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Environmentalism and the Disaster Strategy

Stefano Nespore

I.

INTRODUCTION

Thinking about the third generation of international environmental law means trying to forecast the future. Many assume that this is an impossible task and that the rule “no prophecy, especially for the future” is to be strictly observed.¹ But it is an activity which many groups love: economists, political scientists, and social researchers on the one hand; environmentalists and environmental lawyers, on the other. However there is a difference between the two groups. For the expert of the first group, the future is not necessarily worse than the present: it could even be better. On the contrary, environmentalists and environmental lawyers constantly imagine the future ranging from bad to very bad.

This attitude is not a new development. It is deeply rooted in environmental thinking. Beginning with the prediction of Malthus in 1798 that starvation in Great Britain was imminent, there has been an endless chain of predictions of catastrophe concerning irreversible environmental damage and unavoidable scarcity of food, minerals, water and other natural resources.

A few examples are sufficient. In 1865 Stanley Jevons predicted the end of coal in Great Britain in a few years. In 1914, the United States Bureau of Mines reported that oil reserves

1. The position affirming that, whatever the future will be, certainly it will be different from whatever is presently imaginable finds its roots in an intuition of Hegel concerning what he called the “*zoè*” (the thinking life). Human beings sometimes think that they can observe and modify the external world; sometimes they think that they are a mere product of the world. Both attitudes are wrong, said Hegel. Human beings are a part of the world they observe; they cannot avoid observing themselves while observing the world. They cannot think as if they were not a fusion with the reality that they want to explain. *Zoè* is the result of this fusion, irremediably linked to the observer and to the observed reality. None of us can escape from this condition: this is the limit of our imagination of the future that we cannot overcome.

would last no more than ten years. According to official reports of the US Department of Interior published in 1939 – and again in 1951 – oil reserves would last slightly more than one decade. In 1972 a world famous book, *The Limits of Growth*, predicted a coming shortage of world reserves of oil, natural gas, silver, tin, uranium, aluminum, copper, lead, zinc and many other resources.

All these predictions were completely incorrect.² Then in 1973 the World Watch Institute started its yearly forecasts of scarcity of food production. Year-by-year, predictions go on, almost always later proven inaccurate.

Since 1961 the world population has doubled. And food demand has increased rapidly: every year there are 90 million more human beings to feed in the developing countries alone. Demand also increases because people in developing countries are wealthier: they have developed a taste for meat; and to fatten livestock it takes a considerable amount of grain.³ But food production has more than doubled. Although the greater increase of production occurred in developed countries, while the population increases mainly occurred in underdeveloped ones (this makes evident that the problem is not so much of production, but of redistribution of the resources and of protectionism measures adopted and strictly implemented by rich countries against poor ones),⁴ the Food and Agriculture Organization (FAO), the International Food Policy Research Institute (IFPRI) and the World Resources Institute are persuaded that agriculture can cope with a growing population⁵ for many decades to come.

A similar history can be traced for pollution. During the Seventies the enemy was nuclear energy; during the Eighties, chemicals and acid rain. Chemicals were considered the principal

2. Unless otherwise indicated, the following data come from: MELISSA LEACH & ROBIN MEARNS, *THE LIE OF THE LAND* (1996); Melissa Leach & Robin Mearns, *Plenty of Gloom*, *THE ECONOMIST*, Dec. 20, 1997, at 21.

3. According to Food and Agriculture Organization (FAO), calories consumed per capita in 1993 are 27% higher in the Third World than in 1963. Today, one-third of the world's grain goes to feed animals; to meet growing meat demand, the world's livestock population has boomed. Cattle numbers rose by 40% between 1961 and 1997, pigs by 130% and chickens by 246%. See World Resources Institute, *Critical Consumption Trends and Implications: Degrading Earth's Ecosystems*, at <http://www.wri.org/critcons/> (last modified July 10, 2000).

4. The case of strict barriers on imports of food products in the European Union countries to protect European agriculture.

5. However, following the lowest of three projections made by the U.N., the world population will stabilize around 2040 at the level of 7.5 billion, then start to decline.

cause of the increased incidence of cancer. However, recent medical statistics agree that the rate of mortality from cancer not related to smoking has actually declined since 1950.⁶ The decline of the forests in Germany and in the U.S., confidently attributed in the past to acid rain and considered irreversible, reverted its trend years ago. FAO reports that forest cover in Europe (excluding the Former Soviet Union) increased by more than four percent between 1980 and 1994 and grew in the first half of the Nineties by three percent; in the same period growth in the United States was two percent.⁷ Few today attribute the previous decline to acid rain. With cautious terms, the problem is now described as follows: "Over the years, scientists, foresters, and others have watched some forests grow more slowly without knowing why. The trees in these forests do not grow as quickly as usual. Leaves and needles turn brown and fall off when they should be green and healthy. Researchers suspect that acid rain may cause the slower growth of these forests. But acid rain is not the only cause of such conditions."⁸

The same considerations can be applied to other well-known issues, like desertification and deforestation. In 1984, a United Nations report asserted that the desert was conquering 21 million hectares of land worldwide every year. Reports published ten years later declared that there was no net advance of the desert on a world scale. In some areas the desert has gained; in some others it has shrunk. Claims made in the 1980s about deforestation in the Amazon also today are considered gross overestimates: not 20% of the total and 80 million hectares per years (as asserted) but 9% and 21 million hectares per year during the Eighties, reduced to not more than ten million hectares in the

6. In 1930, the annual rate of cancer mortality in the U.S. was 143 per hundred thousand; in 1990, adjusted for the rising age of the population, it was 190 per hundred thousand. But, if we omit lung cancer, the death rate would have dropped 14% between 1950 and 1990. See ROBERT A. WEINBERG, *ONE RENEGADE CELL: HOW CANCER BEGINS* (1999) (Weinberg adds that the same results could be achieved changing to a low-fat, low-meat diet). For interesting comments, see Daniel J. Kevles, *Cancer: What Do They Know?*, *NEW YORK TIMES REVIEW OF BOOKS*, Sept. 23, 1999, at 14. For a discussion of the relation between environmental pollution and cancer and on the question of whether adverse health effects can be attributed to exposure to dioxin, PCBs, chemical pollutants, and trichloroethylene, see *PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW* (Kenneth R. Foster et al. eds., MIT Press 1999).

7. See World Resources Institute, *Forests*, at <http://www.wri.org/forests/index.html> (last modified Mar. 9, 2001).

8. U.S. Environmental Protection Agency, *Effects of Acid Rain: Forests*, at <http://www.epa.gov/airmarkets/acidrain/effects/forests.html> (last updated Dec. 11, 2000).

late Nineties.⁹ In particular, in the Brazilian Amazon, the annual deforestation rate declined from a peak of more than 20,000 square kilometers in 1988 to just over 11,000 square kilometers in 1991 (however, data from the Brazilian government show that it rebounded to more than 29,000 square kilometers in 1995, before declining to 18,100 square kilometers in 1996).¹⁰

In the last ten years, the focus of the environmental emergency has shifted toward other issues: climate change and biotechnology among them. But these issues too have proven extremely controversial and the dangers predicted by environmentalists again look exaggerated.¹¹

I am, of course, not asserting that environmentalism has produced only erroneous disaster forecasts or that environmental policy always worked on the basis on incorrect assumptions. Nor am I arguing that acid rain, desertification, deforestation, and climate changes are not environmental problems. They are. And there are numerous reasons to be concerned about the future of the global environment. Moreover, it must be said that in many cases, as for acid rain and the greenhouse effect, environmentalists have achieved positive results, forcing governments and institutions to address environmental problems. Much environmental improvement, especially in the rich Western countries, can be attributed to the efforts of the environmental NGOs to draw the attention of public opinion and the governments to specific issues.

My aim rather is to argue that environmentalism has been strongly characterized by a disaster strategy, an over-dramatiza-

9. There is no agreement about this issue. For example, John Terborgh, a prominent ornithologist with long experience in the Amazon and co-director of the Center for Tropical Conservation at Duke, asserts that the rates of deforestation have increased during the 1990s. See JOHN TERBORGH, *REQUIEM FOR NATURE* 121 (1999).

10. World Resources Institute, *Deforestation: The Global Assault Continues*, at <http://www.wri.org/wri/trends/deforest.html>.

11. For the global warming issue, see generally Pace University's global warming web site at <http://joshua.law.pace.edu/env/energy/globalwarming.html>. More critical views on the issue can be found on the Global Warming Information Page at <http://www.globalwarming.org/>. For a downsizing view of the issue, see Curt Supplee, *Studies May Alter Insights Into Warming*, WASH. POST, Mar. 15, 1999, at A7 (reporting about two new studies (published the previous months in *NATURE* and *SCIENCE*) of the Earth's ancient atmosphere "that may alter the way scientists understand the relationship between airborne carbon dioxide and climate change, and the entire dynamics of future greenhouse global warming.") The U.S. Environmental Protection Agency (EPA) estimated in 1995 that sea levels would rise at an average of 34 cms per year until 2100, a significant reduction compared to the Agency's 1983 estimate of 175 cms. Cfr. <http://www.reast.demon.co.uk/gw9510.html>.

tion of future environmental world emergencies, using inaccurate and unchecked scientific data, while forgetting present environmental disasters. After considering the rationale for and the effects of this attitude, the article will point out that changes that have occurred in the world in recent years suggest the adoption of a different strategy for environmentalism and consequently for environmental law.

THE EFFECTS OF THE DISASTER STRATEGY

The worldwide effects of the strategy are several.

a. *Distortion of Environmental Law and Environmental Policy*

Law, lawyers and legal policy follow and implement the general policy outlines set for the sector and transform the outlines into regulation, at the national and at the international levels. In the international arena, a great part of the efforts of environmental legal experts has been to respond to issues stressed by environmentalism, that is to focus on the issues selected by the disaster-strategy. More specifically, since these issues concern huge catastrophes set in some distant future, efforts of the legal experts have been to build up international legal systems, financial devices, and cooperative conventions to promote legal and institutional processes to avoid the future catastrophe.¹² Resulting at the international level is a diversion of attention of environmental lawyers. Also, environmental policy has been diverted from the numerous environmental problems affecting today's world that require legal solutions for resolution.

b. *Distortion of Economic and Financial Budgets*

In the same way, the disaster strategy adopted by environmentalism diverted financial resources of the States and of international organizations towards huge and controversial projects in order to avoid or to limit possible negative future effects, sacrificing progress on present environmental problems. Today's environmental problems, which can be confronted and mitigated, if not solved, receive no or low priority because they do not seem as disastrous as future problems. The latter, not subject to con-

12. In the 1990s, the concept of "common concern" developed. See United Nations Framework Convention on Climate Change, May 9, 1992 (declares that "change in the Earth's climate and its adverse effects are a common concern of humankind."). See also Phillippe Sands, *The Greening of International Law: Emerging Principles and Rules*, 1 IND. J. GLOBAL LEG. STUD. 293 (1994).

temporaneous verification, can be described in terms as gloomy as anybody wishes. Of course, there is no rational or ethical way to support this choice, given that the financial and legal investment in today's problems makes better economic sense than any other equivalent investment. Apart from this comparative perspective, there is no method to be sure that investments on a project to be realized in the distant future make economic sense at all. In fact, in measuring benefits in the distant future (say, more than 30-years from now) economic forecasts are weakened by uncertainty about what will be the state of the world, the people's preferences and values, and available technology.¹³

c. *Loss of Public Support*

The disaster strategy is a vicious circle. The strategist is forced to create new and greater disasters to hold the attention of the public. The strategist cannot allow people to say, "Oh, another one," and turn the page of the newspaper. He needs to have the public constantly upset, following the issues, campaigning and financing. Of course, that reaction cannot continue forever. There is a point where people, seeing no concrete results whatever they do with regard to future environmental crises, and perceiving concrete results of day to day environmental policy and from tighter regulations adopted throughout the industrialized world, become insensitive to the strategy. They no longer care what environmentalists say. There are signs of decline in public support for environmentalism, especially in the developed countries. In the last five years the main environmental organizations have experienced declines in membership (and consequently a consistent reduction in their financial strength). In many countries "Green Parties" are loosing political support.

III.

THE REASONS FOR THE DISASTER-STRATEGY

Why has environmentalism adopted a disaster strategy? I suggest two main reasons:

a) Environmentalism emerged in postindustrial countries and bears heavy marks of this origin. For wealthy people in rich countries the concern over possible ruinous events somewhere in a distant future is more important than the gigantic environmen-

13. See generally PAUL PORTNEY & JOHN WEYANT, *DISCOUNTING AND INTERGENERATIONAL EQUITY* (1999).

tal problems now oppressing the large underdeveloped parts of the world. Western environmentalists are much readier to invest money and energy to prevent a risk that might affect their distant offspring, like the potential (and controversial) warming of the climate that might happen sometime next century, than to finance efforts in out-of-sight areas of the world. There present huge environmental problems need to be solved (air pollution, water pollution and water shortage). These problems destroy the environment and kill thousands of people each year.

For wealthy people in rich countries the future environment is “our environment,” while the present environment where underdeveloped people live is “their environment.”¹⁴ In other terms, environmentalism and environmental policy sell what can be sold. The purchasers of this merchandise live – with few exceptions – in Europe, North America and Australia. They receive what they are willing to buy.

b) Another important reason is that the disaster-strategy is not particularly new or unique to the environmental movement: on the contrary, it fits perfectly in what H.L. Mencken considered a common aim of practical politics: to keep people under alarm by describing an endless series of artificially built-up dangers.¹⁵ Environmentalism has adopted the practice, in an attempt to transform real or not-so-real global problems into epochal issues apt to catch the attention and the support of the public and of international organizations.

The context for this strategy choice was a world strictly organized following the Westphalian model, conceived in 1648 with the Treaty of Westphalia. Under this model, members of only one type of sovereign legal entity –the Nation-State – having absolute internal sovereignty shared the world. Each nation-state had (at least formally) legal powers in its external relations equal to the others. International law and organizations in contrast have lim-

14. This attitude can be traced back to the definition of sustainable development offered by the Brundtland Report. There, equity in the inter-generational sense (i.e., limiting development to protect the options of future generations) was considered as important as the distributive justice in the intra-generational sense (i.e., in its commitment to meeting “the needs of the present”). See WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* 43 (1987); see also Michael McCloskey, *The Emperor Has No Clothes: The Conundrum of Sustainable Development*, 9 DUKE ENVTL. L. & POL’Y F. 153 (1999).

15. The “meteor” or “asteroid” – syndrome used by United States and China to pursue and to justify experiment in military and nuclear matters offers a good example. See generally Mike Davis, *Stone Killers*, NATION, Oct. 28, 1996, at 38.

ited powers and are not very effective. Sovereignty basically meant that governments were free to do whatever they liked to their own people and to their assigned or conquered territory.¹⁶ In this context, one rigidly and mutually controlled in order to exclude the emergence of new world actors, environmentalism began. The disaster-strategy was a very efficient strategy (probably the only one available), which would foster emergence and official recognition of powerful Non-State organizations.

To be sure, this strategy has been successful and has reached impressive goals in a short period. Many environmental NGOs are today known worldwide, and recognized as legitimate legal entities at the international level: environmental NGOs – and their counterparts, NGOs representing the interests of industry and the business – are routinely admitted to the negotiations of international agreements concerning the environment, and to their implementation (where representatives of states may act only as go-betweens in order to mediate the conflicting perspectives of the different NGOs participating to the discussions).¹⁷ The same may be said regarding the internal and local level: there they are represented by branches of their organization, by political “green” parties, and are often backed by traditional parties and political organizations.

Moreover, they have attained great political and financial power; surely they are stronger today than dozens of States on the world-map. Greenpeace, for example, with its own fleet some years ago challenged France on the sea to block a planned nuclear experiment.¹⁸ Other environmental NGOs succeeded in forcing huge corporations to respect their requests. Some cases are well known: McDonald’s shifted from plastic bags to paperbags, following pressure from some environmental organizations.¹⁹ And three major producers of tinned tuna (*Starkist* and *Chicken of the Sea* and *Bumblebee* tuna) were convinced to

16. Contributions to the understanding of sovereignty have been numerous. For a good outline of this issue, see Symposium, *The Decline of the Nation State and Its Effects on Constitutional and International Economic Law*, 18 CARDOZO L. REV. 903 (1996). A provocative view of the origin and the development of sovereignty in the modern era is offered in L. FERRAJOLI, *LA SOVRANITÀ NEL MONDO MODERNO* (Laterza Bari 1997).

17. *Id.*

18. The 1997 budget of Greenpeace was \$130 million, with \$92.5 million to invest in specific campaigns; contributors in 1991 numbered almost five million.

19. See John Holuscha, *Packaging and Public Image: McDonald’s Fills a Big Order*, N.Y. TIMES, Nov. 2, 1990, at A1.

purchase only dolphin-free tuna, that is, tuna caught without use of a kind of net dangerous to dolphins.²⁰

IV.

THE CHANGING WORLD

Considering the effects of and the reasons for the disaster strategy, it appears that this strategy cannot be further exploited. Not only is it impossible to proceed *ad infinitum* in the circle of future danger and to maintain public attention and that of domestic and international political organizations, but also the general conditions that created this strategy are changing. Three aspects of change seem to be directly relevant.

a. *The Disintegration of the "Westphalian Model"*

At the turn of the century, we are witnessing the decomposition of the Westphalian-model, one that has lasted for more than 300 years. For instance: in Europe, at the middle of the seventeenth century there were more than 500 public authorities: States in all possible sizes and shapes (large, medium, small and micro) and central and local religious powers with sovereign characteristics (like territorial control and a monopoly on punishment) cut from, or often overlapping with, the sovereignty of the former. At the beginning of this century, on the world stage there were only States, reduced to not more than 25. In the same period, we moved from only 20% of the total available land covered by sovereign States to the whole planet, another impressive, although apparently countervailing, shift. At the end of this process, only one type of sovereign legal entity survived – the States – which shared the whole world, with absolute internal sovereignty, and with equal (at least formally) legal powers.

In the 20th century, especially in the last forty years, this process has not only ceased but has reverted: legal entities in the world are increasing in number and in type.²¹ The strictly quantitative increase is amazing: the world map contained 62 States in 1914 (25 in Europe as then defined), 74 in 1946, and more than 200 today. From a qualitative point of view,²² today we have

20. See Phillip Shabecoff, *Three Companies to Stop Selling Tuna Netted With Dolphins*, N.Y. TIMES, Apr. 13, 1990, at A1, A4.

21. S. Cassese, *Gli Stati nella rete internazionale dei poteri pubblici*, in RTDP 1999, 321-329, spec. 328; D. Zolo *Cosmopolis. La prospettiva del governo mondiale Milano* (1995).

22. JAMES N. ROSENAU, *TURBULENCE IN WORLD POLITICS* (Brighton 1994).

many new international legal entities: Federations of States, Unions of States, Cooperation Treaties, Political Organizations (G-7, NAFTA), Financial and Economic Organizations (World Bank, IMF), Military Organizations, and International Courts with growing powers that erode the traditional all-comprehensive sovereignty of the State. In addition, we have international NGOs often wealthier and more powerful than dozens of the existing States. Among them are churches and religious organizations, human rights and health organizations. In this last group are the Environmental NGOs, whose number, power and authority boomed in the last twenty years so that they now make a true difference in world affairs and in the internal policy of some states.²³ They act as transnational pressure groups, and – as noted – are routinely admitted to the negotiations of international environmental agreements and are involved in their implementation.

However, as many have pointed out, environmental NGOs and environmental activists should not be considered simply pressure groups: rather they are political actors in their own right, directing a substantial part of their effort to politicize the civil society.²⁴ Moreover, a number of large enterprises (Microsoft, Toyota, IBM, Siemens and Samsung are the ones mentioned in Raymond Vernon's last book)²⁵ behave as powers independent of the States. Certainly they are more powerful and richer than many States, and are able – directly or indirectly through organizations representing their interests and through transnational economic institutions like the World Bank – to superimpose their view of international relations, of sustainable development, and also of an environmental protection compatible with industrial goals onto the traditional nation-centered way.²⁶

23. See generally Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Policy*, 47 *WORLD POLITICS* 311 (1995). See also MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Margaret E. Keck & Kathryn Sikkink, *Transnational Advocacy Networks in International and Regional Politics*, *INT'L SOC. SCI. J.*, Mar. 1999, at 89.

24. On this wide issue, see Ronnie Lipschutz, *Restructuring World Practice: The Emergence of Global Civil Society*, *MILLENNIUM* (1992); see also RICHARD FALK, *EXPLORATIONS AT THE EDGE OF TIME* (1992).

25. See RAYMOND VERNON, *IN THE HURRICANE'S EYE: THE PROSPECTS OF MULTINATIONAL ENTERPRISES* (1998).

26. See generally Matthias Finger & James Killoyne, *Why Transnational Corporations are Organizing to Save the Environment*, *ECOLOGIST*, July 1997, at 138. The authors maintain that big transnational corporations have assumed control—through allocation of funds of the World Bank—of the business of protection and

The present situation, far from being stable, is the following: we have many more States but also many other actors and legal entities. All are competing to keep or to attain support, money, sovereignty, and power.

In conclusion, sovereignty today is something intrinsically different from the recent past.²⁷ Certainly, it increasingly means less that governments are free to do whatever they wish to their own people and to their territory.²⁸ It has been said that, "sovereignty, the power of a nation to stop others from interfering in its internal affairs, is rapidly eroding."²⁹ Or, in other words, "States will increasingly be required to take into account the needs of all members of the international community in developing or applying their policies and laws previously thought to be solely a matter of domestic jurisdiction."³⁰

b. *Economic and Financial Globalization*

Deeply intertwined with the disintegration of the Westphalian model, we are witnessing today another event, which is much more common and general than the former. It is the well-known and often-misunderstood globalization: growing economic interdependence between States. Although not without precedent – Marshall McLuhan wrote in 1962 that electronic interdependence "recreates the world in the image of a global village" and one can easily find similar descriptions of the western world

enhancement of the environment, particularly in the underdeveloped countries. They specifically point out the intense activity of a NGO representing big business, the World Business Council on Sustainable Environment (WBCSD). With specific regard to the position of the World Bank, Greenpeace remarks, "In response to pressure to increase financing for global environmental protection, the World Bank took the lead in 1991 in establishing the Global Environment Facility (GEF). The GEF would enable the institution to become the key agency in financing two key environmental conventions – the Framework Convention on Climate Change and the Biodiversity Convention, both signed in Rio. Administration of the GEF not only gives the bank new government funds to administer, it also provides a 'green' cover for many environmentally destructive bank loans." See GREENPEACE, WORLD BANK FACT SHEET NO. 3: WORLD BANK AND THE ENVIRONMENT.

27. Keith Aoki, *Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, the National Sovereignty, Global Intellectual Property and the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 443 (1998).

28. As many have remarked, in 1999 the Kosovo War and the trial of General Pinochet are evident signals of the rise of a serious challenge to the principle: limits of sovereignty are deeply changing.

29. Walter B. Wriston, *Bits, Bytes, and Diplomacy*, FOREIGN AFF., Sept/Oct 1997 at 174.

30. PHILIPPE SANDS, *supra* note 12; see also GAETANO SILVESTRI, LA PARABOLA DELLA SOVRANITA 3 (1996).

before the First World War – this globalization is new. It is characterized by electronic technology, powerful computers available to the general public, extremely inexpensive communication, possibilities of free and quick investing in foreign markets. It is also characterized by the lack of a centralized government and a centralized policy, although, as many point out, a new transnational class of powerful managers is emerging: as Duclos points out, a hyper-bourgeoisie is slowly substituting the traditional levels of command, playing a world-wide business, floating above national institutions, local cultures and local markets, usually located in the financial centers of globe.³¹

All these elements of the new globalization contribute to deep social and cultural changes all over the world.³² Many fear that globalization creates many dangers and pitfalls. Not only will people lose many kinds of protectionist practices (in the economy as well as in culture), but also many States, particularly the weaker or the poorer ones, will be forced to adapt to competition and to the market rules;³³ they will sell out their national resources and cancel welfare programs, however meager they were.³⁴ In particular, a large number of environmentalists believe that free trade and trade liberalization will ruin the global environment, causing a sort of “race to the bottom.” In the poorer countries governments compelled to play or perish in the unavoidable globalization game will be forced to set lower environmental standards in order to attract investments and “dirty”

31. Regarding this new class, see DENIS DUCOS, *UNA NUOVA CLASSE SI IMPOSSA DELLE LEVE DEL POTERE MONDIALE. LA NASCITA DELL'IPERBORGHESIA*; see also JEAN-CLAUDE MILNER, *LE SALAIRE DE L'IDEAL* (1998); SASKIA SASSEN, *CITTA GLOBALI*, UTET (1997).

32. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999); W. WRISTON, *supra* note 13 at 175, observes that “the information revolution is . . . profoundly threatening the power structures of the world.” See also Saskia Sassen, *Global Financial Center*, *FOREIGN AFF.*, Jan.-Feb. 1999 at 95-97, remarking that global capital markets are continuing the process of integration into a new supranational order, while the international network of financial centers is expanding.

33. Although many think that globalization is simply a matter of political choices: see R. GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS*, 88 (1987), (speaking of the new economy as a product of a permissive international order determined by the choices of some states which can impose the rules of the game on all the others).

34. See ULRICH BECK, *WAS IST GLOBALISIERUNG? INTUMER DES GLOBALISMUS, ANTWORTEN AUF GLOBALISIERUNG*, SUHRKAMP VERLAG 26 (1997). See, e.g., RAYMOND VERNON, *supra* note 25, suggesting that the relatively benign climate in which multinationals have been operating during the past 10 years could be soon facing rough waters, especially in European countries where fears are spreading that a too-open economy endangers welfare.

industrial activities fleeing from developed countries. The wealthy countries will also so act in order to avoid the flight of industry and the consequent loss of jobs to countries with less developed environmental regulations or with a lax enforcement. Summing up, as DiMento and Doughman pointed out, “trade liberalization might be seen as rewarding trade partners uncommitted to environmental protection, thereby removing incentives to comply with environmental laws and create stricter environmental standards.”³⁵

Others think that globalization creates new opportunities for individuals, multinational companies and countries. With the spreading of trade liberalization, the world will become richer. This wealth is the surest way to make it cleaner, through promotion of social interest in environmental quality and the increased capacity to pursue environmental goals.³⁶

c. *Improvements in the Environment and the Growing Implementation of Environmental Regulation at a Local Level in the Industrialized World*

Today the air, rivers, lakes, and forests in the rich industrialized countries – that is, in the font of support of environmentalism – are, at the local level, much better off than they were a few decades ago. Once an issue is identified as an environmental concern, something in most cases is done about it. Many sources of air pollution and lead levels in the air have been brought under control. Waters are cleaner, since wastes are now treated before release. In other words, where growth has occurred, the environment has often become cleaner and healthier. The reasons are several: the spreading of environmental consciousness and education, the insertion of environmental issues in the agenda of many political parties, the success of environmental regulations (criminal as well as administrative and civil) and their implementation.

What will happen with environmentalism and environmental law in this new world? What will emerge from the decline of the Westphalian model and the boom of globalization?

35. Joseph Dimento & Pamela Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L. REV. 653 (1998).

36. This is the position of THE ECONOMIST: see *Why Greens Should Love Trade*, Sept 15, 1999 at 17.

V.

THE CHANGING STRATEGY OF ENVIRONMENTALISM
AND ENVIRONMENTAL POLICY

The point of departure is that the Westphalian model centered on States and on governments free to do whatever they wanted to their territory, and the old, non-globalized, free-trade-adverse economy, has together contributed to destroying the environment. The reason is simple: the model was not conceived to cope with the great problems of management and preservation of the environment in an industrial and post-industrial world. As soon as these problems emerged and it became clear that States alone could not possibly solve them, effort was directed to build up international agreements to limit their power and their sovereignty, keeping the States always at the center of the scene. The ultimate result was reached in the Nineties, when the concept of "common concern" of the States was widely developed,³⁷ reaching the ultimate formula of a "shared but different responsibility" for environmental preservation, recognizing the different contribution of the developed and underdeveloped countries to the environmental degradation.

The results have been meager. Firstly, the rich countries, although contributing substantially to the past and present environmental degradation, refuse to change their "life style" (as President Clinton has declared) and to reduce their impact on the environment. Secondly, it has proved extremely difficult to secure effective and trustworthy cooperation. As always in the case of collective action where there is no effective enforcement, anyone can be a free rider, while others comply with agreements.³⁸

Ultimately, international law is not binding, and implementation of the rules cannot be forced (apart from waging war, obviously reserved for the most important violations). Countries not adhering to international law on some matters generally do not bear consequences of their choices, and many countries, like the United States, consider their Constitution prevailing over International Treaties. As John Bolton points out, "governments often follow only those international laws that suit their interests

37. The 1992 Climate Change Convention declares that change in the earth's climate and its adverse effects "are a common concern of humankind" Convention on Biological Diversity, June 5, 1992; see PHILIPPE SANDS *supra* note 12.

38. This last point is examined in John Dunn, *Introduction: Crisis of the Nation-State*, POL. STUD., March 15, 1994 at 13.

and ignore those that do not", concluding that "international laws are not law" in the common sense of the expression.³⁹

We have seen that the choice of the disaster-strategy on the world scale by environmentalism can be interpreted as an efficient move to fight State monopoly over its territory and to affirm environmental organizations as legitimate actors in the world arena. The decline of the Westphalian model, the expansion of globalization and the now consolidated presence as legitimate actors of environmental organizations (together with other non-state organizations) provide a great opportunity for reshaping environmental strategy. In this respect, we do not agree that this evolution, and globalization in particular, pose a great danger for the environment. The rich, developed countries continue to consider the underdeveloped world an area to be plundered as soon as the occasion arises, while in the underdeveloped world poverty and need or greed of governments lead to the collapse of resources and an increase of pollution. However dangerous globalization may be, we should not forget that until very recently the State-centered, non-globalized world produced the damages to the environment we experience today. Thus, we must trust in a non-State-centered, globalized world to find the path to change.

Nor can we agree with the fundamentalist view affirming that wealth damages the environment.⁴⁰ These views do not take into consideration the fact that in the 20th century when we had growth, we also had a healthier environment. It is in the poor countries, with no or very slow growth, where air and water pollution is increasing, where deforestation remains a problem, and where it is very difficult to cope with the immense problems connected with preservation and with environmental safety. Aaron Wildavsky's provocative assertion that "wealthier is healthier," used in the Seventies to mock the tough anti-growth environmentalist position, today is supported by experience.⁴¹ Consequently, we should agree with one conclusion stressed years ago in the Brundtland Report: poverty is the principal cause of the degradation of the environment all over the world.⁴² This con-

39. John Bolton, *The Global Prosecutors: Hunting War Criminals in the Name of Utopia*, FOREIGN AFF. Mar/Apr 1999 at 157, 159.

40. M. URN, GLOBALE GEFÄHRDUNGEN UND INTERNATIONALE KOOPERATIONEN DER BURGE IM STAAT 51 (1995).

41. On this issue, see Lant Pritchett & Lawrence Summers, *Wealthier is Healthier*, 31 J. HUM. RESOURCES 841-869 (1996).

42. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 14.

clusion is both widely cited and methodically ignored. World poverty in fact is increasing at a shocking rate (although some underdeveloped countries – like India - are witnessing improvement in the conditions of life of their inhabitants). According to Lant Pritchett, in 1870 Great Britain and the United States had an income per capita nine times that of the poorest country. One hundred and twenty years later, in 1990, it was more than 45 times. If we take the 17 richest countries of 1870, their income per capita was 2.5 times that of all the other countries together; today's 17 richest countries have an income of 4.5 times that of the rest of the world.⁴³ If we believe in the causal relation between wealth and environmental quality, and if we do not wish to witness in the next century the twilight of environmental care and preservation and the waning of environmental law and policy [except in a few fortunate spots of the world], the real enemy to fight is poverty.

At this point, two objections by environmentalists and environmental lawyers are clear. First, combating poverty is not the business of environmental law. This position is inaccurate unless policymakers and practitioners wish their business to be confined locally to a progressively shrinking clean environment and globally to disaster-forecasts. It is also wrong, because, having been so concerned with the negative environmental effects of growth, the environmental community should now focus on the more justified concerns about the negative environmental effects of poverty. Above all, this position is wrong because the major causes of environmental degradation – whatever they are – should be the business of environmentalists and environmental policy.

The second objection is understandable: how possibly can environmental law and its practitioners fight poverty in the underdeveloped world? This is the core of the problem. Presently, the fight against poverty is pursued by many of the forces that have affirmed and extended their powers in the non-Westphalian-globalized world. Economic and financial organizations as well as NGOs concerned with aid to underdeveloped countries and with protection of the human rights are planning and starting programs where the fight against poverty is at the center of their activity. Environmental organizations should not remain aloof from this global movement but should take an active part, ex-

43. Lant Pritchett, *A Survey of the 20th Century*, THE ECONOMIST, Sept 11, 1999 at 27.

plotting their position of being an "actor sovereignty-free."⁴⁴ On one hand, they should assume official roles, cooperate with all state and non-state entities, and contribute with their experience and their specific skills. On the other hand, they should expand their activity in the "global civil society" (that is, in the "complex network of economic, social and cultural practices based on friendship, family, market, voluntary affiliation" located above the individual but below the state, across national boundaries).⁴⁵ In particular, environmentalists and environmental lawyers must take active roles in the collective political and legal action that is being organized. Their aims are to lift environmental standards adopted by industry and transnational corporations in the underdeveloped countries, and to set general rules and a mandatory international regulatory framework for international investments. This is the only way to avoid the "race to the bottom."

This collective action cannot be deferred, considering the huge increase of private investments in these countries in the last years, in comparison with public or international funding (private investments, less than half of the total in 1990, have reached three-fourths of the total in 1995). Private investments are, of course, much more likely to exploit the need for money and often the corruption of the regimes in power to pursue production at low costs and without excessive controls.⁴⁶

Moreover, environmental NGOs and environmental law must play an active role in forcing wealthy states and transnational corporations to adopt as a strategic goal, not short term commercial gains via liberalization, but a long term perspective, consisting of a wider set of integrated economic and environmental as well as security and social objectives.⁴⁷ In other words, globalization and free trade require more controls, not more liberalization. Environmental NGOs must seize an opportunity and assume leading roles in planning creative policies both at home and abroad.⁴⁸ The governance of international capital flows and

44. The expression is in JAMES ROSENAU, *supra* note 22.

45. See RONNIE LIPSHUTZ, *supra* note 24; see also Alberto Melucci, *The Symbolic Challenge of Contemporary Movements*, SOC. RES. 52 (1985); RUSSELL DALTON & MANFRED KUECHLER, *CHALLENGING THE POLITICAL ORDER: NEW SOCIAL AND POLITICAL MOVEMENTS IN WESTERN DEMOCRACIES* (1990).

46. See Lyuba Zarsky, *International Investment Rules and the Environment: Stuck in the Mud*, 4 FOREIGN POL'Y 1 (1999).

47. See Lyuba Zarsky, *Toward a New Foreign Policy*, 4 FOREIGN POL'Y 3 (1999).

48. Richard N. Haass & Robert E. Litan, *Globalization and Its Discontents. Navigating the Dangers of A Tangled World*, FOREIGN AFF., May-June 1998, 2,6.

investments in underdeveloped countries should become the key environmental policy issue in the next future.

There is another important point. When one discusses the fight against poverty, it should not be forgotten that the poverty of a country depends much more on the way it is governed than on natural conditions or social constraints (as we all like to think). Recent evidence suggests that there is a strong link between poverty and the absence of democracy and dictatorship, between poverty and the lack of civic and economic freedom, and of a predictable regulatory and economic climate. Protecting human rights, investments and property rights, enforcing the law, and avoiding inflation and corruption are the independent causal factors offering a way out of poverty.⁴⁹ Therefore they are also the best strategies with which to promote environmental protection. Where human, civic and property rights are fairly regulated - not simply abandoned to the market forces - where law is enforced, where democratically elected governments avoid corruption and inflation, where participation in the development of legislation is encouraged and transparency is guaranteed, where the judiciary is really independent, there are the strongest possibilities to escape from poverty. There we have better education, more knowledge, better health, and, as a result, a better-preserved environment.

Probably for the first time, because of the complex changes described above, the deep links existing between all non-State entities operating today in the underdeveloped world emerge in

49. See The Fraser Institute, *Economic Freedom in the World* at <http://www.freetheworld.com>. The Institute uses 17 measures of freedom, considered as a broad concept, requiring not only a free market but also constant regulatory intervention by the State. See also Jonathan Isham, Daniel Kaufmann, & Lant Pritchett, *Governance and the Returns to Investment: An Empirical Investigation*, World Bank-IRIS, IRIS Working Paper No. 186 (1998). The paper links measures of societal-level participation to project-level performance. The participation variable comes from Freedom House's Civil Liberties Index, that covers 13 participation-related items, including the right of peaceful assembly, freedom of opinion and expression, the right and opportunity to take part in the conduct of public affairs, the right to freedom of opinion and expression, and the right to form trade unions. In general on this still controversial issue. See Robert A. Mitchell, *How to Link Democratic Governance With Economic Growth*, 3 AMERICAN DIPLOMACY, Autumn 1998. Mitchell writes that "the usual assumption is that "a democratic government" is the independent causal factor that improves an economy's performance. In the absence of widely accepted evidence supportive of these linkages, there are advocates of the opposite causal relationship, as partially reflected by those who would delink trade and human rights policies toward growing overseas markets for U.S. exports. These advocates argue that market-based economic growth will lead to greater democracy, although the reasons for this are not always clear."

full light: since human rights, poverty, democracy, and the environment all are intertwined, no organization taking care of one of these aspects can achieve its goals without the assistance and the cooperation of the others. Furthermore, the possibility of gaining access to the globalized world and the danger of being excluded make the governments of many underdeveloped countries much more ready to accept principles of democracy, human rights and fair regulation, ignored until a few years ago.

For environmental policy, it is the right moment to turn attention to disasters happening at the present moment, not far from the gardens of the rich world. Not only States and governments, but also environmental NGOs and environmental law, will determine whether the possible benefits of this era will be exploited or squandered by the policies they adopt and by the practices they follow.

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