of individuals and communities of present and future generations to live in a healthy, protected and balanced environment. To the recognition of this right, the subsequent Article 34 associates the provision of the legitimacy to act by any individual, either as an individual or as a representative of a community, to promote environmental protection actions. For the purposes of this paper, it is worth noting how part of the Article 33 refers to the possibility that the exercise of rights to the environment is not only due to human beings, but also to other living beings (*otros seres vivos*) among which are animals. [52]

72 A comparison between the cases of Ecuador and Bolivia shows how the inclusion of "nature" rights in the Constitution favours more the effectiveness of the prerogatives correlated to the recognised subjective positions. In the Bolivian system, in fact, the guarantee of protection is in any case subordinated to the prior legal recognition of rights, unlike in the case of Ecuador.

73 On the other hand, unlike the Ecuadorean Constitution, which does not contain any indications on the content of the notion of "nature". More, the ways of protecting its rights is based on general rules of principle: *Ley no. 71/2010* provides precise indications with respect to both profiles.

74 Regarding the first aspect, the "Mother Earth" is qualified as "*el sistema viviente dinámico conformado por la comunidad indivisible de todos los sistemas de vida y los seres vivos, interrelacionados, interdependientes y complementarios, que comparten un destino común*". [53] The reference to the "Madre Tierra" in *Ley no. 71/2010* must, however, be read in conjunction with the provision that clarifies its contents in correlation with "*sistemas de vida*", which are described as "*comunidades complejas y dinámicas de plantas, animales, micro organismos y otros seres y su entorno, donde interactúan comunidades humanas y el resto de la naturaleza como*

una unidad funcional, bajo la influencia de factores climáticos, fisiográficos y geológicos, así como de las prácticas productivas, y la diversidad cultural". [54]

75 About the second profile, the objective of *Ley no. 71/2010* is to recognise the rights of "Mother Earth" and, at the same time, to identify the obligations incumbent on the State and society to ensure their respect. [55] The former are indicated in part with general references [56] and, on the other hand, with regard to individual natural elements, [57] according to a list that is not exhaustive. [58]

76 The imputation of claims is thus connected with the qualification of "Madre Tierra" as a subject of law and, more specifically, as a "*sujeto colectivo de interés public*". [59] The reference to the community is functional in guaranteeing the effectiveness of the protection of the rights recognised by the law: it has the effect of transferring ownership not only to "Madre Tierra" but to all its components (including the human ones). It follows that every member of the community is also the holder of the rights of "Madre Tierra" and that the exercise of individual rights must only take place in a form that is compatible with the former. In the structure of *Ley no. 71/2010*, individual rights therefore appear as rights that are "conditional" in their externalisation. Consistently, any conflicts must be resolved without affecting the "*sistemas de vida*". [60]

77 Within the framework described, the Bolivian law lists the obligations incumbent on the State in view of the objective of guaranteeing the rights recognised to "Mother Earth". These include the development of public policies, systematic preventive actions and promotion of the recognition of these rights, also in international relations. [61] At the same time, the duties of physical and juridical persons, public and private, who are obliged not only to respect but also to defend the rights of "Mother Tierra" are indicated, if necessary, initiating jurisdictional actions against acts capable of harming these prerogatives. [62]

78 The implementation of *Ley no. 71/2010* is conditional on the establishment of the "*Defensoría de la Madre Tierra*", a body entrusted with the mission of strengthening the effectiveness of the rights, obligations and duties provided for through the exercise of

many powers. [63] The draft law under discussion qualifies the *Defensoría* as a politically, functionally and organisationally independent institution. The same draft foresees for this subject cognitive and investigative powers in relation to acts or omissions related to the violation of the rights of "*Mother Earth*", powers of active legitimacy in environmental matters before ordinary and constitutional jurisdictions and powers to present legislative proposals and make recommendations. The *Defensoría* also has the power to adopt public censures for acts or conduct contrary to the principles laid down. [64]

4.2 The recognition of rights to individual *res naturalis*

79 The second instrument promoted by the doctrine of *Earth jurisprudence* found application in New Zealand where, for the first time, rights were recognised for a river as an identifiable and delimited "ecological being". [65]

80 Specifically, in 2017, the New Zealand Parliament passed the *Te Awa Tupua Whanganui River Claims Settlement Act*, by which it granted legal personality to the *Whanganui* River (*Te Awa Tupua*, in the *Māori* language), the third longest in the country, thus relinquishing exclusive ownership over this natural resource. [66] The measure follows the *Te Urewera Act* adopted in 2014 by which *the Te Urewera National Park*, a national park through which part of the *Whanganui* River flows. [67]

81 The *Whanganui River Act* was intended to definitively resolve the conflict over the attribution of ownership of this natural resource that had arisen since 1873 between the New Zealand Government and the *Māori* tribe, who had always settled on the banks of the *Whanganui* River. According to New Zealand law, in fact, since the river in question was navigable, the ownership of its bed belonged to the Government and the relative administrative management functions to the local authorities. In the interpretation of the *Māori*, however, the application of the Treaty of *Waitangi* should have prevailed, which since 1840 has recognised the right of the Aboriginal people to maintain their lands and to enjoy its fruits.

82 In this context the *Whanganui River Act* provided for the protection of the entire river and affirmed its express qualification as an indivisible and living whole of physical and metaphysical elements for its entire extension.

83 Within this framework, the *Whanganui River Act* uses the recognition of the legal personality of the *Whanganui River* and the area in which it is located to create a new framework of governance of the natural resource. [68] Indeed, this qualification has the effect of legitimising the "personified" river to take legal action to protect its rights. To guarantee the effectiveness of this capacity, the *Whanganui River Act* has provided for a representation mechanism that allows the *res* inanimate to avail itself of a body with the function of legal guardian, which will be responsible for acting in its name and on its behalf in the event of a lawsuit. The composition of this legal entity is equal as it is attended by a member appointed by the government and one appointed by the indigenous population who, endowed with identical powers, take on the role of representatives of the rights of the river. [69]

84 In the same year in which the *Whanganui Act* was adopted, the *High Court of Uttarakhand* in India recognised the *Ganges* and *Yamuna* rivers, as well as their tributaries and other watercourses flowing in various ways into the main ones, with legal personality and all the rights, duties and responsibilities of a living being. [70] The decision was based on the sacredness of the rivers recalled for the Indian people and the need to preserve them, even by adopting extraordinary measures, from further exposure to factors of environmental degradation that threatened to undermine their very existence.

85 Like in the first examined case, the effectiveness of the guarantee of the prerogatives related to the possession of legal status was pursued through the imputation to an institutional subject of the status of representatives of the two rivers.

86 The *High Court*, moreover, reiterated this orientation in the *Glaciers case*, upholding the request to recognise the legal personality of all the *res naturalis* of the State of *Uttarakhand*, including the *Gangotri* and *Yamunotri* glaciers located at the sources of the *Ganges* and *Yamuna* rivers. In this decision, the Court, moreover, explicitly

stated that "personified" natural resources are accorded rights that should be considered equivalent to human rights, with the effect of determining identical treatment even in the case of compensable damages. [71]

87 It must be considered, however, that in the *Ganges and Yamuna* case, the state of *Uttarakhand*, which had been assigned the task of representation, appealed against the *High Court*'s ruling before the *Supreme Court of India* questioning the legitimacy of the recognition of its role as "guardian" of the rivers. The appeal was based on two main reasons. On the one hand, the transnational extension of the natural resources concerned posed problems of sovereignty since the State of *Uttarakhand* believed that it could not take decisions concerning the territory of other States, such as neighbouring Bangladesh also affected by the passage of the rivers in question. The formula of exclusive representation should have been replaced, if anything, by that of shared governance. Secondly, the exercise of the powers of representation had as its counterpart the liability of the State concerned in the event of damaging events, of natural or anthropic origin, connected with the life cycle of the rivers. Hence the duty to respond directly in the event of claims, e.g. also in the event of flooding or drowning. [72]

5. Preliminary conclusions and perspectives for future research

88 Several conclusions can be drawn from the cases considered.

89 The application of the instruments promoted by *Earth jurisprudence* occurs in different ways. The recognition of legal personality and the imputation of rights to "nature" or single *res naturalis* is based on constitutional provisions, laws or derives from jurisprudential decisions.

90 The implementation of *Earth jurisprudence* principles therefore takes place in a "flexible" manner. But this is consistent with the underlying approach of the theory, which includes very different natural resources.

91 The cases also show how the way in which the theorised principles are transposed conditions their degree of legal effectiveness. Consequently, it conditions the effectiveness of the protective function. Recognition of legal personality or rights in favour of "nature" or individual "ecological beings" occurring in application of a constitutional or normative provision is integrated into the framework of principles and rules in force in the legal system concerned.

92 On the other hand, when recognition derives from a judgment, its concrete implementation may require further adaptations or may be complex if it fits into a regulatory framework that is not "favourable". Moreover, while it is true that recognition by judges is likely to produce effects quickly and is independent of the political context of reference, its stability over time is uncertain because subsequent judgments might have a different orientation. [73]

93 Secondly, in the *Whanganui* River case, the recognition of legal personality is integrated with that of the affirmation of indigenous peoples' rights over natural resources. [74] In the Indian case, on the other hand, it is the search for an alternative model of protection of *res naturalis* that justifies the inversion of their position from "object" over which to exercise rights to "subject" of rights.

94 This last consideration makes it possible to return to the initial research question: does the protection model proposed by *Earth jurisprudence* guarantee a more protective way of protection of natural resources than the protection offered by public property and by domain model?

95 The analysis of the cases does not allow for a fully positive answer. The reasons for this uncertainty are outlined above.

96 It is also true, however, that the incisiveness of the model proposed seems to be strengthening rapidly according to a process that is not entirely new. The "legal anthropomorphisation" of natural resources is, in fact, asserting itself according to logics analogous to those that inspired the emergence and consolidation of environmental interest: at an early stage it found recognition in international law; it was then accepted in European law; finally, through it, it was transposed into the law of the member States of the European Union.

97 If the theory of the *Earth jurisprudence* were to be accepted at the European Union level according to the process described, on the model happened in the Mar Menor case in Spain, it could represent a decisive push towards the revision of the legal paradigms of nature protection typical of the domain regime. In fact, the growing diffusion and variety of cases ascribable to this model of protection shows the outdatedness and limits of the legal rules dedicated to public property, [75] especially in those legal systems that have adopted them not so recently. [76] It could, as has already happened in several cases, encourage interventions to change the regulatory framework of reference at the State level. [77]

98 The Italian case is emblematic.

99 The domain model is regulated by the Civil Code adopted in 1942 and by numerous sectoral laws implementing the codified general principles. [78] Already the presence of this stratification of sources had favoured the loss of value of the Code's provisions. In the light of the constitutional reform that led to the amendment of Article 9 in the terms described above, the problem is even more evident: how can the reference to the Republic's duty to protect ecosystems be made compatible with the presence of laws that only protect individual categories of natural resources without considering their systematic interactions? [79]

100 It may be necessary to reform the Civil Code and reclassify natural public goods as closely as possible to the new paradigms emerged in European and international law.

101 However, this would still be a solution based on current logic.

102 At the opposite, renouncing the legal division of natural resources into rigid categories would be innovative. Instead, legal rules could focus on the dutifulness of the protection function and its application beyond the ownership of assets. The focus would be shifted to the ability of *res naturalis* to satisfy fundamental rights of present and future generations.

103 Since these *res* have very different characteristics from one another, it would be essential to "graduate" the protection regime. As mentioned, protection should have as its scope not individual assets but interconnected ecosystems of natural assets. Protection should

therefore also take care to include the interrelationships that exist between naturals resources and to protect their value from a transnational and global perspective.

104 The transition could have as its starting point a revisitation, in the perspectives outlined, of the theory of the "*échelle de la domanialité*". In a nutshell, this theory, as is well known, is based on the observation of the physical variety of public property. From it derives the need for a non-uniform legal regime and a not based solely on the binary distinction between public and private property. Instead of imposing on public domain the regime of public property, it is proposed to classify it according to a six-level gradation with distinctions based on the degree of proximity to the two opposite poles of the scale, public property and private property. [80]

105 To conclude, the reflections carried out so far show how the growing pervasiveness of the environmental interest is imposing a reflection on the relationship between nature and law.

106 This has, since ancient times, aroused the interest of jurists and legal philosophers who have emphasised its complexity. [81] At the same time, they have pointed out the ambiguity and pitfalls of "rights of nature" theories. [82] Among the most obvious is the consideration that the recognition of legal personality to "nature" or its elements does not solve the problem of the effectiveness of this model of representation. Personified "nature" is not, in fact, able to express its will directly but can only act through natural and legal persons who represent it. [83]

107 If it then looks at the contrast between natural law and legal positivism, the relationship between "nature" and man is represented in terms of the conflict between "natural law" and "positive law": [84] The idea of nature as an "object" capable of imposing itself on law, conditioning its "*institutions, while remaining outside it, extraneous to it*" therefore prevails. [85]

108 The natural resource protection theories discussed seem to offer the possibility of a different view.

109 The definition of "nature" from the point of view of law in the cases considered is in fact based on the conception that it is governed by its own laws. Laws capable of establishing the order of things in the

natural world in the same way that the laws of law establish the legal order in the world of men. Thus considered, the two orders are no longer in antithesis and can be placed within the framework of a higher "cosmic law". [86] From this direction, "*the view of nature allows one to deal with rules constitutive of the entire living system... that relativise the social categories invented by man, including legal ones: they relativise, not subvert*" by integrating the environmental law of states and the relations between states, without denying their founding status and usefulness. [87]

110 What emerges, therefore, is not only the immateriality of "nature" but also its physical and objective dimension as a set of *res naturalis* that, as we have seen, can guarantee the enjoyment of fundamental rights. In the perspective indicated, "nature", no longer just an element in opposition to law, becomes relevant for the actual definition of the legal order and, as far as it is of interest here, for the construction of effective administrative rules, i.e. those capable of achieving the set objectives.

111 In this sense, "nature" could also pose itself as a paradigm capable of limiting the expansion of certain categories of rights, such as economic rights aimed at the exploitation of *res naturalis*, while at the same time favouring the strengthening of other emerging rights, such as those of future generations.

NOTES

1 See D. Amirante, S. Bagni, *Environmental Constitutionalism in the Anthropocene. Values, Principles and Actions*, Oxon/Mew York, Routledge, 2022, and L. J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene*, Oxford/Portland, Bloomsbury Publishing, 2016.

2 The Sustainable Growth Strategy developed by the European Commission aims to coordinate states in the implementation of actions to implement the *goals* set out in the 2030 Agenda. The goal set out in the *Green Deal* is zero climate impact by 2050 and the reduction of atmospheric emissions by at least 55% by 2030, as stated in the Communication of 11 December 2019 COM(2019) 640 final. See E. Chiti, "Managing the ecological transition of the Eu: The European Green Deal as a regulatory process", in *Common Market Law Review*, vol. 59, no. 1, 2022, p. 19 ff.

3 See Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration.

4 See Communication of the Commission of 20 May 2020 entitled *EU Biodiversity Strategy for 2030 "Bringing nature back into our lives"*.

5 See T. Fensterseifer, J. R. Morato Leite, "Towards ecological law? Environmental law on the threshold of a new ecocentric legal paradigm in the Anthropocene", in *DPCE Online*, vol. 64, no. 2, 2024.

6 The definition is proposed by C. Cullinan, "Earth Jurisprudence", in L. Rajamani, J. Peel (ed.), *The Oxford Handbook of International Environmental Law*, Oxford, Oxford University Press, 2021, 2nd ed., p. 235. By the same author see *Wild Law. A Manifesto for Earth Justice*, Oxford, Green Books, 2011, 2nd ed.

7 See C. Clark, N. Emmanouil, J. Page, A. Pellizzon, "Can You Hear the Rivers sing? Legal Personhood, Ontology and the Nitty-Gritty of Governance", in *Ecology Law Quarterly*, vol. 45, no. 4, 2019, p. 787 ff.; D. R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World*, Toronto, ECW Press, 2017, (specially p. 135 ff.); P. Burdon (ed.), *Exploring Wild Law: The Philosophy of Earth Jurisprudence*, Kent Town, Wakefield Press, 2011.

8 See Art. 3(1), Regulation (EU) 2024/1991.

9 The most significant passage of the *dissenting opinion* is this: "The critical question of 'standing' would be simplified and put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced… and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation… The voice of the inanimate object, therefore, should not be stilled… It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard… Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away… That is why these

environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life which it represents will stand before the court… Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community". The decision can be found here: < https://caselaw.findlaw.com/court/us-supreme-court/405/727.html >.

10 For a reconstruction of the case see D. R. Boyd, *The Rights of Nature*: A *Legal Revolution That Could Save the World*, Toronto, ECW Press, 2017, especially p. 102 ff. For a critical analysis S. W. Stern, "Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solutions to the Problem of Environmental Standing", in *Fordham Environmental Law Review*, vol. 30, no. 2, 2018, p. 21 ff.

11 See for example the data in the 2019 report of the *Intergovernmental Science—Policy Platform on Biodiversity and Ecosystem Services* (IPBES). On line: <https://www.ipbes.net/sites/default/files/inline/files/ipbes_global_assessment_report_summary_for_policymakers.pdf>, consulted on 10/28/2024.

12 This is emphasised in Referencia: AL CHL 5/2020, p. 3 ff., on line: <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25449>, consulted on 10/28/2024, which refers to the right to food and the right to public health, especially in view of the health emergency due to the spread of the SARS-Covid19 virus.

13 The EPBC Act can be found at the following link: <https://www.legislation.gov.au/Details/C2021C00182>, consulted on 10/28/2024.

14 The EPBC Regulation Act can be found at the following link: <https://www.legislation.gov.au/Details/F2020C00778>, consulted on 10/28/2024.

15 The official Board statement accompanying the resolution can be found hère: <https://parksaustralia.gov.au/uluru/pub/uktnp-climb-closure-words-from-chair-nov-2017.pdf>, consulted on 10/28/2024. The requirement on the climbing ban is also reiterated in the *Uluṟu-Kata Tjuṯa National Park Management Plan* 2021, on line: <https://www.legislation.gov.au/Details/F2021L01354>, consulted on 10/28/2024, in the section on the applicable principles for tourism management of the nature park (in particular, see p. 83).

16 The project is managed by the *Instituto Nacional de Pesquisas Espaciais* (INPE) in collaboration with the *Ministerio do Meio Ambiente* and the *Instituto Brasileiro do Meio Ambiente e dos Recursos Nautrais Renovàveis* (IBAMA). It involves government bodies and independent agencies.

17 The amendments were challenged before the *Supremo Tribunal Federal* (STF), which, in its *plenary* decision *of 21 de fevereiro 2018*, found them only partially unconstitutional. The issue is reconstructed by R. Bordalo, "O Código florestal e o Supremo Tribunal Federal", in *Revista de direito administrativo e infraestrutura*, vol. 3, no. 11, 2019, p. 313 ff.
Previously, F. Wantoil Lima, N. Lima Bragança, J. Garcia de Almeida Neto, "Constitucionalidade do novo código florestal brasileiro", in *III CIPEEX—Ciência para a redução das desigualdades*, vol. 2, 2018.

18 On the subject, see G. Napolitano, *La logica del diritto amministrativo*, Bologna, Il Mulino, 2020, p. 160-161.

19 See F. Lopéz, *Conservar el patrimonio natural*, Madrid, Reus, 2019.

20 On the topic see E. Ryan, "The public trust doctrine, property, and society", in N. Graham, M. Davies & L. Godden (eds.), *The Routledge Handbook of Property, Law and Society*, London, Routledge, 2023, p. 240 ff.; M. C. Blumm, M. C. Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law*, Durham, Carolina Academic Press, 2021 (3rd ed.); A. Panizio, "Public Trust Doctrine in Comparative Environmental Law", in *FEU research paper*, no. 7, 2020, p. 10.; J. Arnold, A. Jacoby, "Examining the Public Trust Doctrine's Role in Conserving Natural Resources on Louisiana's Public Lands", in *Tulane Environmental Law Journal*, vol. 29, no. 2, 2016, p. 149 ff.; M. D. Jr. Smith, "A Blast from the Past: The Public Trust Doctrine and Its Growing Threat to Water Rights", in *Environmental Law*, vol. 46, no. 3, 2016, p. 461 ff.; J. P. Byrne, "The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?", in *UC Davis Law Review*, vol. 45, no. 3, 2012, p. 915 ff.; R. M. Frank, "The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future", in *UC Davis Law review*, vol. 45, 2012, p. 665 ff.; M. C. Blumm, "The Public Trust Doctrine and Private Property: The Accommodation Principle", in *Pace Environmental Law Review*, vol. 27, no. 3, 2010, p. 649 ff.; R. J. Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources Law: Questioning the Public Trust Doctrine", in *Iowa Law Review*, vol. 71, 1986, p. 631 ff.; J. L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", in *Michigan Law Review*, vol. 68, no. 3, 1970, p. 471 ff.

21 On this subject, G. Napolitano, *Introduzione al diritto amministrativo comparato*, Bologna, Il Mulino, 2020, p. 218-220.

22 See T. Perroud, "Recherche sur un fondement de la domanialité publique dans les pays de common law: la notion de public trust", in N. Kada (codir.) *et al.*, *Mélanges à la mémoire de Gérard Marcou*, Paris, IRJS Éditions, 2017, p. 951.

23 The protection of future generations is also enshrined in the Italian Constitution. Article 9(2), as reformulated by Law no. 1/2022, provides that the Republic "protects the environment, biodiversity and ecosystems, also in the interest of future generations. State law regulates the ways and forms of animal protection".

24 For example, in its order of 24 March 2021, the *Bundesverfassungsgericht* (BVerfG) upheld appeals against the Federal Climate Act adopted on 12 December 2019 (*Bundes-Klimaschutzgesetz*). In this decision, the German Constitutional Court held that Section 20a of the *Grundgestez* allows the legislator's discretion to be conditioned by the objective of *climate neutrality*, which now inextricably links political decision-making to ecological issues and scientifically relevant data, requiring that adequate and sufficient guidance for the reduction of greenhouse gas emissions in accordance with the limits agreed upon in the 2015 Paris Agreements be provided by way of legislation. See also ECHR 9 April 2024 (KlimaSeniorinnen Schweiz and others vs Switzerland).

25 On this topic see in general L. J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene*, *op. cit.* See also G. Della Cananea, F. Di Lascio, "État et changement climatique en Italie", in D. Costa (dir.), *Annuaire européen d'administration publique, 2022. Contraindre l'État à agir face au dérèglement climatique*, no. 45, Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 2024, p. 193 ff.

26 The data are reported by A. T. Wolf, J. A. Natharius, J. J. Danielson, B. S. Ward, J. k. Pender, "International River Basins of the World", in *International Journal of Water Resources Development*, vol. 15, no. 4, 1999, p. 387 ff.

27 On this subject see S. C. McCaffrey, *The Law of International Watercourses*, Oxford, The Oxford International Law Library, 2019, 3rd ed.

28 See the Convention for the *Equitable Distribution of the Waters of the Rio Grande*, signed in Washington on 21 May 1906 (available at the following

link: <https://www.ibwc.gov/Files/1906Conv.pdf>, consulted on 10/28/2024). For a reconstruction of the case, see W. A. Paddock, "The Rio Grande Convention of 1906: A Brief History of an International and Interstate Apportionment of the Rio Grande", in *Denver Law Review*, vol. 77, 1999, p. 287 ff.

29 The *UNECE Water Convention* was adopted by the United Nations on 17 March 1992 (original version here: <https://unece.org/DAM/env/water/pdf/watercon.pdf>, consulted on 10/28/2024) and amended in 2003 (amendments here: <https://unece.org/DAM/env/documents/2004/wat/ece.mp.wat.14.e.pdf>, consulted on 10/28/2024).

30 The *UN Watercourses Convention* was adopted on 21 May 1997 but took more than 17 years to enter into force on 17 August 2014. Although it has been ratified by only 36 states and has in fact a limited scope of application, it represented an important step forward in establishing a legal regime for the transnational protection of the longest river basins. The document can be found at the following link: <https://treaties.un.org/doc/Treaties/1998/09/19980925%2006-30%20PM/Ch_XXVII_12p.pdf>, consulted on 10/28/2024.

31 The expression from which the contribution by V. Shiva, *Water Wars: Privatisation, Pollution and Profit*, Cambridge, MA, South End Press, 2002, takes its title here. For further insights in comparative perspective see T. E. Frosini and L. Montanari, "The Right to Water. Some reflections in comparative perspective", in *Diritto pubblico comparato ed europeo*, no. 2, 2012, p. 509 ff.

32 As outlined in the report UN-Water, *Summary Progress Update 2021: SDG 6—water and sanitation for all*, Geneva, Switzerland, 2021, p. 4.

33 Thus L. Pasqui, "Territorio e confini nello specchio dei grandi fiumi transnazionali. I casi Nilo e Danubio", in *Federalismi.it*, no. 24, 2022, p. 247.

34 One of the achievements of the *Antarctic Treaty* is to have affirmed the cessation of any claims on Antarctica. On the contrary, the Arctic is not, to date, the subject of any international treaty and, therefore, the laws of individual states apply in this territory, which are mainly concerned with regulating how natural resources are extracted from the subsoil. See M. Mazza, *I diritti degli indigeni sulle risorse naturali ed energetiche negli Stati arctic*, Naples, Jovene, 2012.

35 The document can be found at: <https://www.un.org/esa/forests/wp-content/uploads/2018/08/UN_Forest_Instrument.pdf>, consulted on 10/31/2024.

36 The document can be found at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/115/46/PDF/N1711546.pdf?OpenElement>, consulted on 10/31/2024. On forest protection see E. Tramontana, "'Global Public Goods' and International Law: insights from International Forest Protection", in N. Gullo (ed.) *Human Rights and the Environment*, Naples, Editoriale scientifica, 2021, p. 111 ff.; M. C. Pontecorvo, *Il "regime" internazionale per la protezione delle foreste*, Naples, Satura Editrice, 2011.

37 The Communication can be found at: <https://eur-lex.europa.eu/legal-content/IT/TXT/HTML/?uri=CELEX:52021DC0572&from=EN>, consulted on 10/31/2024.

38 The Agreement can be found at: <https://treaties.un.org/doc/Treaties/2023/06/20230620%2004-28%20PM/Ch_XXI_10.pdf>, consulted on 10/31/2024. Here is the accession decision of the Council of the European Union: <https://data.consilium.europa.eu/doc/document/ST-7577-2024-INIT/it/pdf/>, consulted on 10/31/2024.

39 See D. Zacharias, "The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution", in *German Law Journal*, vol. 9, no. 11, 2008, p. 1833 ff.; S. Battini, "The procedural side of legal globalisation: The case of the World Heritage Convention", in *International Journal of Constitutional Law*, vol. 9, no. 2, 2011, p. 340 ff.; J. E. Noyes, "The Commons Heritage of Mankind: Past, Present and Future", in *Denver Journal in International Law and Policy*, vol. 40, no. 1, 2011, p. 447 ff.

40 This is the reconstruction proposed by S. Cassese, "L'arena pubblica. Nuovi paradigmi per lo Stato", in *Rivista trimestrale di diritto pubblico*, no. 3, 2001, p. 607 ff. For a non-legal perspective on the subject, see D. Innerarity, *El nuevo espacio público*, Madrid, Espasa, 2006 (transl. it., *Il nuovo spazio pubblico*, Roma, Meltemi, 2008).

41 See N. Bassi, "Il demanio planetario: una categoria in via di affermazione", in *Rivista trimestrale di diritto pubblico*, no. 3, 2011, p. 619-620.

42 The expression is taken from F. Munari, L. Schiano di Pepe, *Tutela transnazionale dell'ambiente*, Bologna, Il Mulino, 2012, p. 19, who use it as an

alternative to "*global commons*". On this topic see also I. Kaul, I. Grunberg, M. A. Stern (eds.), *Global Public Goods. International Cooperation in the 21st Century*, New York, Oxford University Press, 1999; F. Constatin (ed.), *Les Biens publics mondiaux. Un mythe légitimateur pour l'action collective?*, Paris, L'Harmattan, 2002; I. Kaul, P. Conceição, K. Le Goulven, R. U. Mendoza (ed.), *Providing Global Public Goods: Managing Globalization*, New York, Oxford University Press, 2003; N. Brando, C. Boonen, S. Cogolati, R. Hagen, N. Vanstappen, J. Wouters, "Governing as commons or as global public goods: Two tales of power", in *International Journal of the Commons*, vol. 13, no. 1, 2019, p. 553 ff.

43 The tripartition is illustrated by C. Cullinan, "Earth Jurisprudence", *op. cit.*, p. 237-239. In legal science, the study by C. D. Stone, "Should Trees Have Standing?—Towards Legal Rights for Naturals Objects", in *Southern California Law Review*, vol. 45, no. 2, 1972, p. 450 ff., expanded in the later, *id.*, *Should Trees Have Standing? Law, Morality, and the Environment*, Oxford, Oxford University Press, 2010, 3rd ed. There is a vast literature on the subject. See, among others, I. Milkes S., J. A. Pimiento E., S. Baena C., "Más allá del reconocimiento como 'sujeto de derechos' a la Naturaleza: Un análisis práctico para una comprensión semántica", in *Revista de Derecho Administrativo Economico*, no. 36, 2022, p. 193 ff.; L. Estupinan Achury, C. Storini, R. Martinez Dalmau, F. A. de Carvalho Dantas (dir.), *La Naturaleza como sujeto de derechos en el constitucionalismo democrático*, Bogotá, Universidad Libre, 2019; M. Torre-Schaub, "La protection du climat et des generations futures au travers des 'droits de la nature': l'emergence d'un droit constitutionnel au 'buen vivir¸'", in *Droit de l'Environment*, no. 267, 2018, p. 1 ff.; M. Carducci, "Natura (diritti della)", in *Digesto delle Discipline Pubblicistiche*, Agg., Milan, Utet, 2017, p. 487; S. Baldin, "Los derechos de la Naturaleza. De las construcciones doctrinales al reconocimiento juridico", in *Revista general de derecho público comparado*, no. 22, 2017; D. R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World*, Toronto, ECW Press, 2017; S. Pavlik, "Should Trees Have Standing in Indian Country?", in *Wicazo sa Review*, vol. 30, no. 1, 2015, p. 7 ff.; R. Avila Santamaria, "El derecho de la naturaleza: fundamentos", in E. Martinez, A. Acosta (coord.), *La Naturaleza con Derechos. De la filosofía a la política*, Quito, AbyaYala, 2011, p. 173 ff.; P. Burdon, "The Rights of Nature: Reconsidered", in *Australian Humanities Review*, no. 49, 2010, p. 69 ff.

44 The only exception in Europe, to date, is the *Mar Menor* Lagoon in Spain, which was granted legal personality by Law no. 19/2022 of 30 September 2022.

45 The database referred to contains the regulatory provisions and case law decisions to date and can be found at: <http://www.harmonywithnatureun.org/rightsOfNature/>, consulted on 10/31/2024.

46 Indeed, States have deemed that current patterns of consumption and production are causing serious and rapid depletion of natural resources as well as increasing levels of environmental degradation, undermining the "carrying capacity" of the planet. To date there are thirteen UN resolutions dedicated to *Harmony with Nature*, the first adopted on 21 December 2009 (*resolution* A/RES/64/196) and the last on 28 December 2022 (*resolution* A/RES/77/169). *Resolution* A/RES/64/196 provided for the adoption of a report on the subject by the Secretary-General. In the eleventh and last of these documents, sent to the Assembly on 28 July 2022 (report A/77/244), progress in the dissemination of the *Earth jurisprudence* doctrine is highlighted, particularly with regard to the increase in the number of cases of recognition of rights in nature or its components. The documentation referred to can be found at the following link: <http://www.harmonywithnatureun.org/chronology/>, consulted on 10/31/2024.

47 Ecuador's 2008 Constitution, along with Venezuela's 1999 Constitution and Bolivia's 2009 Constitution were considered the three fundamental norms of the so-called *Nuevo Constitucionalismo Latinoamericano*, as R. Viciano Pastor, "La problemática constitucional del reconocimiento de la Naturaleza", in L. Estupinan Achury, C. Storini, R. Martinez Dalmau, F. A. de Carvalho Dantas (dir.), *La Naturaleza como sujeto de derechos en el constitucionalismo democrático*, *op. cit.*, p. 141, which reconstructs the historical and social context in which these acts were adopted and which favoured certain similarities such as the relevance recognised to social rights. Article 11(6) of the Constitution of Ecuador states, in this regard, that "*Todos los principios y los derechos son inalienables, irrenunciables, indivisibles, interdependientes y de igual jerarquía*". Therefore, the qualification of rights in the Constitutional Charter is based on the principles of indivisibility, interrelation and interdependence of all fundamental rights, from which follows an identical relevance of civil and political rights with social rights. Despite this, however, only in the present case have rights to nature been expressly attributed. The contents of the debate on the ecocentric tendency of South American constitutionalism are discussed by D. Amirante, S. Bagni, *Environmental Constitutionalism in the*

Anthropocene. Values, Principles and Actions, Oxon/Mew York, Routledge, 2022.

48 Thus, in Article 72(1) of the Constitution of Ecuador.

49 Article 71, par. 1-2, of the Constitution of Ecuador state "*La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos. Toda persona, comunidad, pueblo o nacionalidad podrá exigir a la autoridad pública el cumplimiento de los derechos de la naturaleza*".

50 See Article 72(2) of the Constitution of Ecuador. For further discussion see R. Llasag Fernandez, "De la Pachamama a los derechos de la Naturaleza en la Constitución plurinacional del Ecuador", in L. Estupinan Achury, C. Storini, R. Martinez Dalmau, F. A. de Carvalho Dantas (dir.), *La Naturaleza como sujeto de derechos en el constitucionalismo democrático*, *op. cit.*, p. 269 ff.; F. Simon, "La Naturaleza como sujeto de derechos en la constitución ecuatoriana: la construcción de una categoría de interculturalidad", *ibid.*, p. 299 ff.; E. Daly, "The Ecuadorian exemplar: the first ever vindications of constitutional rights of nature", in *Review of European, Community & International Environmental Law*, vol. 21, no. 1, 2012, p. 63 ff.; M. Melo, "Los derechos de la naturaleza en la nueva Constitución ecuadoriana", in E. Martinez, A. Acosta (coord.), *Derechos de la naturaleza. El futuro es ahora*, Quito, Abya Yala, 2009, p. 51 ff.; E. Gudynas, "La ecología política del giro biocéntrico en la nueva Constitución de Ecuador", in *Revista Estudios Sociales*, no. 32, 2009, p. 34 ff.

51 The case is dealt with in Judgment no. 012-18-SIS-CC of 28 March 2018, available at: <http://files.harmonywithnatureun.org/uploads/upload659.pdf>, consulted on 10/31/2024. For a more in-depth discussion, see S. Suárez, "Defendiendo la naturaleza: Retos y obstáculos en la implementación de los derechos de la naturaleza. Caso río Vilcabamba", report of the Centro Ecuatoriano de Derecho Ambiental (CEDA), 2013, p. 1 ff. (available at the following link: <http://library.fes.de/pdf-files/bueros/quito/10230.pdf>, consulted on 10/31/2024).

52 In this regard, see S. Baldin, "I diritti della natura nelle costituzioni di Ecuador e Bolivia", in *Visioni LatinoAmericane*, no. 10, 2014, p. 34 ff.

53 See Article 3(1) of *Ley no. 71/2010*. The definition was taken up by Article 5, par. 1, of the subsequent *Ley de 15 de octubre de 2012*

no. 300, entitled *Ley marco de la Madre Tierra y desarrollo integral para vivir bien*.

54 Thus Article 4 of *Ley no.* 71/2010. See A. E. Vargas Lima, "El derecho al medio ambiente en la Nueva Constitución Política del Estado Plurinacional de Bolivia", in *Anuario de Derecho Constitucional Latinoamericano*, XVIII, 2012, p. 251 ff.

55 See Article 1 of *Ley no.* 71/2010.

56 In this sense, Article 7 of *Ley no.* 71/2010 refers to the right "*a la vida*", understood as the right to the preservation of the integrity of life systems and related natural processes; the right to "*diversidad de la vida*", relating to the need to preserve the variety of species that make up "Madre Tierra" also by limiting their genetic or, in any case, artificial modifications the right to "*equilibrium*", i.e. the preservation of the interrelationships and interdependencies of the different elements; the right to "*restauració*", i.e. the restoration of "sistemas de vida" affected by anthropic activities; and, finally, the right "*a vivir libre de contaminación*", which could be defined as the right not to be subjected to polluting sources.

57 These are the right "*al agua*", which requires safeguarding the functionality of the water cycle, and the right "*al aire limpio*", which refers to the need to preserve air quality. Both rights are functional to guaranteeing the sustenance and protection of the "sistemas de vida" which, in turn, allow the reproduction of the elements of which the "Madre Tierra" is composed.

58 Article 5 of *Ley no.* 71/2010 clarifies in this regard that "*Los derechos establecidos en la presente Ley, no limitan la existencia de otros derechos de la Madre Tierra*".

59 Thus Article 5 of *Ley no.* 71/2010.

60 See Article 6 of *Ley no.* 71/2010.

61 For details of the obligations referred to, read Article 8 of *Ley no.* 71/2010.

62 See Article 9 of *Ley no.* 71/2010.

63 The reference is to Article 10 of *Ley no.* 71/2010.

64 The bill, proposed to the Cámara de Diputados by the *Comisión de Región Amazónica, Tierra, Territorio, Agua, Recursos Naturales y Medio Ambiente*, can be found at the following link: <https://www.cedib.org/wp-content/uploads/2021/04/anteproyecto_de_ley_defensoria_de_la_madre_tierra.pdf>, consulted on 10/31/2024.

65 This case was followed by several others of a similar tenor, some of which were the subject of legislative, regulatory or administrative provisions and others of which were ordered by a case law decision. See D. Tacaks, "We Are The River", in *University of Illinois Law Review*, vol. 2021, no. 2, p. 545 ff.; E. L. O'Donnell, J. Talbot-Jones, "Creating legal rights for rivers: lessons from Australia, New Zealand, and India", in *Ecology and Society*, vol. 23, no 1, 2018, p. 7 ff.; *id.*, "Legal rights for rivers: what does this actually mean?", in *Australian Environment Review*, vol. 32, no. 6, 2017, p. 159 ff.; L. Cano Pecharroman, "Rights of Nature: Rivers That Can Stand in Court", in *Resources*, vol. 7, no 1, 2018, p. 1 ff.

66 The *Te Awa Tupua Act* is available at the following link: <https://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html>, consulted on 10/31/2024.

67 The *Te Urewera Act* is available at the following link: <https://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html>, consulted on 11/04/2024.

68 See section 12 of the *Te Awa Tupua Whanganui Act*.

69 This body is flanked by an advisory and an executive committee also composed of local government representatives and groups and associations representing other interests along the river such as tourism, recreation and fishing. For further discussion see A. Hutchison, "The Whanganui River as a Legal Person", in *Alternative Law Journal*, vol. 39, no. 3, 2014.

70 The mentioned decision is *Mohd. Salim v State of Uttarakhand & others case*, WPPIL 126/2014, Uttarakhand High Court at Nainital, 2017 (the so-called *Ganges and Yamuna case*). The judgment can be found at the following link: <https://elaw.org/system/files/attachments/publicresource/in_Salim__decision_dec2016.pdf?_ga=2.93076254.2059424702.1573720212-2103727208.1570435362>, consulted on 11/04/2024.

71 The recalled decision is *Lalit Miglani v State of Uttarakhand & others*, WPPIL 140/2015, Uttarakhand High Court at Nainital, 2017 (so-called *Glaciers case*), available at: <https://indiankanoon.org/doc/92201770/>, consulted on 11/04/2024.

72 *The Supreme* Court, while the appeal was pending, suspended the effects of the judgement on the *Ganges* and *Yamuna* rivers as a precautionary measure, considering the objections raised regarding the inapplicability in practice of the consequences deriving from the recognition of legal personality to be well-founded. It thus created a de facto "vacuum" in the

protection of these rivers due to the absence, in the current legal framework within the Indian system, of administrative instruments capable of reducing or, at least, effectively limiting environmental degradation. On the cases discussed with reference to the Indian system see E. L. O'Donnell, "At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India", in *Journal of Environmental Law*, vol. 30, no. 1, 2018, p. 135 ff.

73 In agreement, E. L. O'Donnell, J. Talbot Jones, "Creating legal rights for rivers: lessons from Australia, New Zealand, and India", *op. cit.*

74 See, inter alia, M. Manning, B. Rose, *Trust in the Land: New Directions in Tribal Conservation*, Tucson, University of Arizona Press, 2011; G. Amparo Rodríguez, "Environmental and Traditional Indigenous Culture Protection: the Colombian Case", in N. Gullo (eds. by), *Human Rights and the Environment*, Naples, Editoriale Scientifica, 2021, p. 277 ff.

75 See J. Caillosse, "Faut-il en finir avec la domanialité publique ?", *Études foncières*, no. 100, 2002, p. 7 ff.

76 A reconstruction of European and non-European state legal regimes see F. López Ramón, O. Vignolo Cueva (ed.), *El dominio público en Europa y América Latina*, Lima, Círculo de derecho Administrativo, 2015; F. López Ramón (ed.), *El patrimonio natural en Europa y Latinoamérica*, Zaragosa, Gobierno de Aragón, Departamento de Hacienda y Administración Pública, serie: Monografías de la Revista Aragonesa de Administración Pública, no. 17, 2018; F. López Ramón (ed.), *Los bienes públicos*, Bogotá, Temis, 2024.

77 The introduction of recent amendments to civil codes to accommodate rules on environmental rights and duties is examined by S. Lanni, *Greening the Civil Codes: Comparative Private Law and Environmental Protection*, New York, Routledge, 2023.

78 On demanio in the Italian system, see O. Ranelletti, "Della formazione e cessazione della demanialità", in *Giur. it.*, no. IV, 1899, 1 ff., now in *Scritti giuridici scelti*, vol. IV, Napoli, Jovene, 1992, p. 410 ff.; E. Guicciardi, *Il demanio*, Padova, Cedam, 1934, p. 170 ff.; F. Cammeo, "Demanio" (voce), in *Il Digesto italiano*, vol. IX, Torino, UTET, 1887-1898, p. 903 ff; F. Cammeo, *Corso di diritto amministrativo*, vol. II, Milano, La Litotipo, 1914, p. 979 ff.; G. Zanobini, "Il concetto di proprietà pubblica e i requisiti giuridici della demanialità", in *Studi senesi*, 1923, now in *Scritti vari di diritto pubblico*, Milano, Giuffrè, 1955, p. 165 ff; S. Romano, *Principii di diritto*

amministrativo italiano, Milano, Società Editrice Libraria, 1912, p. 477 ff.; G. Colombini, "Demanio e patrimonio dello Stato e degli enti pubblici", in *Digesto delle Discipline Pubblicistiche*, vol. V, Turin, Utet, 1990, p. 1 ff.

79 On the effects of the Italian constitutional reform, F. de Leonardis, "La riforma 'bilancio' dell'art. 9 Cost. e la riforma 'programma' dell'art. 41 Cost. nella legge costituzionale n. 1/2022: suggestioni a prima lettura", in *ApertaContrada*, 28 February 2022; F. Fracchia, "L'ambiente nell'art. 9 of the Constitution: a 'negative' approach", in *Il diritto dell'economia*, no. 1, 2022, p. 15 ff.; M. Delsignore, A. Marra, M. Ramajoli, "La riforma costituzionale e il nuovo volto del legislatore nella tutela ambientale", in *Rivista giuridica dell'ambiente*, no. 1, 2022, p. 1 ff.

80 The theory was first introduced in L. Duguit, *Traité de droit constitutionnel*, Paris, E. de Boccard, 1923, t. III, 2nd ed., p. 344 ff. It was later taken up by J.-M. Auby, *Contribution à l'étude du domaine privé de l'administration*, Études et Documents du Conseil d'État, 1958, p. 35 ff., and by F. Melleray, "L'échelle de domanialité", in *Mélanges Moderne*, Paris, Dalloz, 2004, p. 287 ff.

81 "*To grasp the relationship between nature and law, between values and rules, is not easy*": thus G. Maria Flick, M. Flick, *Elogio della foresta. Dalla selva oscura alla tutela costituzionale*, Bologna, Il Mulino, 2020, p. 8.

82 This is emphasised, for example, by M. Carducci, "Natura (diritti della)" (voce), in *Digesto delle Discipline Pubblicistiche*, Agg., Milano, Utet, 2017, p. 487, according to which in this regard "a plurality of narratives prevail, reflected on philosophies of life or existence, worldviews, legal traditions that inevitably condition not so much the analysis of the theme, but rather its semantic framing" (p. 488).

83 Thus I. Milkes S., J. A. Pimiento E., S. Baena C., "Más allá del reconocimiento como 'sujeto de derechos' a la Naturaleza: Un análisis práctico para una comprensión semántica", *op. cit.*

84 The perspectives of the "dispute" between advocates of natural law and advocates of legal positivism are amply reconstructed in the collection of essays by N. Bobbio, *Giusnaturalismo e positivismo giuridico*, Bari/Roma, Laterza, 2011. By the same author see *Il positivismo giuridico. Recta Ratio. Tesi e Studi di Filosofia del Diritto*, Turin, Giappichelli, 1996. For more recent developments, read E. Caterina, "Il ritorno del diritto di natura nel costituzionalismo europeo del secondo dopoguerra", in *Diritto pubblico*,

no. 1, 2022, p. 3 ff., and I. Trujillo (ed.), "Le ragioni del diritto naturale dal Novecento ai nostri giorni", in *Rivista di filosofia del diritto. Journal of Legal Philosophy*, no. 2, 2022, p. 231 ff.

85 Thus F. Cortese, G. Piperata (eds.), "Selvaggio e selvatico nel governo delle istituzioni pubbliche", in *Istituzioni selvage?*, Milan, Mimesis, 2022, p. 8.

86 N. Irti, *L'uso giuridico della natura*, Bari/Roma, Laterza, 2013, p. 15, who argues the thesis "of the unity in the Whole" with reference to the philosophical thought of ancient Greece and, therefore, well before the affirmation of dualism between natural law and positive law in the sense discussed above.

87 M. Carducci, "Natura (diritti della)" (voce), in *Digesto delle Discipline Pubblicistiche*, *op. cit.*, p. 490.

ABSTRACTS

English
Traditionally, in civil law legal systems, the protection of natural resources has been pursued through the French *domaine* model. In the last two decades, it has been challenged by the debate on the commons and the effects of the enhancement of environmental interest. In several non-European systems, the protection of *res naturalis* is increasingly taking place with an inversion of the anthropocentric perspective. Nature and its components are recognised as having legal personality and the capacity to perform legal actions as a subject of law with its own claims. This new perspective must be investigated as a possible alternative to the traditional regimes of natural heritage protection.

Français
Traditionnellement, dans les systèmes juridiques de *civil law*, la protection des ressources naturelles a été assurée par le modèle du domaine d'origine français. Au cours des deux dernières décennies, ceci a été remis en question par le débat sur les biens communs et les effets du renforcement de l'intérêt environnemental. Dans plusieurs systèmes non européens, la protection des *res naturalis* s'inscrit de plus en plus dans une perspective anthropocentrique inversée. La nature et ses composantes sont reconnues comme ayant une personnalité juridique et la capacité d'accomplir des actes juridiques en tant que sujet de droit avec ses propres revendications. Cette nouvelle perspective doit être étudiée comme une alternative possible aux régimes traditionnels de protection du patrimoine naturel.

INDEX

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