

INTERNATIONAL ENVIRONMENTAL LAW: CAN IT DEAL WITH THE BIG ISSUES?

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Can international environmental law deal with the big issues? The topic is important because the big issues to which I refer are nothing less than the protection of the natural systems and cycles that support life on this planet and because international environmental law (IEL) has become the chosen instrument for protecting these systems. I begin by asserting four propositions that set the stage for the analysis that follows.

First, around 1980, a decade after the first Earth Day in 1970, a new agenda of global-scale environmental concerns emerged and gained prominence—an agenda that differed sharply from the predominantly domestic one that sparked the modern environmental movement in the late 1960s and early '70s. Central to this new agenda were ten major issues: (1) Depletion of the stratospheric ozone layer by CFCs and other gases; (2) Climate change due to the increase in “greenhouse gases” in the atmosphere; (3) Loss of crop and grazing land due to desertification, erosion, conversion of land to non-farm uses, and other factors; (4) Depletion of the world’s tropical forests, leading to loss of forest resources, serious watershed damage (erosion, flooding, and siltation), and other adverse consequences; (5) Mass extinction of species, principally from the global loss of wildlife habitat, and the associated loss of genetic resources; (6) Rapid population growth, burgeoning Third World cities, and ecological refugees; (7) Mismanagement and shortages of freshwater resources; (8) Overfishing, habitat destruction, and pollution in the marine environment; (9) Threats to human health from mismanagement of pesticides and persistent organic pollutants; and (10) Acid rain and, more generally, the effects of a complex mix of air pollutants on fisheries, forests, and crops.

Second, throughout the 1980s and '90s, there was an outpouring of activity in response to this agenda. Science, non-governmental organizations (NGOs), businesses, governments, and academia all responded in various ways and to different degrees. What emerged from these initiatives can properly be thought of as the international community’s first attempt at global environmental governance (GEG).

Third, the principal focus of all this activity has been to negotiate international plans of action—especially treaties. Scores of international

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agreements have been forged in recent decades. The first attempt at GEG has been predominantly an effort involving IEL.

Finally, despite all the effort, the disturbing trends noticed twenty years ago continue essentially unabated—ozone depletion being a notable exception. The problems are more deeply entrenched, and time is now short. Judging from this fact, as well as the analysis of particular treaty regimes affecting specific issues such as climate and biodiversity, it is a fair if unfortunate conclusion that this first effort at GEG has largely failed. The international community has not acted decisively to reverse the trends, and the results of twenty years of international environmental negotiations are deeply disappointing. It is not that what has been agreed upon, for example, in the framework conventions on climate, desertification, biodiversity, or the Law of the Sea is wrong or useless. Those conventions have raised awareness, provided frameworks for action, and stimulated useful national planning exercises. But the bottom line is that these treaties and their associated agreements and protocols do not drive the changes that are needed. The issue with these treaties is not weak enforcement or non-compliance, it is weak treaties themselves.

Thus far, the climate convention is not protecting climate, the biodiversity convention is not protecting biodiversity, the desertification convention is not preventing desertification, and even the older and stronger Convention on the Law of the Sea is not protecting fisheries. Nor are they poised to do so. The same can be said for the extensive international discussions on world forests, which never have reached the point of a convention.

The Kyoto Protocol, one of the most advanced of these efforts, is an important but modest first step in protecting climate. It has taken a decade to move to the point where it could be adopted. And, alas, even if its goals for 2010 are met, it will likely be because of the extensive use of “flexibility mechanisms” and carbon sinks—some would say loopholes—that reduce its impact. One must give credit to the serious efforts being made to breathe life into the Kyoto Protocol, particularly in Europe, but it is also important to appreciate how far the world is from a solution to the climate change challenge.

With this as background we come to the critical question: Why? Why has our first effort at GEG, with its great emphasis on IEL, largely failed, or at least failed to date?

Here is the way I would characterize the situation: a serious disease is attacking Mother Earth, and, in response, we have dispensed pitifully weak medicine. This is not to say that the medicine did nothing—it helped a

bit—but it also compounded the problem by making people mistakenly think that an effective response was being administered.

The disease is serious for three reasons. First, global-scale environmental deterioration is driven by very powerful forces. Most familiar is the population explosion. It took all of human history for the global population to expand to a billion and a half people by the year 1900. Over the last century, however, that many people have been added, on average, every thirty-three years. In the last twenty-five years, global population increased by fifty percent—from four to six billion—with virtually all of this growth occurring in the developing world.

Global population may have increased four-fold in the past century, but world economic output increased twenty-fold. From the dawn of history to 1950, the world economy grew to about six trillion dollars. It now grows by this amount every five to ten years. Since 1960 the size of the world economy has doubled and then doubled again. Energy use moved in close step with economic expansion, rising at least eighteen-fold in the twentieth century.

This twentieth century growth has brought enormous benefits in terms of health, education, and overall standards of living, but these gains have been purchased at a huge cost environmentally. And still the world economy's forward momentum is great. Economic growth will continue to expand dramatically in this century. With population poised to grow by twenty-five percent over the next twenty years, with people everywhere striving to better themselves, and with governments willing to go to extraordinary measures to sustain high levels of economic expansion, there is no reason to think that the world economy will not double and then double again within the lifetimes of today's young people.

The next doubling of world economic activity will surely differ in some respects from the growth of the past. But there are good reasons to believe that this future doubling could, from an environmental perspective, look a lot like the last. The pressures to persist with environmentally problematic technologies and practices are enormous. The U.S. Energy Information Administration projects that global emissions of carbon dioxide, the principal climate-altering gas, will increase by sixty percent between 2001 and 2025.¹ Growing food demand is projected to increase the area under cultivation by twenty-five percent in Africa and twenty percent in Latin America by 2030, extending agriculture further into once-forested areas and onto fragile lands in semi-arid zones. For this reason and

1. U.S. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, REP. NO. DOE/EIA-0484, INTERNATIONAL ENERGY OUTLOOK 4-5 (2003), available at [www.eia.doe.gov/oiia/ieo/pdf/0484\(2003\).pdf](http://www.eia.doe.gov/oiia/ieo/pdf/0484(2003).pdf).

others, countries outside the Organisation for Economic Cooperation and Development (OECD) are projected to lose another fifteen percent of their forests by 2020.²

The much used "IPAT equation" calculates environmental *Impact* as a product of the size of human *Populations*, our *Affluence* and consumption patterns, and the *Technology* we deploy to meet our perceived needs. Each of these is an important driver of deterioration. However, what this useful IPAT formulation can obscure, in addition to the impacts of poverty, is the vast and rapidly growing scale of the human enterprise. Here is what happened in just the past twenty years³:

<i>Indicator</i>	<i>Percent Rise in Twenty Years</i>
Global Population	35
World Economic Output	75
Global Energy Use	40
Global Meat Consumption	70
World Auto Production	45
Global Paper Use	90
Advertising Globally	100

Today, with the world economy poised to quadruple again by mid-century, we could easily experience the rapid expansion of many environmentally destructive activities. We probably could not stop the projected growth if we wanted to, and most of us would not stop it if we could. Close to half the world's people live on less than two dollars per day. They both need and deserve something better. Economic expansion at least offers the potential for better lives, though its benefits in recent decades have disproportionately favored the already well-to-do. Remember also that while growth is a serious complicating factor, we could immediately and completely stop all growth in both population and economic activity and still destroy the planet merely by continuing to do exactly what we are doing today.

2. ORG. FOR ECON. CO-OPERATION AND DEV., OECD ENVIRONMENTAL OUTLOOK 126 (2001), available at <http://www.ulb.ac.be/ccese/nouveau%20site%20ccese/documents/ocde%20environment%20outlook.pdf>.

3. This data is compiled from Worldwatch Institute's *Vital Signs* series and from the World Resources Institute Database. See WORLDWATCH INST., VITAL SIGNS: THE TRENDS THAT ARE SHAPING OUR FUTURE (1992-2000). See generally JAMES GUSTAVE SPETH, RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT (New Haven: Yale University Press 2004).

Behind these immediate drivers—population, affluence, poverty, technology, and the extraordinary scale and relentless pace of economic growth—lie a set of deeper factors. First in importance is the pervasive failure to correct market imperfections. Most crucially, the failure to insist upon environmentally honest prices—prices that reflect the full environmental costs—leads to a market economy that has little environmental guidance. Second is the “growth at all costs” imperative. Historian J.R. McNeill noted that the “growth fetish” solidified its hold on imaginations and institutions in the twentieth century. He writes:

Communism aspired to become the universal creed of the twentieth century, but a more flexible and seductive religion succeeded where communism failed: the quest for economic growth. Capitalists, nationalists—indeed almost everyone, communists included—worshipped [sic] at this same altar because economic growth disguised a multitude of sins. Indonesians and Japanese tolerated endless corruption as long as economic growth lasted. Russians and eastern Europeans put up with clumsy surveillance states. Americans and Brazilians accepted vast social inequalities. Social, moral, and ecological ills were sustained in the interest of economic growth; indeed, adherents to the faith proposed that only more growth could resolve such ills. Economic growth became the indispensable ideology of the state nearly everywhere. . . .

The growth fetish, while on balance quite useful in a world with empty land, shoals of undisturbed fish, vast forests, and a robust ozone shield, helped create a more crowded and stressed one. Despite the disappearance of ecological buffers and mounting real costs, ideological lock-in reigned in both capitalist and communist circles. No reputable sect among economists could account for depreciating natural assets. The true heretics, economists who challenged the fundamental goal of growth and sought to recognize value in ecosystem services, remained outside the pale to the end of the century. Economic thought did not adjust to the changed conditions it helped to create; thereby it continued to legitimate, and indeed indirectly to cause, massive and rapid ecological change. *The overarching priority of economic growth was easily the most important idea of the twentieth century.*⁴

4. J.R. McNEILL, SOMETHING NEW UNDER THE SUN: AN ENVIRONMENTAL HISTORY OF THE TWENTIETH-CENTURY WORLD 334–35, 336 (2000) (emphasis added) (citation omitted).

Economic globalization is but the latest manifestation of this growth imperative.

The third factor is that our values and habits-of-thought war against effective environmental protection. Two very basic ways we tend to view the world today are captured in the awkward words anthropocentrism and contempocentrism. Regarding the former, Lamont Hempel has noted that the decline of theocracy and the rise of science in Europe gave Western civilization a self-confident belief in the human ability to dominate nature. "No longer merely caretakers of God's creations," he notes, "people began to imagine themselves, in René Descarte's words, as the 'lords and possessors of nature.'"⁵ This view of the world—that nature belongs to us rather than we to nature—is powerful and pervasive, and it has led to much mischief.

Contempocentrism is the habit of thought that discounts the future in favor of the present. Like anthropocentrism, it is another form of self-centeredness. Contempocentrism is at war with one of the two central propositions of environmental ethics: the proposition that we have duties to future generations (the other is Aldo Leopold's proposition that we have duties to other species). It is significant that the first principle in the first statute of the modern environmental era, the National Environmental Policy Act of 1969 (NEPA), calls upon the federal government and "the Nation" generally to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."⁶ It is a sacred trust—our duty to our children, our neighbor's children, and their children—and it is a trust at which we are failing.

A moment's reflection on challenges like climate change and tropical deforestation suggests that they are driven by essentially all these factors. Ozone layer depletion, by contrast, was a relatively superficial problem driven initially by what was an innocent technological mistake. We thought CFCs were safe, and when we found that they were not, we rather quickly found chemical and other alternatives.

These considerations also suggest the second reason the global agenda is inherently difficult: most global-scale challenges are formidable because they require far-reaching, complex responses involving international cooperation. Consider some of the measures needed to address global climate change: new energy policies, new transportation strategies, changes in agriculture and the management of forests around the world, and so on.

5. LAMONT C. HEMPEL, ENVIRONMENTAL GOVERNANCE: THE GLOBAL CHALLENGE 66 (1996).

6. National Environmental Policy Act, 42 U.S.C. § 4331(b)(1) (2000).

All must proceed within an international framework accepted by all major countries.

The final inherent problem of the global agenda is its difficult politics. Global-scale challenges have thus far garnered only weak and scattered political support. One way to bring out the political difficulty of grappling with the global-scale challenges is to stress the contrasts between the global issues that emerged around 1980 and the predominantly domestic ones that led to the first Earth Day in 1970—issues such as local air and water pollution, strip mining, clear cutting, and highway construction. Consider the following contrasts, somewhat overstated to make the point:

<i>1970 Domestic Agenda</i>	<i>1980 Global Agenda</i>
Understandable	Scientifically complex, difficult to understand
Highly visible impacts	Remote or difficult to perceive impacts
Current Problem	Future Problem
Us/Here	Them/There
Acute Problem	Chronic Problem

These contrasts suggest the technical complexity of the global-scale issues and the political vulnerability of efforts mounted to respond. Furthermore, these considerations make clear that addressing global-scale issues requires extraordinary leadership, resources and actions. But what did we do? In a nutshell, we framed and implemented a flawed response—weak medicine for a very ill patient.

Basically, the response of the international community has missed the mark in two key respects. First, it opted for IEL as the primary means of attack while badly neglecting measures that could more directly correct the underlying drivers of large-scale deterioration. Second, having selected IEL as the chosen instrument, it never really gave IEL a chance to succeed.

Why was it that the IEL approach got adopted so thoroughly and quickly? Why did the international community slide easily into negotiating conventions and protocols? First, there were plenty of precedents. The legal-regulatory approach was the approach most often taken domestically with environmental protection. And, it was taken internationally in the regulation of trade, aviation, and other areas. So, the model was readily available. It was used so frequently because it seemed a sensible way to frame agreements and monitor compliance. Also, words and even regulation were cheap, at least for governments. The principal alternative to regulation was spending. Alternatives, including addressing the

underlying causes of the problems, would have cost governments more than they wanted to spend. Another factor not to be discounted was that lawyers are hustlers and, of course, lawyers prefer these legal-policy approaches. Finally, one can assume that many governments favored the IEL approach because within the international law framework (1) their sovereignty would ensure that they need not accept anything they did not like and (2) international law procedures protected them from the type of public involvement and scrutiny common in domestic policymaking.

Another significant feature of the history of international response to the global change agenda is that the responses have followed closely what we can call the "problem-defined approach." A biodiversity problem led to a biodiversity convention. The climate change challenge yielded a climate change convention. The real problem may be something more basic like poverty, or fossil fuels, or transportation, or chlorine-based organic chemistry, but the conventions were framed to address the surface worry rather than the deeper problems. They did not go after underlying causes or drivers of deterioration.

Again, one should ask: Why? I think there were basically three reasons. First, those of us promoting these agreements found it easy to adopt the "problem defined approach" because that was the approach typically taken in environmental management domestically. For good or ill, we have domestic air pollution laws to address air pollution, and so on with water pollution and all the others. This model was in everyone's mind. Second, by defining the solution in terms of the publicly perceived problem, treaty advocates maximized the chance of ongoing public support. And third, imagine the disaster that would have happened if the solutions had been defined more in terms of underlying drivers and forces. The environmental community in and out of government would immediately have lost control of the process, which would have moved to the agriculture community or the energy industry. Thus, the relatively weak environmental community pursued a defensible strategy to keep control of the process. Better to keep the issue under environmental control on environmental turf and let the implications for these powerful interests emerge more indirectly.

There are costs associated with this problem-defined approach. Most importantly, of course, is the fact that one is not directly addressing the real, underlying problems, but only the symptoms. Another cost is that one ends up with many conventions because there are many problems. This gives rise to coordination problems, limits on participation—especially from capacity-short developing countries, and various inefficiencies.

A further way we have brought weak medicine to the patient is that we have accepted, or at least lived with, procedures for reaching global

agreements that could not be slower, more cumbersome, or inclined to weaker results. A revealing exercise is to contrast national legislating, say in the Congress, with international legislating, say in climate negotiations.

In international negotiations, it is sovereign nations that are represented at the table, and sovereignty means that no country is required to accept the will of the majority or be obligated without its consent. Whereas most Congressional decisions require agreement by a majority (fifty-one percent), international agreements require agreement by essentially every country that is important (one hundred percent). Getting such a consensus almost always requires more compromise than securing a majority. Although a powerful legislator can sometimes block unfavorable legislation, that power pales in comparison to the power of a country, that is essential to the agreement, to simply walk away.

Many factors such as these make legislating internationally much more difficult than the normal national legislative process. Thus, the weakness of current international environmental treaties should come as no surprise. They were forged in cumbersome negotiating processes that give maximum leverage to any country with an interest in protecting the *status quo*. The United States successfully weakened the Kyoto Protocol, Brazil worked to keep a forest convention at bay, and Japan and other major fishing countries watered down the international marine fisheries agreement.

Relatedly, the international institutions created in the United Nations to address global environmental issues—the United Nations Environment Programme (UNEP), Economic and Social Council's (ECOSOC) Commission on Sustainable Development, and the secretariats of the various convention bodies—are among the weakest multilateral organizations. UNEP's budget, for example, is quite small—the Nature Conservancy's is many times larger—and its role is partially undermined by the proliferation of independent treaty secretariats outside UNEP.

International negotiating procedures differ radically from both national legislative processes and even more radically from the rule-making processes of independent regulatory agencies. Imagine two ends of a spectrum. At one end are U.S. regulatory agencies like the Federal Trade Commission and the Food and Drug Administration, which, operating under broad "public interest" mandates from Congress, set the rules and norms in their areas. A small group of appointed officials is, in effect, writing laws for the country, subject to be sure to Congressional reversal. One could imagine a world environmental agency like these federal regulatory agencies. It is a wild idea, you might think, but it anchors one end of the spectrum. The processes we have been examining for regime formation and so on are at the other end of this spectrum. These processes

are full of opportunities for delay, indecision, unsatisfactory resolution of issues and weak results. One interesting step back towards the middle of this spectrum is the intergovernmental decision to allow the Montreal Protocol negotiators to set targets for ozone depletor reductions without nation-by-nation ratification and to do so by a two-thirds vote, thus breaking with consensus decision-making. In other words, the Ozone Convention Conference of the Parties functions a bit like an international regulatory agency.⁷ Several environmental agreements now adopt this approach on specific, more technical questions.

If governments want a strong, effective process in the international environmental area, there are several models from which to choose, for example, those governing international air transportation, trade, intellectual property rights, atomic energy and so on. That these models are not used to protect the global environment is a conscious decision of governments to stick with a weak international process.

The international community has also dealt poorly with the inevitable political opposition and conflict. Several political fault lines surface repeatedly in international negotiations on the environment, and we have not been very forceful or creative about closing these gaps.

A. *The Environment vs. the Economy*

There is often a seamless link between economic interests and the positions taken by governments in negotiations. An excellent analysis by David Levy and Peter Newell concludes that “[g]overnment negotiating positions in Europe and the United States have tended to track the stances of major industries active on key issues, such that the achievement of global environmental accords is impossible if important economic sectors are unified in opposition.”⁸

Economic pressures can lead to political decisions that undermine even well-crafted treaties. This happened, for example, with the Convention on the Law of the Sea, which created for each coastal country a 200-mile exclusive economic zone designed to overcome open access fishing on what were once the high seas. In response, rather than protecting their new fishing grounds, governments responded by subsidizing new fishing fleets

7. The Ozone Secretariat's role includes arranging meetings and monitoring the implementation of the Montreal Protocol on Substances that Deplete the Ozone Layer. Ozone Secretariat, United Nations Environment Programme, About the Secretariat at http://www.unep.org/ozone/About_the_Secretariat/index.asp (last visited Apr. 3, 2004).

8. David L. Levy & Peter Newell, *Oceans Apart? Business Responses to Global Environmental Issues in Europe and the United States*, 42 ENV'T 8, 9 (2000) (citation omitted).

and neglecting needed regulation. Widespread overfishing has resulted. The new Stockholm Convention on Persistent Organic Pollutants is being blocked in the United States today due primarily to concern with its provisions facilitating the regulation of additional dangerous chemicals beyond the dozen in the original agreement. In sum, IEL is largely the creation of states heavily influenced by domestic industry demands.

B. The North vs. the South

To generalize, the poorer countries of the global South have perceived the global environmental agenda as an agenda of the wealthy North, and, indeed, international environmental regimes have typically been pushed by the richer countries. The poorer countries have not only given these concerns a lower priority, they have feared that agreement would undermine their growth potential or impose high costs of compliance. For this reason, both the Montreal Protocol (protecting the ozone layer) and the Kyoto Protocol (protecting climate) have taken the approach of regulating the industrial countries first.

There have been exceptions, but in general, the developing world often feels more than a little put upon by the many international processes underway and worries that its priorities are not reflected there. Many developing countries are struggling to exist as viable entities and to be heard, and these factors can intensify assertions of sovereignty.

Whenever we have a global challenge with a major South dimension, we should pay special attention to the points made by Anil Agarwal, who for decades was one of India's leading environmental advocates. Agarwal argued that we are unlikely to get effective international agreements engaging the South unless the developing countries are dealt with fairly in a way that recognizes their aspirations and special challenges. Doing so will require, among other things, increased development assistance, fair trade regimes, and other forms of international cooperation.⁹

This imperative was recognized at the Rio Earth Summit where commitments were made to roughly double official development assistance (ODA) to support the Summit's ambitious Agenda 21, a compilation of far-sighted policies and goals covering many sectors and issues. Unfortunately for the credibility of the North and much else, development assistance has

9. GREEN POLITICS: GLOBAL ENVIRONMENTAL NEGOTIATIONS 2-4 (Anil Agarwal et al. eds., 1999); see also MARIAN A. L. MILLER, THE THIRD WORLD IN GLOBAL ENVIRONMENTAL POLITICS 139-52 (1995). For an overview of the requirements of a successful global environmental politics, see Maurice Strong, *Stockholm Plus 30, Rio Plus 10*, in *WORLDS APART: GLOBALIZATION AND THE ENVIRONMENT* 33, 33-50 (James Gustave Speth ed., 2003).

declined significantly since Rio, not increased, dropping from \$73 billion in 1992 to \$54 billion in 2000. Rio's Agenda 21 was never seriously implemented. Had it been, the possibility of greater international cooperation on the North's treaty agenda would have been enhanced. Agenda 21 is a good example of a compilation of measures that, if fully supported, would have both complemented the treaty processes since Rio and more directly tackled some of the underlying forces leading to today's large-scale environmental challenges. In short, Agenda 21 was just what was needed, and the failure to pursue it is central to understanding the lack of progress over the past decade. Despite the Bush Administration's recent increase in U.S. development assistance—an additional \$5 billion a year into the new Millennium Development Account—the United States still remains dead last among OECD countries in development assistance as a percentage of GDP.

C. The United States vs. the World

Legal scholar David Hunter has noted that “[m]ore than any other country, the United States is responsible for the existing gulf between Rio's rhetoric . . . and the post-Rio environmental reality.”¹⁰ If there is one country that bears most responsibility for the lack of progress on international environmental issues, it is the United States.

At the root of the United States' negative role is what can only be described as an American exceptionalism that at times borders on arrogance. It appears in many guises, including not feeling it necessary to participate in international treaties. Consider the following: At last check, 191 countries have ratified the Convention on the Rights of the Child, yet the United States is not among them. Similarly, most countries have ratified the Convention on the Elimination of All Forms of Discrimination Against Women, 165 at last count, but Afghanistan and the United States have not. Our partners in opposing the Land Mine Convention include Cuba, Sudan, Democratic People's Republic of Korea, and Libya. We join Libya again in being among the few that have not ratified the Convention on Biological Diversity, and, believe it or not, we have not yet ratified the Law of the Sea Treaty. It is well known that the Bush Administration has rejected the Kyoto Protocol, but the list of important international environmental treaties not ratified by the United States is actually rather long. The list goes on, and the pattern is clear—a pattern of unilateralism

10. David Hunter, *Global Environmental Protection in the Twenty-First Century*, in GLOBAL FOCUS: U.S. FOREIGN POLICY AT THE TURN OF THE MILLENNIUM 117, 120 (Martha Honey & Tom Barry eds., 2000).

and of staying outside the multilateral system unless we need it—*à la carte* multilateralism.

The United States has also been a leader in the business of pursuing trade, financial liberalization, and pro-market adjustment at the expense of the partnership compact for sustainable development forged at Rio. With “trade, not aid” as their motto, many U.S. policymakers have seen the globalization (market) paradigm as supplanting the need for the Earth Summit’s sustainable development (partnership) paradigm.

Political philosopher Benjamin Barber, commenting on the U.S. corporate scandals of 2001 and 2002, puts the failure of U.S. leadership on global environmental issues in a larger context:

[B]usiness malfeasance is the consequence neither of systemic capitalist contradictions nor private sin, which are endemic to capitalism and, indeed, to humanity. It arises from a failure of the instruments of democracy, which have been weakened by three decades of market fundamentalism, privatization ideology and resentment of government.

....

The corrosive effects of this trend are visible not only on Wall Street. The Bush administration, which favors energy production over energy conservation, has engineered a reversal of a generation of progress on environmentalism that threatens to leave the [hazardous wastes clean-up] Superfund program underfunded, air-quality standards compromised and global warming unchecked. These policies can be traced directly to that proud disdain for the public realm that is common to all market fundamentalists, Republican and Democratic alike. . . .

The United States fails to see that the international treaties it won’t sign, the criminal court it will not acknowledge and the United Nations system it does not adequately support are all efforts, however compromised, at developing a new global contract to contain the chaos. . . .

....

The ascendant market ideology claims to free us, but it actually robs us of the civic freedom by which we control the social consequences of our private choices.¹¹

The Environmental Law Institute is a middle-of-the-road organization that serves as our country’s principal watering hole for mainstream

11. Benjamin R. Barber, *A Failure of Democracy, Not Capitalism*, N. Y. TIMES, July 29, 2002, at A23.

environmental lawyers. Its president in 2002, William Futrell, was driven, however, to sound an extraordinary alarm:

America's legacy of robust environmental law and policy is now in serious jeopardy. Anti-government ideologues of the bar and the bench are resurrecting the pre-modern dogmas of radical federalism and unfettered economic liberty to attack not just environmental laws themselves but the constitutional substructure on which those laws are erected. According to some advocates and judges, the Constitution demands massive deregulation, special rights for corporations and developers, and the curtailment of citizens' access to justice. If left unanswered, this reinterpretation of constitutional principles could lead to a judicial dismantling of environmental protection in the United States.

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These developments in the courtroom are not accidental, but the result of a well-financed effort to reshape the judiciary (as well as the political branches of government) along strict ideological lines. . . . Today, a handful of right-wing foundations provide generous funding for organizations . . . hostile to environmental regulation.¹²

Those who attack long-settled domestic environmental protections are, of course, even more dead-set against international ones.

I often ask myself why American conservatives do not more actively seek to conserve America. Part of the answer, I suspect, lies in the point made by Benjamin Barber. Environmental challenges threaten the ascendant pro-market, anti-government ideology. They require major governmental responses, including action at the international level. They require "interference" with the market to ensure that social and environmental goals are served. And they require rethinking the utopian materialism that puts a premium only on unlimited economic expansion.

To escape this dilemma many people opt for denial: environmental challenges, they are forced to conclude, are not that serious and are routinely exaggerated by environmental advocates. A group of environmental Polly Annas—from Julian Simon in the early 1980s down to today's Bjorn Lomborg—have intentionally or unintentionally lent a semblance of credibility to this denial, but it is still a condition of denial, of not facing reality. While there are certainly exaggerations and also honest

12. J. William Futrell, *Now on Endangered List: Environmental Law Itself*, 19 ENVTL. F. 64, 64 (2002).

mistakes in environmental advocacy, national academies of science, Nobel laureates, intergovernmental scientific panels, and countless others have for two decades repeatedly affirmed the reality and seriousness of global-scale environmental challenges.

In sum, the failure of green governance at the international level is a compound of many elements. The issues on the global environmental agenda are inherently difficult: powerful underlying forces drive deterioration and require complex and far-reaching responses, while the inherently weak political base of international action is typically overrun by economic opposition and protection of sovereignty. Meanwhile, the response that the international community has mounted has been flawed: the root causes of deterioration have not been addressed seriously, weak multilateral institutions have been created, consensus-based negotiating procedures have ensured mostly toothless treaties, and the economic and political context in which treaties must be prepared and implemented has been largely ignored. To some degree these results can be attributed to accidents, errors, and miscalculations, but the lion's share of the blame must go to the wealthy, industrial countries and especially to the United States which, since the Montreal Protocol, have not accorded global-scale environmental challenges the priority needed to elicit determined, effective responses.

For the last quarter century we have carried out our first attempt at GEG. Since it is an experiment that has largely failed, it is high time, indeed past time, to get on with a new approach—one redesigned for success. If the diagnosis offered here is correct, it points us toward strong medicine. Maximum attention must be given to national and international efforts to address the underlying drivers of deterioration. This requirement means expending far more effort and money on global population, poverty, and underdevelopment; bringing new technologies on line; correcting perverse subsidies, pervasive market failure, and environmentally dishonest prices; focusing on sustainable consumption patterns; greening globalization and much more. Getting it right in this new phase of GEG also means a sharply revised approach to IEL. IEL has a central role to play in GEG Part II but only if we take it seriously. The impact of IEL in the future depends critically on creating effective international environmental organizations—we badly need UNEP to grow up to become a World Environment Organization—and on adopting new procedures for framing and enforcing international environmental goals and norms.

The European Community/European Union has seen a progression in which environmental policy has moved from being the separate province of each European country to being more common throughout Europe. The

extent of the change is reflected in a 2002 *New York Times* article: "The European Commission plans to take eight countries to the European Court for not implementing water standards. Britain, Belgium, Spain and Luxembourg failed to meet the December 2000 deadline for drinking water; France, Greece, Germany and Ireland failed to meet standards for waste water or bathing water."¹³

There was a moment in 1989 when the world seemed ready to change. Motivated primarily by concern over global warming, twenty-four countries—including France, Germany, Brazil, India, and Japan—signed the Hague Declaration which called for an international body that could make non-unanimous decisions needed to protect the global environment. Forty countries eventually signed the declaration, but conspicuous by their absence were most of the permanent members of the UN Security Council—the United States, China, Russia, and Britain. So the Hague Declaration died an early death. But this history does remind us that sometimes seemingly far-out ideas can quickly gather strength and prominence.

Building a new IEL also involves providing the public with access to the governance process. GEG today is still far too dominated by the outmoded idea that only governments get to play. Principle 10 of the Rio Declaration began to break with this orthodoxy:

Environmental issues are best handled with the participation of all concerned citizens At the national level, each individual shall have appropriate access to information concerning the environment . . . and the opportunity to participate in the decision-making processes. . . . Effective access to judicial and administrative proceedings . . . shall be provided.¹⁴

Rio's Principle 10 focuses mostly on access at the national level, but access at the international level is just as important. Until citizens can have their say in international fora, get the information they need for participation, submit petitions for action and complaints for non-compliance, participate in hearings and initiate judicial proceedings—all the things that are available in many countries at the national level—IEL and policy will never have the dynamism it so badly needs. Law professor David Hunter has called for an international administrative procedures

13. *Water Standards Not Met*, N. Y. TIMES, Feb. 23, 2002, at A7.

14. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 436 (2d ed. 2002).

treaty to set minimum norms on how intergovernmental organizations relate to citizens.

We also need to recognize that IEL does not operate in a vacuum. We must strengthen the broad “external” context—the setting—from which we expect impressive legal regimes to emerge and in which we expect them to be effectively implemented. Most basic here is the transition in governance to capable, accountable, and democratic governments. The United Nations Development Programme estimates that today about seventy percent of the people in the developing world live under relatively pluralistic and democratic regimes. Progress on this front is *sine qua non*; it can be aided by development assistance focused on building capacities in government, on fighting corruption, on political and civil rights, and on elections and democratic reforms.

Development progress in the poorer regions is essential for many reasons, but its relevance here is that IEL will never succeed unless development is succeeding. The only world that works is one in which the aspirations of poor people and poor nations for fairness and opportunity are being realized. Developing country views in international negotiations on environment are powerfully shaped by their fear of the costs of environmental measures, their preoccupation with their own compelling economic and social challenges, and their distrust of the intentions and policies of the industrial countries. Sustained and sustainable human development, strongly supported by the international community, provides the only context in which the developing world has enough confidence, trust, and hope to ground the difficult measures needed to realize environmental objectives.

Beyond sharply improving overall development prospects, we need to bring both creativity and resources to the forging of “compacts” or “bargains” between the rich countries of the North and poorer countries of the South. Under these arrangements, poorer countries would take impressive steps to halt deforestation and biodiversity loss, for example, while rich countries provide financial, political, and other support for these efforts (which will often be politically difficult and risky) as well as for the poorer countries’ economic priorities. The Global Environmental Facility provides almost \$1 billion a year to assist developing countries in meeting international objectives, principally in climate and biodiversity protection, and can be thought of as a type of broad global compact. It should be supplemented by a flowering of country-specific compacts, incorporating and linking priority goals of industrial and developing countries.

A phenomenal expansion of economic activity is projected for the decades immediately ahead. Down one path, this growth can protect,

regenerate, and restore the environment. It can provide sustainable livelihoods for the world's poor and lead to large improvements in quality of life for all. There is still world enough and time for this century to see the coming of a future that gives primacy to human solidarity and environmental sustainability. But this future will not be won without a profound commitment to urgent action. IEL has an essential role to play in addressing the major challenges of the global environment, but it can play that role only in a dramatically different context.