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Sustainable Development and Postmodern International Law: Greener Globalization?

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SUSTAINABLE DEVELOPMENT AND POSTMODERN INTERNATIONAL LAW: GREENER GLOBALIZATION?

BARBARA STARK*

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INTRODUCTION

The second session of the Global Preparatory Committee ("PrepCom") for the World Summit on Sustainable Development ("WSSD") opened on January 28, 2002, in New York. Three observations emerge from ten days of plenary meetings and "side events," cacophony and sound bites, visions of a vibrant, pristine world in the dimly lit United Nations ("UN") basement, dingy with cigarette smoke. First, there was no big picture, no metanarrative of sustainable development.¹ There is no grand theory, no neat framework to which a coherent set of rules can be applied, and under which subcategories can be organized and responsibilities allocated.

This was evident in the seating arrangements, or lack of seating arrangements, at the conference. Participants and observers sat wherever there were empty seats in the cavernous conference halls, the permanent State and international organization ("IO") nameplates either ignored or noted with a slight smile. For example, a young Japanese woman sat before the United Arab Emirate nameplate. It didn't matter, of course, because the participants did not "represent" anyone in any political sense, nor were many of them accountable to any particular group or constituency. Even those who made statements on behalf of States at the plenary sessions were doing so more in a public relations capacity than a representative one. (South Africa reiterates its support for the development of a new paradigm: "The German government encourages responsible investment in developing countries..."). Most speakers used microphones and their voices were disembodied snatches of rhetoric, punctuated by cell phones and reverberations of simultaneous translation. It was difficult to imagine anything coherent emerging from this process.²

¹ For an informed and illuminating overview of the major approaches to sustainable development, see NAT'L RESEARCH COUNCIL, OUR COMMON JOURNEY: A TRANSITION TOWARD SUSTAINABILITY 21-25 (1999) *excerpted in* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 206-08 (2002).

² This did not preclude energetic efforts to establish priorities. See, e.g., *News Release: Chemicals, Strengthening UNEP and Modernizing World's Environmental Machinery Key Issues at Global Environment Talks, Environment Ministers Meet in Colombia on Road to World Summit on Sustainable Development*, U.N.C.P., Jan. 21, 2002 (describing upcoming global ministerial environmental forum meeting in Cartagena to address, among other issues,

Second, while there was no big picture there were literally thousands of little ones.³ Most of the participants seemed to be promoting a particular project or approach, including "green" labeling,⁴ permaculture,⁵ the creation of a global people's assembly,⁶ organic agriculture,⁷ a greater role in environmental policy making for those historically excluded, including women,⁸ minorities,⁹ and regional groups,¹⁰ and endlessly proliferating "pilot

the "trend towards moving chemical manufacturing from industrialized to developing countries"). Because the UNEP has no executive power and its programs are financed directly by States, "[i]ts mission is to persuade and convince States of the need for environmental action, provide information, expertise and advice, and sponsor treaties." LAKSHMAN GURUSWAMY & BRENT HENDRICKS, *INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL* 42 (1997).

³ FINDING COMMON GROUND: ENHANCING EXPORT POTENTIAL AND PROTECTING THE ENVIRONMENT UNIDO 8 (2002) (noting over 750 projects, costing \$170 million, implementing the Montreal Protocol); GLOBAL ENVTL. FACILITY, INTRODUCTION TO THE G.E.F. 1 (2002) (stating that Global Environmental Facility has funded more than 1000 projects in 156 countries since 1991).

⁴ RAINFOREST ALLIANCE, MISSION STATEMENT 8 (2002) (describing "green labeling" programs).

⁵ See, e.g., THE FARM, LIVING AND LEARNING OPPORTUNITIES (describing the Workshop on "Permaculture Fundamentals" from May 24 - June 1, 2002), at <http://www.thefarm.org/etc> (last visited Feb. 26, 2003).

⁶ WIDER ANGLE, WORLD INST. FOR DEV. ECON. RESEARCH 2 (2001) [hereinafter WIDER ANGLE] (including articles by Deepak Nayyar and Ravi Kampur urging the creation of a global people's assembly "to serve as the voice of global civil society," and noting problems in development analysis, including the ways in which "improvements in national measures of poverty can hide a worsening for large sections of the poor").

⁷ POSITION PAPER: SUSTAINABILITY AND ORGANIC AGRICULTURE, INT'L FED. OF ORGANIC AGRIC. MOVEMENTS (2002) (world-wide umbrella organization of the organic agricultural movement with 750 member organizations in 100 countries stating that "organic agriculture is sustainability put into practice").

⁸ WOMEN'S ACTION AGENDA FOR A HEALTHY AND PEACEFUL PLANET 2015 (describing ten themes of the women's action agenda). WOMEN'S ENVIRONMENTAL DEVELOPMENT ORGANIZATION, GENDER AND GOVERNANCE, SUSTAINABLE DEVELOPMENT, ECONOMIC AND SOCIAL JUSTICE (describing WEDO's work in "emphasizing the linkages between these sectors and . . . highlighting the critical role women play in the social, economic and political realms").

⁹ MINORITY RIGHTS GROUP INT'L, MRG BRIEFING (setting out Executive Summary, including description of the International Development Targets ("IDG"s), including economic well-being, social development and environmental sustainability and regeneration).

¹⁰ INST. FOR NATURAL RES. IN AFRICA, AN AFRICAN INSTITUTION TO RESPOND TO AFRICA'S

projects.”¹¹ As the PrepCom progressed, little tables with piles of literature began sprouting up until there were mountains of expert reports, glossy magazines, and fact sheets authored by armies of Ph.D.’s.¹² There were probably enough for a home-heating with-UN-pamphlets project; if only there was some zero emissions method of getting them all to deforested areas.

Third, while the United States in its official capacity as a State maintained a very low profile, the United States as the driving force of global capitalism was ubiquitous. The contrast was particularly striking after January 31, 2002, when the advance guard for the World Economic Forum began to arrive.¹³ Coming out on the New York streets in the evening one was to emerge into a barricaded, blocked-off midtown, and groups of watchful police officers on every corner. The city was bracing itself for the Forum, at which the United States was a very public host.

DEVELOPMENT PROBLEMS (2002), <http://www.unu.edu/inra/about.html> (describing programs for “developing, adapting and disseminating technologies that promote sustainable use of the continent’s natural resources”).

¹¹ See, e.g., INT’L. ATOMIC ENERGY AGENCY, IAEA ACTIVITIES IN ASSISTING DEVELOPING COUNTRIES TO IMPLEMENT AGENDA 21: A REVIEW (1993-2001), Background Paper No. 6 at 1 (describing International Atomic Energy Agency’s support for over A800 technical cooperation projects, valued at over 200 million U.S. dollars” and “[m]ore than 380 training courses . . . with the total of over 5000 participants . . . [assisting] the 1850 participating institutions to meet their respective national Agenda 21 priorities”); UNITED NATIONS OFFICE FOR PROJECT SERVICES, PROGRAMME DE MICROFINANCEMENTS DU FEM (2002) (describing more than 2300 micro-credit projects). See also *supra* note 3.

¹² See, e.g., INT’L INST. FOR APPLIED SYS. ANALYSIS, GLOBAL SCIENCE PANEL: POPULATION AND SUSTAINABLE DEVELOPMENT; INTERGOVERNMENTAL OCEANOGRAPHIC COMMISSION ET AL., ENSURING THE SUSTAINABLE DEVELOPMENT OF OCEANS AND COASTS—A CALL TO ACTION, Background Paper No. 7 (2001) (noting the need for urgent action in view of the 250 million clinical cases of gastroenteritis and upper respiratory disease “caused annually by bathing in contaminated sea water” as well as the “need to halve, by 2015, the proportion of very poor people in the world”).

¹³ See Prado Dawra, *Schwab Sees Forum Meeting as Peaceful and Useful for City: Police Cite Preparedness for Expected Protests*, THE EARTH TIMES, Jan. 29, 2002, at 1 (noting that Klaus Schwab, Founder and President of the World Economic Forum, “was pleased with the warm receptivity of New York City authorities to the transfer of his organization’s celebrated annual meetings from Dados”).

These three observations correspond to three concepts widely viewed as characteristically postmodern.¹⁴ First, the absence of a big picture corresponds to Jean-Francois Lyotard's definition of postmodernism as "incredulity toward metanarratives."¹⁵ Second, the mad proliferation of projects reflects what geographer David Harvey describes as "the most startling fact about postmodernism . . . its total acceptance of . . . ephemerality, fragmentation, discontinuity, and the chaotic."¹⁶ Third, the contrast between the United States' key role in globalization, and its marginal role in the WSSD process, exemplifies critic Fredric Jameson's description of postmodernism as "the cultural logic of late capitalism."¹⁷ These three distinct but related concepts provide a working definition of postmodern international law ("PIL")¹⁸ and show how PIL can be used to define, albeit contingently, and to encourage greener globalization.¹⁹ From a postmodern perspective, to paraphrase Stanley Fish, there is no such thing as global governance, and it is a good thing, too.²⁰ This does not mean that there is *no*

¹⁴ The description "characteristically postmodern" is problematic since "many doubt whether the term [postmodernism] can ever be dignified by conceptual coherence." POSTMODERNISM AND SOCIETY 9 (Roy Boyne & Ali Rattansi eds., 1990).

¹⁵ JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION xxiv (Jeff Bennington & Brian Asumitrans trans., 1984).

¹⁶ DAVID HARVEY, THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE 44 (1989).

¹⁷ FREDRIC JAMESON, POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM (1991).

¹⁸ This acronym fits in nicely with the alphabet soup of UN agencies (WHO, UNIFEM, UNESCO, ECOSOC, etc.) and multinationals (BP, MCI, CNN, etc.), the wordless "newspeak" in which we communicate, or not. It also pleasantly evokes recent drug company advertisements and the promise of a magic "pill," a pharmaceutical solution for an increasingly toxic world. While The Breast Cancer Fund, an American NGO, seeks tighter restrictions against persistent organic pollutants ("POP"s) drawing on research showing that they are carcinogens, for example, others focus on developing new drugs. See, e.g., *Novartis ad*, N.Y. TIMES MAGAZINE, May 5, 200, at 73 ("More life. Novartis is giving women with cancer more days to love, to work, to live . . . each year.").

¹⁹ See Stephen M. Feldman, *Playing With the Pieces: Postmodernism in the Lawyer's Toolbox*, 85 VA. L. REV. 151, 152 (1999) (noting that modern scholars have "accept[ed] [the] postmodern insight that all substantive ends and legal processes reflect distinctive cultural values and social positions" but that they "domesticate [such] postmodern insights by putting them in the lawyer's toolbox, to be taken out and used only when needed").

²⁰ STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO

governance,²¹ nor does it mean that additional (or improved)²² mechanisms for governance might not be useful.²³ It does mean, however, that

(1994).

²¹ Lakshman Guruswamy suggests an appropriately expansive definition of "governance" in the environmental context: a "Governance" refers to that national and international domain in which decision-making power and authority is influenced or exercised. Governance applies not only to government-created laws and policy but extends also to those private decisions affecting a plethora of socio-economic issues that have public impact. . . . [g]overnance traverses the interaction between . . . formal institutions of government and civil society." Lakshman D. Guruswamy, *Cartography of Governance: An Introduction*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 1, 2-3 (2002).

²² See, e.g., Johanna Rinceanu, *Enforcement Mechanisms in International Environmental Law: Quo Vadunt?* 15 J. ENVTL. L. & LITIG. 147 (2000); Mary Ellen O'Connell, *Enforcing the New International Law of the Environment*, 35 GER. YB. INT'L L. 293 (1992). For an ambitious effort to ground "governance" in sustainable development, see John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1 (1998). In suggesting an agenda for Rio + Ten, environmentalists Derrick Osborn and Tom Bigg suggest that there are three essential prerequisites: "(1) good information and good science, well-disseminated . . . (2) good economics, and policy analysis. Why does development take the path it does? What motivates people, companies and countries? What measures can alter behavior in a more sustainable direction? (3) Political support for such changes has to [be] mobilized and made into an effective instrument for countering short-termism. How can all parts of society be engaged in the issues? How can changes in values and lifestyles be brought about?" DERRICK OSBORN & TOM BIGG, EARTH SUMMIT II: OUTCOMES AND ANALYSIS 15 (1997). These must be addressed on a fragmented, case-by-case basis. For some promising approaches, see ENVIRONMENTAL LAW, THE ECONOMY, AND SUSTAINABLE DEVELOPMENT: THE UNITED STATES, THE EUROPEAN UNION, AND THE INTERNATIONAL COMMUNITY (Richard L. Revesz et al. eds., 2000) (comparative analysis of environmental regulation in multi-jurisdictional legal and political systems).

²³ See, e.g., FRIENDS OF THE EARTH INT'L, POSITION PAPER ON INTERNATIONAL ENVIRONMENTAL GOVERNANCE (2002) (noting that "international environmental governance will be a major theme on the agenda of the WSSD" and urging "improved compliance with existing agreements. In particular, it should be ensured that transnational corporations and . . . International Financial Institutions [sic] comply with sustainable development agreements."); *Governance of Transnational Corporations: A Call for a Binding Agreement* ("output from a three-day NGO Conference on Corporate Accountability and the WSSD, Jan. 27-28, 2002, noting that codes of conduct and similar voluntary approaches are an insufficient response" in calling for a binding framework to cover "corporate duties and obligation; citizen and community rights; support of socially and environmentally responsible government initiatives; and liability and implementation mechanisms."); GREENPEACE, THE LESSONS OF HISTORY: STALLED ON THE ROAD FROM RIO TO JOHANNESBURG 2 (2002) (noting "need for policies and mechanisms that hold corporations

centralized, unified, *global* governance is unlikely to further “sustainable development,”²⁴ especially as understood by the global have-nots.²⁵ It also means that terms like “governance” and “improved” may themselves be problematic and subject to dispute.²⁶ Thus, it may well be more constructive to deconstruct at this point, and PIL offers an array of tools for deconstruction and even subversion.²⁷ Subversion is necessary, at least in part, because of the recalcitrance of the United States.²⁸ The richest and most powerful country on the planet is unlikely to “do the right thing” as long as it is perceived as political suicide for democratically elected leaders

accountable for environmental and social impacts of their activities”).

²⁴ See *Developments in the Law: International Environmental Law*, 104 HARV. L. REV. 1484, 1581 (1991) [hereinafter *Developments*] (arguing “that coercive enforcement power is not essential to international efforts to protect, manage, and improve the global environment”).

²⁵ See, e.g., INT’L INST. FOR ENV’T AND DEV., *THE FUTURE IS NOW* 9 (2001) (quoting Amartya Sen, “[t]he real debate associated with globalization is, ultimately, not about the efficiency of markets, nor about the importance of modern technology. The debate, rather, is about inequality of power”).

²⁶ For a thoughtful overview of governance of intensive agriculture, for example, see David E. Adelman & John H. Barton, *Environmental Regulation for Agriculture: Towards A Framework to Promote Sustainable Intensive Agriculture*, 21 STAN. ENVTL. L. J. 3 (2002) (challenging the “[r]igid dichotomy between intensive forms of agriculture—those which are heavily reliant on agrochemicals and irrigation agriculture—which are assumed to be environmentally detrimental, and less intensive traditional agricultural practices—integrated pest management and ecologically based methods—which are assumed to be in harmony with environmental protection”).

²⁷ INT’L INST. FOR ENV’T AND DEV., *THE FUTURE IS NOW*, *supra* note 25, at 12. (“What is fascinating and hopeful about the current situation—especially following the collapse of the Multilateral Agreement on Investment (“MAI”) and the debacle at Seattle—is the degree to which the political and corporate establishment feel the need to make nods in the direction of poverty reduction, sustainability and greater accountability.”).

²⁸ See, e.g., John Nielsen, *Spinning the Environment*, (NPR MORNING EDITION), July 29, 2002 (listing complaints of environmentalists against the Bush administration, including: “limestone mining in the Everglades, energy development on public lands, dumping mining waste in lakes, [and] an energy bill with subsidies for the fossil fuel industry”). The United States, of course, is not monolithic. See, e.g., Jim Jeffords, *Unhealthy Air*, N.Y. TIMES, June 30, 2002, at 15 (“It is already too late for the United States to lead the world against global warming. . . . But if the president won’t lead the world, then the business community, the American people and their elected representatives in the Congress must lead the president.”).

to try to persuade the American people to significantly lower their standard of living.²⁹

I. INCREDULITY TOWARD METANARRATIVES

Like international human rights law, postmodernism is often linked to the discovery of the Nazi death camps after World War II.³⁰ International law responded by drafting new laws, drawing on the Enlightenment.³¹ Postmodernists such as Theodor Adorno, in contrast, questioned the role of the Enlightenment project itself in the Holocaust.³² The “final solution” was not, after all, a barbarian rampage but an orderly, systematic “scientific” program of genocide—authoritarian, bureaucratic and perversely “rational.”³³

²⁹ “American politicians might argue that it would be political suicide for any United States President to urge his people towards massive economic and social sacrifice necessary for rapid global advancement of sustainable development.” RANEE K. L. PANJABI, *THE EARTH SUMMIT AT RIO: POLITICS, ECONOMICS, AND THE ENVIRONMENT* 128 (1997).

³⁰ This is a relatively recent iteration of postmodernism. For an earlier iteration, see NIETZSCHE AS POSTMODERNIST: ESSAYS PRO AND CONTRA (Clayton Koelb ed., 1990). For an even earlier iteration, see MARTHA NUSSBAUM, *LOVE’S KNOWLEDGE* (1992) (describing ancient Greek skeptics).

³¹ “International law has seen itself as the voice of civilization, of the center, of the modern, of the future, and of universal humanism and progress against, or in dialog with, voices of the non-Christian world, the primitive, underdeveloped, non-Western, outlaw world of those who do not yet see things from a high place.” David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT’L L. & POL. 335, 359 (2000).

³² See GILLIAN ROSE, *THE MELANCHOLY SCIENCE: AN INTRODUCTION TO THE THOUGHT OF THEODOR W. ADORNO* 19 (1978) (Nietzsche, according to Adorno, refused “complicity with the world” which . . . comes to mean rejecting the prevalent norms and values of society on the grounds that they have come to legitimize a society that in no way corresponds to them—they have become lies.). See, e.g., THEODOR ADORNO & MAX HORKHEIMER, *DIALECTIC OF ENLIGHTENMENT* (John Cummings trans., 1972). According to John Gray, the Enlightenment contemplated “the creation of a single worldwide civilization” and the United States, “the last great power to base its policies on this Enlightenment thesis,” seeks the global domination of democratic capitalism, a “single universal free market.” JOHN GRAY, *FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM* 2 (1998).

³³ See JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (2001) (arguing that states seek to make the life of society “legible” in order to make it controllable by political power). According to Rorty, the notion of humans as “rational” “accounts for the residual popularity of Kant’s astonishing claim that sentimentality has nothing to do with morality, that there is something distinctively and

The dark side of the Enlightenment was its embodiment of Nietzsche's "will to power," its reification of reason, and its march to universalism.³⁴ This was all too evident to Adorno in contemporary Stalinism and fascism.³⁵ As recent observers have noted, the dangers are not limited to those particular totalizing cultures. The dark side of the Enlightenment can be seen, for example, in the insistence on "universal" environmental standards promulgated in the North, notwithstanding the prohibitive human costs for less developed countries ("LDC"s).

The Enlightenment made "man," rather than God, the center of the universe. Critics have charged that its "universal," "objective," "rational" subject is in fact a Western white man,³⁶ and its promised Utopia is the universalization of Western culture.³⁷ Just as the Enlightenment masked the

transculturally human called "the sense of moral obligation" which has nothing to do with love, friendship, trust, or social solidarity." Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 111, 124 (Stephen Shute & Susan Hurley eds., 1993). Santos argues that law is the "alter ego" of science. BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* 4 (1995).

³⁴ Nietzsche exposed the Enlightenment as the unity of reason and domination. ROSE, *supra* note 32, at 20.

³⁵ Both espoused noble ideas which masked a very different reality. Environmentalists note a disturbingly similar gap between theory and practice. This may be understood as part of a general disillusionment. "In Europe at the start of the twentieth century most people accepted the authority of morality. . . . Reflective Europeans were also able to believe in moral progress, and to see human viciousness and barbarism as in retreat. At the end of the century, it is hard to be confident either about the moral law or about moral progress." JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY* 1 (2000).

³⁶ See ANDREAS HUYSEN, *AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, POSTMODERNISM* 159 (1986) ("At the center of the humanist creed lies the concept of the Western self.") A corollary is the notion that "[w]hat [is] good for [America] is good for the world." Nathaniel Berman, *In the Wake of Empire, The Grotius Lecture Series*, 14 AM. U. INT'L L. REV. 1521, 1532 (1999). See also, *Normative and Nowhere to Go*, in Pierre Schlag, *Laying Down the Law: Mysticism, Fetishism, and the American Legal Mind* 24 (1996) ("Postmodernism questions the integrity, the coherence, and the actual identity of the humanist individual self. . . . For postmodernism, this humanist individual subject is a construction of text, discourses, and institutions. The promise that this particular human agent would realize freedom, autonomy, etc. has turned out to be just so much Kant.")

³⁷ See, e.g., Edward W. Said, *Yeats and Decolonization*, in Terry Eagleton et al., *Nationalism, Colonialism, and Literature* 69-71 (1990) ("By the beginning of World War I, Europe and America held eighty-five percent of the earth's surface in some sort of colonial subjugation.

will to power of Western culture,³⁸ and its devastating legacy of imperialism,³⁹ post Cold War international law masks the will to power of late capitalism,⁴⁰ which seems to view American access to cheap oil as a right.⁴¹ By challenging the Enlightenment metanarrative, PIL challenges Western hegemony, culturally and politically.⁴²

This, I hasten to add did not happen in a fit of absent-minded whimsy or as a result of a distracted shopping spree.”).

³⁸ See e.g., Kennedy, *supra* note 31, at 441.

³⁹ See Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT’L L. & POL. 243 (2000).

⁴⁰ The phrase “late capitalism” is Fredric Jameson’s. See JAMESON, *supra* note 17. Cf. Eve Darian-Smith, *Power in Paradise: The Political Implications of Santos’s Utopia*, 23 LAW & SOC. INQUIRY 81, 86 (1998) (concluding that Santos’s goal “is, above all, modernist: it conceals relations of power in the march toward emancipation of the oppressed”).

⁴¹ The “right” to cheap oil has trumped more traditional human rights. See, e.g., Glenn Frankel, *Nigeria Mixes Oil and Money: A Potent Formula Keeps U.S. Sanctions at Bay*, WASH. POST, Nov. 24, 1996, at C1 (describing how Nigeria avoided sanctions after hanging the writer Ken Saro-Wiwa and eight other political activists); Nadine Gordimer, *In Nigeria, The Price for Oil is Blood*, N.Y. TIMES, May 25, 1997, at 11 (arguing that “the questions of freedom of the press and expression in Nigeria have become an issue for Nigerians and for those of us . . . who know that if, in what is optimistically called the global village, the lines go down in one street the power failure is the responsibility of all inhabitants”). See also Norman Kempster, *Rights Group Calls U.S. Blind to Saudi Abuses*, L. A. TIMES, March 28, 2000, at A4 (Amnesty International accuses the United States of ignoring human rights violations by Saudi Arabia because of its economic clout.). As I have argued elsewhere, international law sometimes conflates “free market democracy” with human good. Barbara Stark, *Women and Globalization*, 33 VAND. J. TRANSNAT’L L. 503, 550 nn.285-86 (2000). Free markets are human goods, some of our law and economics friends quickly counter. While it is clear that this is sometimes true, at least for some, it is equally clear that it is not always true for everyone. See *id.* at 514 nn.46-49 (describing human cost of Structural Adjustment Programs in Mexico).

⁴² This does not necessarily mean the wholesale rejection of Enlightenment aspirations. See Kirk Johnson, *A Cockeyed Optimist Professes the Dismal Science*, N.Y. TIMES, Apr. 25, 2002, at B2 (Jeffrey Sachs, Director of the Earth Institute at Columbia University, “sees 18th [sic] century thinking as a strength, and a means of avoiding despair, in his work on the problems of poverty, environmental degradation and disease in developing nations. ‘There was a belief that the world could achieve peace, that the world could achieve shared prosperity, that reason matters and that technology gives an opportunity for human betterment. . . . I believe in all of those things.’” At the same time, however, Professor Sachs is a “hands-on economist” who insists on an in-depth understanding of the ecological base of the places he studies.).

PIL's "incredulity toward metanarratives" is particularly applicable in the environmental context. As Jonathan Charney has explained, there are many good reasons for "universal" environmental law since environmentally harmful activities often have transboundary impact.⁴³ As a practical matter, however, master plans have major drawbacks. First, there is the often unsurmountable problem of achieving consensus among countries.⁴⁴ Second, there is the risk of large scale harm to the environment, whether through mistake or greed.⁴⁵ Third, even if there are no mistakes, because of the complexity and interdependence of ecosystems, "universal" remedial measures may themselves cause harm imperceptible on a small scale.⁴⁶ Finally, as Professor Charney points out, such measures may require binding States without their consent. This not only raises serious questions of State sovereignty,⁴⁷ but, from a PIL perspective, it also raises the question of Western domination and the subordination of other interests to a neoliberal

⁴³ Jonathan I. Charney, *Universal Environmental Law*, 87 AM. J. INT'L L. 529 (1993). See also GURUSWAMY & HENDRICKS, *supra* note 2, at 405 (noting that "[u]niformities of biophysical reactions are part of nature's writ that runs ubiquitously and universally, and the laws of nature can give rise to identical biophysical reactions").

⁴⁴ Uwe M. Erling, *Approaches to Integrated Pollution Control in the United States and the European Union*, 15 TUL. ENVTL. L.J. 1, 42 (2001) ("The existing experience concerning substantive standard setting [with regard to integrated pollution control] teaches that the core idea of a truly holistic multimedia approach remains largely wishful thinking and aspiration.").

⁴⁵ See *infra* note 172 (describing the string of World Bank-financed ecological disasters). Such master plans are too attractive to big money, which is not necessarily monolithic "Big Money," but may consist of a number of powerful players within States.

⁴⁶ Indeed, environmentalists increasingly question the Enlightenment premise of human progress through reason. Rather, the limits of reason, and the limited ability of humans to be reasonable, is increasingly recognized. No one believes that "progress" in sustainable development, for example, is inevitable. See OSBORN & BIGG, *supra* note 22, at 2 ("[c]rucially, the global political deal that was struck at Rio has come unstuck. At Rio the countries of the North agreed to make new and additional resources available to the South to enable them to handle their development in a more sustainable [way] but . . . the total of official aid has instead shrunk by 20% over the past 5 years.").

⁴⁷ See *Developments*, *supra* note 24, at 1579 ("Sovereignty and economic concerns, however, are so strong that international environmental institutions should, to the extent possible, bypass the state-to-state level of traditional international law and focus on fostering communication among nongovernmental organizations, international agencies, and state officials.").

agenda.⁴⁸ Thus the point is not to come up with better metanarratives.⁴⁹ Rather, from a PIL perspective, the point is to question the metanarratives which underlie and perpetuate current dilemmas.

A. *The Metanarratives of Environmentalism and Development*

The metanarrative of environmentalism is a story of a planet on the brink of disaster;⁵⁰ its ecology already compromised and gravely endangered by overpopulation,⁵¹ over-consumption of nonrenewable resources;⁵² and human pollution that has poisoned the air⁵³ and the water,⁵⁴ and seems well on the way to altering the climate.⁵⁵ As Michael McCloskey, President of the Sierra Club, succinctly suggests, the starting point should be ascertaining “what is needed to sustain global life support systems and maintain

⁴⁸ See *supra* notes 36-42.

⁴⁹ Environmentalists have generated wonderful metanarratives. We could become more like the Scandinavians, for example. See, e.g., Mark Thomsen, *Scandinavian Companies Work Toward Sustainable Business Model*, Oct. 3, 2001, <http://www.socialfunds.com/news/article.cgi/article678.html> (last visited Feb. 26, 2003). The United States could become a “team player.” We could commit to sustainable development with creativity and panache. But such metanarratives fail to address the factors that relegate them to the margins. Optimism may be a necessary strategy here, but it is not the same as the naive notion that these ideas will triumph eventually because they are “right.” This notion is simply an iteration of the liberal tenet that Adam Smith’s “invisible hand of the market” is somehow in the service of human progress.

⁵⁰ Or already over the edge. The literature is filled with examples of species, regions, water bodies, and various paradises already irredeemably lost, squandered. See, e.g. *infra*, notes 115-18, 176.

⁵¹ See, e.g., LESTER R. BROWN ET AL., *STATE OF THE WORLD 1990* 4-5 (1990).

⁵² *Id.* at 7-8.

⁵³ Hilary F. French, *Clearing the Air*, in BROWN ET AL., *supra* note 51, at 98.

⁵⁴ *Id.* at 43.

⁵⁵ See, e.g., Darcy Frey, *George Divoky’s Planet*, N.Y. TIMES MAG., Jan. 6, 2002, at 26 (describing alone scientist [who] spends three months every year on a wretched, freezing strip of [Arctic] land . . . trying to alert us to the inescapable truth: our world is melting away.”). Cf. Elizabeth Kolbert, *Ice Memory: Does a Glacier Hold the Secret of how Civilization Began - and how it May End*, THE NEW YORKER, Jan. 7, 2002, at 30 (describing the emergence during the past decade of the view that “abrupt climate change,” occurring long before human technology and thus independent of “global warming” has been the norm for “most of the past hundred thousand years,” a view endorsed by “virtually every climatologist of any standing”). But see *id.* at 36 (scientist responding that “if you believed the climate to be inherently unstable, the last thing you’d want to do is conduct a vast, unsupervised experiment on it”).

biological diversity. . . . [which] should be viewed as limitations on human development."⁵⁶

The metanarrative of economic development describes a similarly desperate situation, but it has a very different focus. It is a story of growing economic polarization, in which the poorest fifth of the world's population subsists on less than five percent world's resources, while the top five percent consume twenty-five percent of these resources.⁵⁷ Most of the high consumers are in the United States and Western Europe, and the legacy of Western colonialism remains very much a part of the story.⁵⁸ Indeed, some see the continuation of that legacy in certain factions of the environmental movement, that claim the natural resources of the South, particularly its rainforests, as the "heritage of mankind."⁵⁹

⁵⁶ Michael McCloskey, *The Emperor Has No Clothes: The Conundrum of Sustainable Development*, 9 DUKE ENVTL. L. & POL'Y F. 153, 157 (1999). For an energetic refutation, see BJORN LOMBORG, *THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD* 329 (2001):

[O]ur food production will continue to give more people more and cheaper food. We will not lose our forests; we will not run out of energy, raw materials or water. We have reduced atmospheric pollution in the cities of the developed world and have good reason to believe that this will also be achieved in the developing world. Our oceans have not been defiled, our rivers have become cleaner and support more life, and although the nutrient influx has increased in many coastal waters like the Gulf of Mexico, this does not constitute a major problem in fact, benefits generally outweigh costs. . . . Acid rain did not kill off our forests, our species are not dying out as many have claimed, with half of them disappearing over the next fifty years—the figure is likely to be about 0.7 percent. . . . [O]ur chemical worries and fear of pesticides are misplaced and counterproductive.

Id.

⁵⁷ See *infra* note 98.

⁵⁸ John S. Applegate & Alfred C. Aman, Jr., *Introduction: Syncopated Sustainable Development*, 9 IND. J. GLOBAL LEGAL STUD. 1, 2 (2001) ("Developing nations fear . . . that limitations on development will simply extend the legacy of imperialism and colonialism by entrenching and extending the existing relationship between a wealthy, industrial North and a poor, economically backward South. The approaches of North and South to international environmental protection do not merely differ; they contradict each other.").

⁵⁹ See e.g., PANJABI, *supra* note 29, at 137 (comparing the property rights of corporations, which Northern governments say they cannot impair, with the property rights of the South's farmers and tribes, to which the North demands free access).

1. Defining "Sustainable Development"

The phrase "sustainable development" links the metanarratives of "environmentalism" and "economic development" in ongoing dynamic tension.⁶⁰ First appearing in *Our Common Future*, drafted by the World Commission on Environment Development ("Brundtland Report")⁶¹ "sustainable development" is defined as meeting "the needs of the present without compromising the ability of future generations to meet their own needs."⁶² The Group of Seven endorsed the Brundtland Report's definition of sustainable development at the Toronto Summit in 1988,⁶³ and it was incorporated in Principle 4 of the Rio Declaration,⁶⁴ which states: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and can not be considered in

⁶⁰ For a less appreciative construction, see Ronnie D. Lipschutz, *Wasn't the Future Wonderful? Resources, Environment, and the Emerging Myth of Global Sustainable Development*, 2 COLO. J. INT'L ENVTL. L. & POL'Y 35 (1991). See generally ENVIRONMENTAL ISSUES AND SUSTAINABLE FUTURES: A CRITICAL GUIDE TO RECENT BOOKS, REPORTS, AND PERIODICALS (Michael Marien ed., 1996); Keith Pezzoli, *Sustainable Development Literature: A Transdisciplinary Bibliography*, 40 J. ENVTL. PLAN. & MGMT. 575 (1997).

⁶¹ WORLD COMM'N ON ENV'T AND DEV., *OUR COMMON FUTURE: THE BRUNDTLAND REPORT* (1987) (stating that sustainability requires "equitable distribution") [hereinafter BRUNDTLAND REPORT]; P.S. Elder, *Sustainability*, 36 MCGILL L.J. 831, 833, 835 (1991) (noting that the term has different meanings for "each of its supporting constituencies"); Kristina N. Tridico, *Sustainable America in the Twenty-first Century: A Critique of President Clinton's Council on Sustainable Development*, 14 J. ENERGY NAT. RESOURCES & ENVTL. L. 205 (1998-99). See also note 28 (noting that the Brundtland Report left the definition of "sustainable development" open.) See generally PANJABI, *supra* note 29, at 95 (noting that the right to a healthy environment is generally considered a "solidarity" right, when it is considered a right at all).

⁶² BRUNDTLAND REPORT, *supra* note 61, at 43.

⁶³ Elder, *supra* note 61, at 832 n.2.

⁶⁴ Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, UN Doc. A/CONF. 151/5/Rev. 1 (1992), *reprinted in* 31 I.L.M. 874, 876. [hereinafter Rio Declaration].

isolation from it.”⁶⁵ The substantive content of this definition, as many commentators have observed, remains ambiguous.⁶⁶

2. Deconstructing Sustainable Development

“Sustainable development” is an intentional oxymoron, a paradox.⁶⁷ It is a self-contained deconstruction in which one term endlessly undoes the other.⁶⁸ The process of deconstruction begins by identifying the opposition contained in a particular concept.⁶⁹ The next step is to invert the hierarchies contained in that opposition.⁷⁰ “Sustainable development” qualifies the privileged conception, the subject of the phrase (“development”), by explicitly linking it with the notion of environmental sustainability. Thus,

⁶⁵ Philippe Sands identifies four objectives: first, a commitment to preserve natural resources for the benefit of present and future generations; second, appropriate standards for the exploitation of natural resources based upon harvests or use; third, use that takes account of the needs of other states and people, and fourth, requiring the integration of environmental considerations into economic and other development plans. Philippe Sands, *Environmental Protection in the 21st Century: Sustainable Development and International Law*, in ENVIRONMENTAL LAW, THE ECONOMY, AND SUSTAINABLE DEVELOPMENT, *supra* note 22, at 369 [hereafter Sands, *Sustainable Development*]. Principles 3-8 of the Rio Declaration address the substantive aspects of sustainable development, while Principles 10 and 15-18 address the procedural aspects. HUNTER ET AL., *supra* note 1, at 205.

⁶⁶ Christopher D. Stone, *Deciphering “Sustainable Development,”* 69 CHI.-KENT L. REV. 977 (1994). Elder, *supra* note 61, at 833.

⁶⁷ See HUNTER ET AL., *supra* note 1, at 209 (describing the “brilliant ambiguity” of the term).

⁶⁸ As Michael Jacobs points out, “the crucial recognition here is that, like other political terms (democracy, liberty, social justice, and so on), sustainable development is a ‘contestable concept’ . . . complex and normative.” Michael Jacobs, *Sustainable Development as a Contested Concept*, in FAIRNESS AND FUTURITY: ESSAYS ON ENVIRONMENTAL SUSTAINABILITY AND SOCIAL JUSTICE 23, 25 (Andrew Dobson ed. 1999) [hereinafter FAIRNESS AND FUTURITY].

⁶⁹ J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L. J. 743, 746 (1987). Balkin is often clearer than those he interprets. As Jonathan Culler remarks, “[n]ot only does repetition produce what can then be regarded as a method, but critical writings that are said to imitate or deviate often provide clearer or fuller examples of a method than the supposed originals.” JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* 229 (Cornell University Press 1982).

⁷⁰ Balkin, *supra* note 69, at 746. The political uses of deconstruction have been noted in other contexts. See, e.g., Lisa Walker, *Deconstruction and Feminism*, in THE OXFORD COMPANION TO WOMEN’S WRITING IN THE UNITED STATES 240, 241 (Cathy N. Davidson & Linda Wagner-Martin eds. 1995) (“The paradigm of binary oppositions is useful to feminism because it denaturalizes identity by exposing its structural aspects.”).

the term exposes what we have forgotten, the hidden environmental costs of the development of the North. At the same time, taking the North's insistence on "sustainability" as the prior concept, the first word of the phrase, "*sustainable* development," implacably links it to the "development" necessary for the South.⁷¹

In deconstruction, the subordinated conception is referred to as the "dangerous supplement."⁷² The supplement is dangerous because it adds to our understanding, exposing our original understanding as incomplete.⁷³ Thus, the juxtaposition of the terms here reminds us that environmental sustainability cannot be assured at the expense of Southern development.⁷⁴ The North's campaign to 'save the rainforests,' for example, functions as a kind of expropriation, claiming Southern forests as a global resource after the North has depleted its own.⁷⁵

"Development" similarly, entails environmental costs. The linkage of terms makes these costs explicit.⁷⁶ The supplement is also dangerous because it subverts our confidence in the privileged concept.⁷⁷ Inverting the hierarchy invites us to consider the necessity of development when engaged in environmental projects and the need for sustainability when engaged in development.⁷⁸

⁷¹ For a collection of papers exploring the "porous boundaries between the concepts of sustainable development and environmental justice," see 1999 Symposium, *The Nexus Between Environmental Justice and Sustainable Development*, 9 DUKE ENVTL. L. & POL'Y F. 147 (1999).

⁷² CULLER, *supra* note 69, at 104-05.

⁷³ Balkin, *supra* note 69, at 751.

⁷⁴ The views of LDCs in connection with sovereignty over their natural resources is set out in G.A. Res. 2158, U.N. GAOR, 21st Sess. (1966) (sovereignty) (reaffirming "the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their national development").

⁷⁵ See PANJABI, *supra* note 29.

⁷⁶ It has been suggested that "sustainable development" needs a clearer definition in order to be operational and in order to provide real political leverage. Jacobs, *supra* note 68 at 23-30.

⁷⁷ *Id.*

⁷⁸ McCloskey, *supra* note 56 at 153-54 (noting that politicians use the concept of sustainable development to "reconcile competing claims from the environmental community, the business community and labor and the poor").

The dangerous supplement, the subordinated opposition, can also be found in the dominant concept as "trace." That is, each of the terms retains a bit of the other, a reminder of its origins:

The word "trace" is a metaphor for the effect of the opposite concept, which is no longer present but has left its mark on the concept we are now considering. The trace is what makes deconstruction possible; by identifying the traces of the concepts in each other, we identify their mutual conceptual dependence.⁷⁹

"Sustainable development" incorporates the metaphor of "trace" by making opposite concepts explicit and inseparable. Thus, it becomes impossible to conceptualize either "development" or "sustainability" without considering the other.⁸⁰ "Sustainable development" is *already* postmodern.⁸¹

⁷⁹ *Id.* at 752.

⁸⁰ It has been suggested that this simply makes both unintelligible. As Michael McCloskey concludes,

let me lament the declining faith in the concept of sustainable development. Intuitively, it seems to make sense and has an inspiring scope. . . . Yet, if "the emperor has no clothes on," we must in the end acknowledge it. There was a day when we needed the high hope and the fine inspiration represented by the concept. But today, we need a usable line of thought—an operational reality. We need a line of thought which can be extended rationally into the detail of research, planning, and application. . . . What we now fear is that 'sustainability' will prove to be no more than a boon to publicists who will paste new labels on old bottles and claim that every project that makes their clients rich is sustainable.

McCloskey, *supra* note 56, at 159.

⁸¹ See Pierre Schlag, *Foreword to Symposium, Postmodernism and Law*, 62 U. COLO. L. REV. 439, 444 (1991) (explaining how *all* law is already postmodern). See also J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1973 (1992) (asserting that "jurisprudence produced during the postmodern era will turn out to display elements of postmodernity whether this is consciously desired or not"). As Dobson notes, "the interesting feature of contestable concepts comes in . . . where the contest occurs: political argument over how the concept should be interpreted in practice . . . disagreements over the 'meaning of sustainable development' are not semantic disputation but *are* the substantive political arguments with which the term is concerned." FAIRNESS AND FUTURITY, *supra* note 68.

B. *The Metanarrative of Scientism*

Environmentalists have consistently expressed incredulity toward scientism, the faith that whatever messes are made by today's development and industrialization can be cleaned up by tomorrow's innovation.⁸² Indeed, in conjunction with the ideologies of growth and materialism, many environmentalists believe that "scientism [is] the problem."⁸³ At the same time, as a leading text notes, "[i]nternational environmental issues are uniquely science-driven. Science plays an indispensable role in identifying global environmental threats, in analyzing those threats, and in developing solutions."⁸⁴ Science promises a language beyond politics, and an objective

⁸² See, e.g., LOMBERG, *supra* note 56, at 328.

[T]his civilization has over the last 400 years brought us fantastic and continued progress. Through most of the couple of million years we have been on the planet we had a life expectancy of about 20-30 years. During the course of the past century we have more than doubled our life expectancy, to 67 years. . . . Infants no longer die like flies—it is no longer every other child that dies but one in twenty, and the mortality rate is still falling. . . . We have far more food to eat—despite the fact that the Earth is home to far more people: the average inhabitant in the Third World now has 38 percent more calories. The proportion of people starving has fallen dramatically from 35 percent to 18 percent, and by the year 2010 this share will probably have fallen further to 12 percent. By that time, we will feed more than 3 billion more people adequately. . . . We have experienced unprecedented growth in human prosperity. In the course of the last 40 years, everyone—in the developed as well as the developing world—has become more than three times richer We have more leisure time, greater security and fewer accidents, more education, more amenities, higher incomes, fewer starving, more food and a healthier and longer life.

Id. See also Mark Sagoff, *Biotechnology and Agriculture: The Common Wisdom and Its Critics*, 9 IND. J. GLOBAL LEGAL STUD. 13, 17 (2001) (arguing that "agricultural biotechnology has pried environmentalism apart from Malthusianism").

⁸³ Elder, *supra* note 61, at 834. "Scientism" has been defined as "an exaggerated trust in the efficacy of the methods of natural science to . . . solve pressing human problems." *Id.* at 834 n.5. WEBSTER'S NEW COLLEGIATE DICTIONARY 1027 (H.B. Woolf, ed., G. & C. Merriam Co. 1981).

⁸⁴ HUNTER ET AL. *supra* note 1, at 367. See also Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169 (2002). But see Lee Epstein & Gary King, *A Reply*, U. CHI. L. REV. 191, 197 (2002) (noting that Revesz's original article did not give the reader a "clue as to how he conducted his research").

perspective.⁸⁵ While these claims have been challenged by postmodernists on a number of fronts,⁸⁶ they retain considerable appeal. Indeed, "[o]ne of the keys to building consensus . . . is developing a critical mass of scientific authority to show that an environmental problem is emerging, and also to determine what corrective action is appropriate."⁸⁷ From a PIL perspective, however, "scientific authority" must be regarded with some skepticism. Research may well be driven by politics,⁸⁸ data can be manipulated,⁸⁹ and scientific "certainty" may be more ambiguous than it first appears.⁹⁰

This skepticism has been incorporated in the precautionary principle.⁹¹ Principle 15 of the Rio Declaration provides that "where there

⁸⁵ Science also promises relatively clear parameters, often expressed in mathematical equations. *But see* George Johnson, *What's So New In a New-Fangled Science?* N.Y. TIMES, June 16, 2002, at 14 (describing challenges of "digital philosophy," which argues that equations should be replaced with algorithms); STEPHEN WOLFRAM, *A NEW KIND OF SCIENCE* (2002).

⁸⁶ *See, e.g.,* Sandra Harding, *Feminism, Science and the Anti-Enlightenment Critiques*, in *FEMINISM/ POSTMODERNISM* 83 (Linda J. Nicholson ed., 1990).

⁸⁷ HUNTER ET AL., *supra* note 1, at 367.

⁸⁸ *See Developments, supra* note 24, at 1532 (noting that "conflicting estimates of environmental damage result not only from scientific uncertainty, but also from politics. States often rely on estimates that support special interests unrelated to environmental preservation").

⁸⁹ For an ambitious and far-reaching investigation into empiricism, *See* Lee Epstein & Gary King, *Exchange: Empirical Research and the Goals of Legal Scholarship*, 69 U. CHI. L. REV. 1 (2002) (noting that "[as] long as the facts have something to do with the world, they are data, and as long as research involves data that is observed or desired, it is empirical") (emphasis added).

⁹⁰ John H. Cushman, J. R., *New Study Adds to Debate on E.P.A. Rules for a Pesticide*, N. Y. TIMES, June 2, 2002, at 28 (describing "contrasting views on research linking a common pesticide to cancer," including findings that frogs develop serious abnormalities after being exposed to much lower levels of the pesticide than the EPA. considers safe in drinking water). *See generally* Epstein & King, *supra* note 89, at 15 (finding "serious problems of inference and methodology . . . everywhere").

⁹¹ The precautionary principle is a basic principle of sustainable development. Sands, *Sustainable Development, supra* note 65, at 408, European Union, Communication from the Commission on the Precautionary Principle, Jan. 17, 2002, at para. 2 (outlining the Commission's approach to the Precautionary Principle and establishing guidelines for its application, including the avoidance of "unwarranted recourse to the Precautionary Principle as a disguised form of protectionism"). This has been described as "potentially the most radical and far-reaching of environmental principles." Sands, *Sustainable Development, supra* note 65, at 375. Probably *because* of this, "its meaning and effect are unclear and remain mired in controversy." *Id.* For an argument that the Principle encourages

are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.⁹² While the precautionary principle may be customary international law,⁹³ the United States has consistently rejected it.⁹⁴ In doing so, the United States gives important leverage to those who can pay for as many studies as it takes to generate “uncertainty” regarding claims of serious or irreversible damage,⁹⁵ even if they are unable to actually refute such claims.⁹⁶

C. *The Metanarrative of American Greed*

There are many metanarratives of the United States.⁹⁷ From a Southern perspective, however, we are widely regarded as global gluttons, consuming a vastly disproportionate share of the world's goods⁹⁸ and

counterproductive decision making, devoting resources better spent elsewhere to protecting the environment against trivial risks, see LOMBERG, *supra* note 56, at 349.

⁹² Rio Declaration, *supra* note 64.

⁹³ Sands, *Sustainable Development*, *supra* note 65, at 401.

⁹⁴ For a thoughtful statement of the administration's position, see John D. Graham, Office of Management and Budget, *The Role of Precaution in Risk Assessment and Management: An American's View*, http://www.whitehouse.gov/omb/inforeg/eu_speech.html (last visited Mar. 22, 2002). See also GREENPEACE, *supra* note 23, at 4 (“The U.S. made sure that Principle 15 of the Rio Declaration did not reflect the Precautionary Principle. As a result, Principle 15 refers to the *precautionary approach*, that terminology favored by the U.S., Canada and Australia.”) (emphasis in original).

⁹⁵ *Developments*, *supra* note 24, at 1533 (noting that “[a]lthough international organizations and NGOs may facilitate more objective scientific research, such organizations are not immune from politics”). But see Dale Oesterle, *A Clear-Headed Look at NGOs*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 129, 131 (2002) (describing NGOs which urge donors to “send in your dollars so we can do a better study”). Research is influenced, if not determined, by market forces in other more general ways as well. See Gina Kolata, *Science Needs a Healthy Negative Outlook*, N.Y. TIMES, July 7, 2002, at 10 (explaining why experiments that fail often are unpublished).

⁹⁶ For a sophisticated analysis of the difficulties in determining transboundary pollution, for example, see John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT'L L. 291 (2002).

⁹⁷ The United States has actively marketed some of these, such as America as the “land of opportunity,” and “home of the free,” to encourage immigration. See Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: A Miracle for Breakfast*, 33 VA. J. INT'L L. 433 (1993).

⁹⁸ According to Panjabi, twenty-three percent of the world's population controls eighty-five

responsible for a vastly disproportionate share of its pollution.⁹⁹ While only five percent of the world's population live in the United States, we consume almost twenty-five percent of the world's energy.¹⁰⁰ In addition, we are considered hypocrites. As Panjabi observes, "the Treaty on Forests was actively promoted by the Americans, the same Americans who had, according to the South, weakened the Climate Change Treaty, rejected the Biodiversity Convention, and generally done their utmost to stress the primacy of their country's self-interest during the Rio process."¹⁰¹ Although we tell LDCs that free markets will bring them prosperity, similarly, we maintain firm barriers against their goods. The World Bank has estimated that a fifty percent reduction in trade barriers by the European Commission, the United States, and Japan would raise exports from developing countries by \$50,000,000,000 U.S. a year.¹⁰²

We maintain these barriers to safeguard our standard of living. "[T]he American standard of living is not up for negotiation," said the first Bush Administration at the Rio conference in 1992.¹⁰³ Ten years ago, it wasn't. But it is now, as those thinking about the next election have already

percent of its income and most of the twenty-three percent live in the North. PANJABI, *supra* note 29, at 102. See Andrew Simms, *Ecological Debt—Balancing the Environmental Budget and Compensating Developing Countries*, (May 2001), http://www.jubilee2000uk.org/ecological_debt/Reports/04%20ecological%20debt.pdf ("A typical U.S. citizen . . . uses fossil fuels at a rate twenty times higher than the average Indian citizen, 300 times that of someone from Mozambique, and many times the threshold for sustainable consumption per person. . . . Klaus Topfer, Executive of the UNEP, called for a ninety percent cut in rich countries."). "It is very unfair to assume that the United States government, United States multinational companies, and the American people are all cast in the same mold. Yet such is this nature of North-South misunderstanding that such assumptions are frequently made. . . ." PANJABI, *supra* note 29, at 99.

⁹⁹ Although the United States has not yet transferred significant amounts of waste to the developing world, officials in Baltimore negotiated with their counterparts in China for permission to dump "tens of thousands of tons of municipal solid waste in Tibet." PANJABI, *supra* note 29, at 126. "Like grass roots advocacy generally, environmental justice reflects a challenge to technocracy, and to technical ways of thinking, not an embrace of them." CHRISTOPHER H. FOREMAN JR., *THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE* 28 (1998).

¹⁰⁰ PANJABI, *supra* note 29, at 124.

¹⁰¹ *Id.* at 141.

¹⁰² World Bank Report of June 1992, *cited in* PANJABI, *supra* note 29, at 115.

¹⁰³ PANJABI, *supra* note 29, at 128.

noted.¹⁰⁴ As many commentators pointed out after September 11th, the American fantasy of the open road has run out of gas.¹⁰⁵

II. THE "CULTURAL LOGIC OF LATE CAPITALISM"

According to Fredric Jameson, "postmodernism is the cultural logic of late capitalism."¹⁰⁶ This "cultural logic" has two related but distinct manifestations: commodification and globalization. Commodification refers to the transformation of something that is not commonly sold, traded or otherwise alienated—water, love, rituals of indigenous cultures—into something that is—bottled water, mail-order brides, \$50 per head "performances."¹⁰⁷ Globalization, as Boaventura de Sousa Santos explains,

¹⁰⁴ Alison Mitchell, *Senator Attacks Oil Policy as Top Democrats Jockey*, N.Y. TIMES, Jan. 23, 2002, at A12 (describing Senator John F. Kerry's criticism of Bush's energy plan as "old thinking").

¹⁰⁵ See, e.g., Ann Patchett, *The Long Drive Home*, N.Y. TIMES, Nov. 25, 2001, at 21.

But the truth is that our belief in the inalienable right to drive is at the heart of our problems. Our unquenchable thirst for oil has shaped our policies in the Middle East—and that has greatly contributed to our present morass. . . . As a country, we have a long way to go if we're going to rethink our relationship to driving. I'm hoping that the one thing we love more than our cars is our independence, and right now, that's something we don't have, at least where our fuel is concerned. Would we be willing to reinstate a national speed limit of 55 mph if it would significantly reduce our dependency on foreign oil? If you are willing to send troops into war to protect your right to drive 70 mph, then I suggest you take the flag off your car.

Id. at 22. Contrast this with President Dwight D. Eisenhower's 1955 speech to Congress about the interstate highway system, "[t]ogether, the united forces of our communication and transportation systems are dynamic elements in the name we bear—United States. . . . [T]he tools of transportation. . . . are but a means to an end. And the end is the unity of our nation—and the mobility and prosperity of our people." N.Y. TIMES, Nov. 25, 2001, at 21. See generally Anna Quindlen, *Honestly - You Shouldn't Have*, NEWSWEEK, Dec. 3, 2001, at 76 ("The notion that we should show the terrorists who's boss by supporting this shaky shanty town of automatic-pilot consumption is as suspect as bailing out the airline industry.").

¹⁰⁶ Pursuant to this logic, free market democracy calls for the elimination of trade barriers to open markets to Western capital. See *infra* text accompanying note 110 (describing effects of globalization on development).

¹⁰⁷ GLOBALIZING INSTITUTIONS: CASE STUDIES IN REGULATION AND INNOVATION 13 (Jan Jenson & Boaventura de Sousa Santos eds. 2000)[hereinafter GLOBALIZING INSTITUTIONS] (describing the "vernacularization of historical religious sites for tourists").

is "the process by which a given local condition or entity succeeds in expanding its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local."¹⁰⁸ Thus, along with dollars, Western culture¹⁰⁹ flowing freely around the world. Mass production of goods has been succeeded by the mass production of images¹¹⁰ and information, from MTV to golden arches, proliferating in endless iterations around the world.¹¹¹ By packaging culture, commodification makes globalization possible. By opening markets, globalization makes

¹⁰⁸ Boaventura de Sousa Santos, *Oppositional Postmodernism and Globalization*, 23 LAW & SOC. INQUIRY 121, 135 (1998). See GLOBALIZING INSTITUTIONS, *supra* note 107, at 12 ("Most frequently, the story of globalization is that of the winners, as told by the winners. The victory of their vision of the future is recounted as an inevitability. In the last two decades globalizations follow—to hear the victors tell it—not only from heavy tendencies of economic structures but also from the lucky escape from misguided political vision which sought to achieve social justice and equality via state action and mobilization of the economically and socially disadvantaged after 1945."). SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 19 (1996) ("The most widely recognized instance of Americanization is seen, of course, in the profound influence of U.S. popular culture exists on global culture."). As Huyssen argues, "specially with the help of the new technological media of reproduction and dissemination, monopoly capitalism has succeeded in swallowing up all forms of older popular cultures, in homogenizing all and any local or regional discourses, and in stifling by cooption any emerging resistance to the rule of the commodity." HUYSEN, *supra* note 36, at 21.

¹⁰⁹ As Professor Falk observes, "'Western' [has been] further deconstructed to be seen as 'American.'" RICHARD FALK, *EXPLORATIONS AT THE EDGE OF TIME: THE PROSPECTS FOR WORLD ORDER* 49 (1992). For a description of the commodification of international law, see Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 VAND. J. TRANSNAT'L L. 503, 553 (2000) (describing the International Superstore).

¹¹⁰ Fredric Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism*, NEW LEFT REV., July-Aug. 1984, at 59. No one would invest in "Third World markets," for example, so the International Finance Corporation of the World Bank repackaged them as "emerging markets," with what turned out to be irresistible connotations of getting in on the ground floor. See Nicholas D. Kristof & David E. Sanger, *How U.S. Wooed Asia to Let Cash Flow In*, N.Y. TIMES, Feb. 16, 1999, at A1.

¹¹¹ Joseph Hanania, "Reality" TV? *Televisions Colonized Reality Long Ago*, N.Y. TIMES, Jan. 21, 2001, at 41 (noting that the United States Department of Justice sent episodes of *Law and Order* to Russian lawmakers in an effort to educate them about the American criminal justice system as they drafted a new constitution in the early 1990s, "despite the fact that [the show's author] never attended law school, [and] creates legal theories and precedents for the show 'out of whole cloth'").

commodification profitable. What gets “sold” in LDCs is American prosperity.¹¹²

A. *Commodification*

Commodification and globalization are in large part responsible for the spread of the environmental movement.¹¹³ They can be constructively exploited, as Greenpeace has effectively demonstrated with the *Rainbow Warrior* and its calendars.¹¹⁴ Some purists may wince at the World Wildlife Federation’s (“WWF”) panda,¹¹⁵ but the furry mammals are an astute marketing ploy for raising consciousness and raising money, with which Greenpeace and WWF can continue to ratchet their public visibility. Commodification contributes to environmentalism, it can be argued, through movies like *FernGully*¹¹⁶ and *Free Willy*¹¹⁷ and tourist attractions like the wildlife preserves in Kenya.¹¹⁸ At the same time, the commodification of the environment encourages exploitation.¹¹⁹ From a PIL perspective, it should be kept in mind that rhetoric can both enhance international environmental

¹¹² As Schlag points out, “[O]urs is a world. . . . where the value of freedom implies at once the downfall of the Berlin wall and the imbibing of Pepsi.” SCHLAG, *supra* note 36, at 47.

¹¹³ Cf. Anghie, *supra* note 39, at 250 n.14 (describing human rights as “a manifestation of globalization in that it is a universal language that creates communities and affiliations which transcend borders”).

¹¹⁴ Greenpeace describes itself as “the best-known international campaigning organization with some 2.5 million members and a reputation for taking direct action.” See also <http://www.greenpeace.org> (last visited January 28, 2003).

¹¹⁵ See Interview with Professor Gary L. Francione, FRIENDS OF ANIMALS, Summer 2002, at 26-27 (noting that Professor Francione “argues that all sentient beings—and not just the ones that are most ‘like us’—are necessarily self-aware and have an interest in their lives”).

¹¹⁶ FERNGULLY (Fox Video 1995).

¹¹⁷ FREE WILLY (Warner Home Video 1993); see FREE WILLY III (Warner Home Video 1997).

¹¹⁸ See *infra* note 135 (describing economic incentives for ecotourism).

¹¹⁹ Whether commodification leads to exploitation (selling “views” leading to smaller-sized lots for development, and greater density) or exploitation to commodification (a road for timber cutting or ski resort access resulting in demand for lots) is an open question in many contexts. Such chicken-and-egg debates are not uncommon when discussing environmentalism and economics. See, e.g., Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: “Disproportionate Siting” or Market Dynamics?*, 103 YALE L.J. 1406 (1994) (arguing that it must be asked which comes first in a given place, a “locally unwanted land use” (“LULU”) or a minority community).

efforts,¹²⁰ encouraging fresh applications, and rhetoric can muddy the waters, especially in the hands of well-paid corporate public relations experts.¹²¹ What increasingly sells in America, for example, is images of unspoiled beaches, old growth forests and mountain retreats accessible only by private plane¹²² or the most intrepid of sport utility vehicles ("SUV"s). Sleek American luxury cars, the colors of precious metals, glide through Ansel Adams landscapes as if through their native habitats.¹²³ The aestheticized wilderness background replaces the fur-draped young women who once adorned car ads as symbols of conspicuous consumption. Madison Avenue has appropriated the activist insight that the environment is not a free good and used it to sell cars.¹²⁴ The notion of the environment as a luxury for the rich is widely recognized by real estate developers,¹²⁵ exotic trek organizers,¹²⁶ and others who profit from the commodification—and the privatization—of the natural world. This is facilitated, ironically, by the failure of some developed States to put a price on the environment; i.e., to recognize the economic value of a healthy environment, and thus to invest

¹²⁰ See, e.g., *Developments*, *supra* note 24, at 1488 ("The world has experienced a political awakening . . . World leaders have increasingly have moved environmental issues from the periphery to the center of their political agendas. . . . The world has entered a 'new age of environmental diplomacy.'").

¹²¹ Cf. FOREMAN, *supra* note 99, at 29 (discussing rhetoric in the context of domestic environmental justice concerns). Christopher Foreman writes, "Visible and involuntary risks have a much greater intuitive lock on the perceptions of ordinary citizens than they do on risk management professionals. Not surprisingly then, critiques of the quantitative literature by earnest academics and policy researchers do not resonate within the movement or within communities. And in the long run, this divergence in perspective is perhaps the most fundamental challenge environmental justice policy-making faces." *Id.*

¹²² See *The Thomas Crown Affair* (1999); Jane Spencer, *Money's Worth/Travel*, WALL ST. J., July 25, 2002, at D2 (comparing one-week packages in Costa Rica: [t]he high-end—"prepare to shell out some *colones*"—requires a private plane to an "isolated mountain-top resort" for \$11,890).

¹²³ Lexus ad, THE NEW YORKER, on file with the WM. & MARY ENVTL. L. & POL'Y REV.

¹²⁴ See *supra* note 61.

¹²⁵ See, e.g., 1221 Ocean Avenue, <http://www.1221ocean.com> (advertising "panoramic ocean and city views . . . 24-hour uniformed entry staff . . . monthly rentals from \$4,000 monthly); see generally LUXURY HOMES AND ESTATES, N.Y. TIMES MAG., June 2, 2002, at 93.

¹²⁶ See, e.g., SIERRA, Mar.-Apr. 2002, at 80-83 (listing exotic treks, such as *Natural Habitat Adventures* found at <http://www.nathab.com>, advertising "Come face to face with a polar bear!"; *Amazon & Andes Explorations* advertising "Rainforest Treetop Canopy Walkway! Scholar Escorted Jungle Safaris!" and *Black Sheep Touring Company* found at <http://www.BlackSheepTouring.co.mz> ("[f]or the discerning adventure and luxury traveler").

in it.¹²⁷ As *Sustainable America* notes, “[GDP] does not account for environmental quality or cultural and social resources. GDP treats natural resources simply as something consumed to produce other economic goods and services.”¹²⁸

Some have argued that markets themselves can be made environmentally friendly. As Geoffrey Heal explains, “markets have not performed notably well in conserving our planet’s environment. Indeed, they have done quite the opposite. But this poor record is not intrinsic in markets. They can be reoriented in a positive direction, in which case their potential for good is immense.”¹²⁹ This is, of course, the win-win premise of neoliberalism, as exemplified in the mechanisms set out in the Kyoto Protocol. As Heal enthusiastically describes it:

The Kyoto Protocol provides an interesting example of how markets might provide powerful incentives for environmental conservation. . . . [G]rowing forests could be remunerated by carbon sequestration credits at a rate of \$70 to \$1000 per hectare per year. This is a lot of money: ranches in Costa Rica, for example, make profits of at most \$100 to \$125 per hectare per year.¹³⁰

¹²⁷ But see OSBORN & BIGG, *supra* note 22, at 41 (noting that the European Union (“EU”) and many other developed countries agree that water should be regarded as an economic good, and priced accordingly).

¹²⁸ THE PRESIDENT’S COUNCIL ON SUSTAINABLE DEVELOPMENT, *SUSTAINABLE AMERICA: A NEW CONSENSUS FOR PROSPERITY, OPPORTUNITY, AND A HEALTHY ENVIRONMENT FOR THE FUTURE*, Chapter 3, Policy Recommendation V (1996) [hereafter *SUSTAINABLE AMERICA*] (setting out sixteen “beliefs”). http://clinton2.nara.gov/PCSD/Publications/TF_Reports/amer-Chap.3.html. As Heal notes, “[w]ater is a good for which individuals and municipalities are willing to pay.” Geoffrey Heal, *Markets and Sustainability* in ENVIRONMENTAL LAW, THE ECONOMY AND SUSTAINABLE DEVELOPMENT, *supra* note 22, at 417. This is not always a simple calculation, however. Recycling, for example, results in “lower energy consumption and lower releases of air and water pollutants.” John Tierney, *Recycling is Garbage*, N.Y. TIMES, June 30, 1996, S6, at 24 (quoting a senior scientist at the Environmental Defense Fund, “[b]ut there are much more direct—and cheaper—ways to reduce pollution”).

¹²⁹ Heal, *supra* note 128, at 427. As then Vice-President Al Gore pointed out, “[t]he United States has a special obligation to discover effective ways of using the power of market forces to help save the global environment.” PANJABI, *supra* note 29, at 116.

¹³⁰ Heal, *supra* note 128, at 410, 414.

[L]and yielding \$25 per hectare annually for ranching and \$70 per hectare

The problem here, again, is the way in which the economic priorities of "development" persist in undermining the environmental priorities of "sustainability."¹³¹ In Heal's example, for instance, critics have pointed out that credits give businesses a "right" to pollute as much as they can afford,¹³² provide incentives for unsustainable monoculture tree plantations,¹³³ and perversely *preserve* dangerous emissions otherwise lost through economic downturns.¹³⁴ Thus, the proliferation of market-driven

for cropping can yield between \$200 and \$300 per hectare as part of a reserve managed for tourism or hunting. . . . An interesting detail is that the presence of lions will add about 30 percent to the revenues from an area, so that the incentive to restock with lions is great. Supporting lions, at the top of the food chain, requires maintenance of most of the rest of the chain beneath them: what the lions eat, what the lions' food eats, and so on. There is a strong economic incentive to do a thorough job of restoration.

Id. at 418.

¹³¹ See, e.g., *UN Development Program Abandons Corporate Partnership*, <http://www.socialfunds.com/news/article.cgi/article280.htm> (last visited Jan. 17, 2002) (explaining that the UN Development Program ("UNDP") cancelled Global Sustainable Development Facility in partnership with fifteen corporations, because of protests against the "tarnished environmental and human rights records of the participating companies").

¹³² See Richard Toshiyuki Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy*, 9 DUKE ENVTL. L. & POL'Y F. 268, 269 (1999).

What was once a wrong—polluting—is now a 'right'. The immorality of pollution trading lies in its treatment of a public resource, pollution free air, as a private commodity. Instead of people having the right to breath free, businesses have the right to pollute as much as they can afford.

Id.

¹³³ FRIENDS OF THE EARTH INT'L ET AL., *TREE TROUBLE: A COMPILATION OF TESTIMONIES* (2001) (describing negative results of monoculture tree plantations in Costa Rica, Equador, Australia, Paraguay, Indonesia, Chile, Camaroon, Colombia, Czech Republic, Bangladesh, Uganda and Tanzania); GLOBAL FOREST COALITION, *FOREST COVER 2* (Dec. 2001) (criticizing the Convention on Biological Diversity for failing to address "the challenges that confront forests").

¹³⁴ See Drury et al., *supra* note 132, at 286.

Since the collapse of the Russian economy, that country's carbon dioxide emissions have dropped by more than 30 percent below 1990 levels. Under the Kyoto Accords, Russia will be granted emission credits as if the economic collapse had never occurred. This will allow Russia to either increase its production levels, or to sell its 30 percent excess emission

creative approaches¹³⁵ simultaneously generates further opportunities for market exploitation.¹³⁶ As Professor Sands notes, moreover, instruments creating rights and duties for the private sector enhance its role in international affairs, even encouraging private sector participation in international law-making.¹³⁷

It has been argued, moreover, that markets are *already* environmentally friendly. As Tierney explains, for example, products produced in States (like the United States) where environmental regulations are in effect, reflect the cost of compliance. “[W]hen consumers follow their preferences, they are guided by the simplest, and often the best, measure of a product’s environmental impact: its price.”¹³⁸ Where it is cost effective to recycle, he suggests consumers will do so. Where it is not, it is probably better for the environment if they don’t.

There are two problems with this argument. First, in calculating recycling costs, Tierney includes the vast sums needed for public education, which presumably decrease over time. Seattle, for example, does better than most communities with curbside recycling because a critical mass of participants have internalized the norms of recycling.¹³⁹ Second, his argument applies only “where environmental regulations are in effect.”¹⁴⁰ The scope of such regulations, and the costs of implementing them, are not addressed. Because of globalization, however, products produced under such regulations compete with those that are not, in what many see as a global race to the bottom.¹⁴¹

credits to other countries.

Id.

¹³⁵ See, e.g., Heal, *supra* note 128, at 420 (“[T]he different ways of obtaining a return from ecosystem conservation . . . are not mutually exclusive. A forest could obtain returns from carbon sequestration, bio-prospecting, managing a watershed and ecotourism.”).

¹³⁶ As Drury and his co-authors note, “[p]ollution trading programs can unfairly concentrate pollution in communities where factories purchase emissions reduction credits rather than reduce actual emissions. These localized health risks from pollution sources, or ‘toxic hot-spots,’ tend to be overlooked by policy makers focused on regional air quality concerns.” Drury et al., *supra* note 132, at 251.

¹³⁷ See Phillippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT’L L. & POL. 527, 536-37, 541-43 (2001).

¹³⁸ Tierney, *supra* note 128, at 24.

¹³⁹ But see *id.*, at 24 (describing Germany’s “notoriously unprofitable” recycling program).

¹⁴⁰ *Id.*

¹⁴¹ One country’s floor, of course, may be another country’s ceiling. See Richard J. Ferris, Jr. & Hong Jun Zhang, *The Challenges of Reforming an Environmental Legal Culture*:

1. Real Costs

A recent ad campaign shows an SUV on an ice floe in the "polar region," linking it to environmental access and privilege.¹⁴² This is a fantasy we can no longer afford. SUVs increase our dependence on foreign oil, which has risen along with their popularity. SUVs received special dispensation from Corporate Average Fuel Economy regulations ("CAFE regulations"), with appalling consequences for the environment. The Bush administration is not only committed to keeping this dispensation in place, it has recently dropped support for a \$1.5 billion program aimed at developing more fuel-efficient cars.¹⁴³ The real costs here are not only the environmental costs attributable to the widespread relaxation of emissions controls. Rather, the real costs include the military/defense costs necessary to ensure a steady supply of foreign oil and to protect American companies from growing global resentment.¹⁴⁴

2. Who Pays Them

The real costs of environmental degradation are currently borne in large part by those who are unable to avoid them, i.e., indigenous people and others, particularly women and children, unable to leave the maquiladoras,¹⁴⁵ the dried-up Aral Sea in central Asia,¹⁴⁶ the slums that ring many of the major

Assessing the Status Quo and Looking at Post-WTO Admission Challenges for the People's Republic of China, 14 GEO. INT'L ENVTL. L. REV. 429, 432 (2002) (quoting a senior official at China's State Environmental Protection Administration suggesting that World Trade Organization ("WTO") membership would benefit the environment).

¹⁴² Saturn ad, NEWSWEEK, on file with the WM. & MARY ENVTL. L. & POL'Y REV.

¹⁴³ Neela Banerjee, *Car Talk*, N.Y. TIMES, Jan. 13, 2002, §4 at 2. Instead, the administration unveiled "Freedom CAR," a partnership with major automakers to develop fuel cells that would replace the internal combustion engine. It is estimated that such cells will take 10 to 20 years to develop. *Id.*

¹⁴⁴ See, e.g., Al Gore, *The Selling of an Energy Policy*, N.Y. TIMES, Apr. 21, 2002, at Wk 13 (deploring "our dangerous dependence on foreign oil, [and an America] held hostage to oil imports and tin horn tyrants like Saddam Hussein").

¹⁴⁵ Frances Lee Ansley, *Rethinking Law and Globalizing Labor Markets*, 1 U. PA. J. LAB. & EMP. L. 369, 385 (1998).

¹⁴⁶ See WOMEN TRANSFORM THE MAINSTREAM (Div. for Sustainable Dev. of the United Nations Dep't. of Econ. & Soc. Affairs & Women's Env't & Dev. Org. eds., 1999) (describing the dying Aral Sea, "[o]nce one of the world's largest inland fresh seas,"

cities of South America,¹⁴⁷ the choking industrial cities of eastern Europe.¹⁴⁸ Proposals abound for reallocating these costs, but the political will to do so is harder to come by.¹⁴⁹

The South has urged recognition of the “polluter pays” principle, for example, which allocates costs to those causing them.¹⁵⁰ This includes long-range and attenuated costs for which the polluter might not be liable under domestic tort law or under traditional rules of state responsibility. Even if the principle is accepted, however, as Osborn and Bigg have pointed out, “[t]here’s something perversely unethical about the ‘polluter pays’ principle, for its reverse logic is that he who can pay can also pollute.”¹⁵¹

destroyed by the large cotton monoculture mandated by the Soviets) *available at* <http://www.un.org/esa/sustdev/wedo.htm> (last visited Feb. 27, 2003).

¹⁴⁷ See McCloskey, *supra* note 56, at 158.

It may also be true that nations whose populations are growing rapidly and getting poorer are forced to ravish their environment in order to survive. However, these impacts are usually limited to the periphery of presently populated areas and do not immediately transfer themselves into remote areas, unless development projects build access roads into them.

Id.

¹⁴⁸ See FOREMAN, *supra* note 99, at 1-2 (“The core claim of the environmental justice movement is that a variety of environmental burdens (for example, toxic waste sites, polluted air and water, dirty jobs, underenforcement of environmental laws) have fallen disproportionately on lower-income persons and communities of color.”). *But see* J.B. Ruhl, *The Co-evolution of Sustainable Development and Environmental Justice: Cooperation, Then Competition, Then Conflict*, 9 DUKE ENVTL. L. & POL’Y F. 161, 163 (1999) (“[E]nvironmental justice” and “sustainable development” are overlapping but distinct: “The two policies do not overlap completely in terms of either scope or focus. They are not interchangeable.”). *Id.*

¹⁴⁹ McCloskey, *supra* note 56, at 154-55.

¹⁵⁰ PANJABI, *supra* note 29, at 133. For a list of treaties that place liability directly upon polluters, see Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 480 (2001). This general principle can be applied in a range of contexts. *See e.g.* Tierney, *supra* note 128, §6, at 13 (describing “pay-as-you-throw system” in effect in cities including San Francisco and Minneapolis, where residents pay for municipal garbage collection according to the amount of garbage they throw out).

¹⁵¹ OSBORN & BIGG, *supra* note 22, at 49 (quoting Yash Tandon, International South Group Network). *See supra* note 86. *See also* Drury et al., *supra* note 132, at 269.

B. *Globalization*

PIL explicitly situates analysis in the spatial and historical contexts of globalization.¹⁵² The “spatial context of globalization”¹⁵³ includes not only geography (Where are environmental disasters occurring? How close to Europe? How far from CNN?) but technology (What kind of monitoring is in place? What kind of damage control is possible?). The “historical context of globalization” refers not only to the post-Cold War triumph of “free market democracy”, but to the transposition of Cold War conflicts to other contexts.

¹⁵² See Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. U. INT'L L. REV. 316, 321 (1999). (“Geography and space are only two dimensions of the total manifold of events that define a particular situation or conflict.”). See also SASSEN, *supra* note 108, at 37. (“Securitization and the ascendance of finance generally have further stimulated the global circulation of capital and the search for investment opportunities worldwide. . . .”).

¹⁵³ Kennedy writes:

Yet it seems obvious to me that the most important work of perpetuating and normalizing the astonishing distributional inequities of our current world is done by the spatial division of the world's political cultures and economies into local and national units and by the conceptual separation of a political public law that operates nationally from an apolitical private law which operates internationally. We now think it obvious that poverty is a local problem, while wealthy people live more and more globally. But spatial and conceptual issues of this type are simply off the map of the discipline's concerns.

Kennedy, *Thinking Against the Box*, *supra* note 31, at 479.

1. Capital Flows

For most of Western history,¹⁵⁴ capital has flowed freely.¹⁵⁵ The end of the Cold War and developments in finance¹⁵⁶ and technology combined to qualitatively change the game during the past ten years.¹⁵⁷ The failure of Soviet communism became the triumph of free market democracy, as formerly closed markets opened and capital poured in at a previously unimaginable rate.¹⁵⁸ As a fund manager in Hong Kong observed, "it's no longer the real economy driving the financial markets, . . . but the financial markets driving the real economy."¹⁵⁹ In addition, the election of President Clinton in 1992 put a free market enthusiast in the White House.¹⁶⁰ The world has never seen anything like the flow of capital during the eight years of his presidency. As then-Deputy United States Secretary of the Treasury Lawrence H. Summers noted:

¹⁵⁴ See Said, *supra* note 37, at 71.

¹⁵⁵ Not until the Great Depression did most governments impose constraints to prevent capital flight. See Kristof & Sanger, *supra* note 110, at A10. In the 1960s, the United States limited rights of citizens and corporations to invest overseas. See *id.* In the 1970s and 1980s, however, the free flow of capital again began to look like a good idea. Presidents Reagan and Bush both supported free trade, for example, and thus contributed to the transformation of the global economy. See *id.*

¹⁵⁶ See Said, *supra* note 37, at 71. "Securitization and the ascendance of finance generally have further stimulated the global circulation of capital and the search for investment opportunities worldwide. . . ." SASSEN, *supra* note 108, at 37.

¹⁵⁷ See, e.g., Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA L. & POL'Y SYMP. 19, 21-22 (1997) (describing the revolution in global communications and its impact on financial systems).

¹⁵⁸ See Nicolas D. Kristof & Edward Wyatt, *Who Went Under in the World's Sea of Cash*, N.Y. TIMES, Feb. 15, 1999, at A1. ("In a typical day, the total amount of money changing hands in the world's foreign exchange markets alone is \$1.5 trillion—an eightfold increase since 1986 and an almost incomprehensible sum, equivalent to total world trade for four months.").

¹⁵⁹ *Id.*

¹⁶⁰ In 1991, then-Governor Bill Clinton met with Robert Rubin, the head of Goldman Sachs at the time, in the private dining room of the "21" Club in New York. Rubin, along with other Wall Street leaders, wanted to know whether the presidential hopeful understood the importance of opening Asian markets. Clinton won their support with his enthusiasm. See Kristof & Sanger, *supra* note 110, at A1.

When history books are written 200 years from now about the last two decades of the 20th century, . . . I am convinced that the end of the cold war [sic] will be the second story. The first story will be about the appearance of emerging markets—about the fact that developing countries where more than three billion people live have moved toward the market and seen rapid growth in incomes.¹⁶¹

Globalization has dramatically increased world income, but it has also increased the polarization between the “haves” and “have-nots.” This is part of a longer term trend, beginning after World War II. As the United Nations Development Program (“UNDP”) summarizes:

During the past five decades, world income increased sevenfold (in real GDP) and income per person more than tripled (in per capita GDP) [b]ut this gain has been spread very unequally—nationally and internationally—and the inequality is increasing. Between 1960 and 1991, the share of world income for the richest 20 percent of the global population rose from 70 percent to 85 percent. Over the same period, all but the richest quintile saw their share of world income fall—and the meager share to the poorest 20 percent declined from 2.3 percent to 1.4 percent.¹⁶²

The gross national product (“GNP”), moreover, is not a reliable indicator of human welfare.¹⁶³ The risks are even greater, because

¹⁶¹Kristof & Wyatt, *supra* note 158, at A1.

¹⁶²HOLLY SKLAR, CHAOS OR COMMUNITY? SEEKING SOLUTIONS, NOT SCAPEGOATS FOR BAD ECONOMICS 162 (1995) (citing U.N. Programme, 1994 Human Development Report 18, 26-27, 35 (1994)). See also *The Maastricht Guidelines of Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691, 691-692 (1998); Keith Bradsher, *Gap in Wealth in U.S. Called Widest in West*, N.Y. TIMES, Apr. 17, 1995, at A1.

¹⁶³For a clear explication of the limits of GNP, see MARTHA NUSSBAUM & AMARTYA SEN, *Introduction to THE QUALITY OF LIFE 1* (Martha Nussbaum & Amartya Sen eds., 1993).

[W]e also need, at the very least, to ask about the distribution of these resources, and what they do to people's lives. . . . We need to know about

globalization has increased both market volatility and market interdependence. In other words, markets are soaring to new highs and plunging to new lows, bouncing from one to the other faster—and less predictably—than ever before, and dragging others with them, sometimes with ruinous consequences.

As free trade has been extended to smaller countries with less regulatory infrastructure and experience with capital,¹⁶⁴ this unprecedented capital flow often has wound up in incompetent and unsupervised hands. In 1996, for example, the Thai Minister of Justice accused his fellow cabinet members of taking \$90 million in bribes for bank licenses.¹⁶⁵ In addition to widespread corruption and cronyism, wild investment schemes¹⁶⁶ and a shaky economy contributed to the 1997 collapse of the Thai baht.¹⁶⁷ But there were contributing factors outside of Thailand and beyond Thai control. Financial institutions played a critical role through unrestrained speculation and hedge funds. The G7 remained oblivious to the looming disaster—despite Japan's warning¹⁶⁸ and failed to address the emergency even when it became impossible to ignore.

The collapse of the baht was quickly followed by the crash of the Indonesian economy, and repercussions spread even to economies that were doing everything right, like Brazil.¹⁶⁹ From Southeast Asia to Eastern Europe

their health care and their medical services . . . education . . . labour . . . political and legal privileges the citizens enjoy ... how family relations and relations between the sexes are structured.

Id.

¹⁶⁴ See Kristof & Sanger, *supra* note 110, at A1.

¹⁶⁵ See *id.*

¹⁶⁶ See, e.g., *id.* (describing an uninhabited ghost town of twenty-four skyscrapers surrounded by townhouses and shops in rural Thailand).

¹⁶⁷ See Kristof & Wyatt, *supra* note 158, at A1.

¹⁶⁸ At a meeting of the G7, the Japanese Prime Minister called for a discussion of the financial instability in Thailand. He was "typically understated, tentative and vague (as is considered polite in Japan) and did not call for any specific action." While the Japanese officials waited expectantly, President Clinton and the other world leaders ignored the Prime Minister's request. See *id.*

¹⁶⁹ Brazil was following the advice of the International Monetary Fund ("IMF") with respect to austerity measures, for example. The collapse of the baht also affected economies that were doing nothing right, like Russia. For an account of the collapse of the Russian economy and its impact on Brazil, see THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* xi (1999).

to Latin America, hundreds of millions of people throughout the world were caught in what President Clinton characterized in his 1999 State of the Union Address as "the most serious financial crisis in half a century."¹⁷⁰ While some can weather the inevitable vicissitudes of free markets,¹⁷¹ the costs are often high, and may well be prohibitive for the already marginalized.

Even the United States Treasury has toned down its free market rhetoric, and it now warns of the dangers of unregulated capital flow.¹⁷² While the World Bank no longer imposes the kind of stringent Structural Adjustment Programs ("SAP"s) that dominated the 1980s,¹⁷³ lenders still

¹⁷⁰ Kristof & Wyatt, *supra* note 158, at A1. There are two main schools of thought as to the primary cause of the continuing crisis. First, Jeffery Sachs of Harvard University attributes it to panic. See, e.g., Jeffrey D. Sachs, Address at Yale Law School Alumni Weekend (Oct. 16, 1998), in YALE LAW SCHOOL OCCASIONAL PAPERS, SECOND SERIES, NUMBER 4 (1998) available at <http://www.law.yale.edu/outside/html/publications/pub-sachs.htm>. Paul Krugman of the Massachusetts Institute of Technology attributes it more to structural weaknesses. See Kristof & Sanger, *supra* note 26, at 8. For a more optimistic view, see Michael M. Phillips, *Apocalypse? No: Round the Globe, Signs Point to Final Days of the Financial Crisis*, WALL ST. J., Apr. 14, 1999, at A1, 1999 (explaining that "the global financial crisis appears to have bottomed out" although "Russia bleeds billions").

¹⁷¹ See Kristof & Wyatt, *supra* note 158, at A1.

¹⁷² See Kristof & Sanger, *supra* note 110, at A1. As Muhammed Yunus has observed, "[U]nrestrained growth is the ideology of the cancer cell." Muhammad Yunus, *Redefining Development*, in 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (Kevin Danaher ed., 1999).

¹⁷³ See, e.g., WOMEN AND ADJUSTMENT POLICIES IN THE THIRD WORLD (Haleh Afshar & Carolyne Dennis eds., 1992). According to Gracia Clark,

[F]or many in the developing world, the policy regime called "structural adjustment" provides the ideological and financial discipline for establishing global space in a country as a whole. Loan conditionalities force national governments to dismantle regulatory controls, restrict subsidies to tax holidays for investors, and build appropriate transport and communications infrastructure.

Gracia Clark, *Implications of Global Polarization for Feminist Work*, 4 IND. J. GLOBAL LEGAL STUD. 43, 47 (1996). Under structural adjustment, protective and collective labor regulations have been eroded, along with employment security. See Guy Standing, *Global Feminization Through Flexible Labor: A Theme Revisited*, 27 WORLD DEV. 583, 584 (1999); cf. Nicholas D. Kristof, *World Ills Are Obvious, The Cures Much Less So*, N.Y. TIMES, Feb. 18, 1999, at A1 (quoting President Kim Dae Jung of South Korea, who argues that the crisis has been beneficial: "I believe that having to restructure our economy under the agreement of the IMF is ultimately a big help for our economy."). See generally KATHY MCAFEE, STORM SIGNALS: STRUCTURAL ADJUSTMENT AND DEVELOPMENT ALTERNATIVES IN THE

want assurances that their loans will be repaid.¹⁷⁴ Belt-tightening remains very much a part of the agenda.¹⁷⁵

Globalization has brought far more capital to LDCs than was ever dreamt of by development.¹⁷⁶ But as many observers had noted, globalization threatens the environment.¹⁷⁷ Poor States are unable to say no to MNCs and the capital and jobs they bring.¹⁷⁸ Nor are poor States able to police them. While this suggests the need for Professor Charney's universal environmental law,¹⁷⁹ the same lack of consensus that drives "sustainable development" makes it difficult to implement *effective* universal environmental standards. Indeed, as Vicki Been notes, national laws attempting to set environmental standards have already been challenged

CARIBBEAN 69-79 (1991) (describing the origins of Structural Adjustment and Development ("SAP"s)).

¹⁷⁴ See MCAFEE, *supra* note 173.

¹⁷⁵ A recent bill sponsored by Congressman Charles Rangel of Harlem (N.Y.), for example, would require African nations to make stringent economic commitments in return for trade concessions. Ronald G. Shafer, *Washington Wire*, WALL ST. J., Mar. 19, 1999, at A1, 1999. Illinois Representative Jesse Jackson, Jr. called the plan "'a crime against humanity' that takes food from the mouths of African babies." *Id.* He proposed an alternative measure which would provide aid, such as debt relief. *Id.* But African trade and finance ministers, in Washington for a State Department meeting, supported the Rangel plan. "We know the Jessie Jackson [Jr.]'s bill doesn't have a chance of passing," said one. "We're not stupid." *Id.*

Under NAFTA the Mexican "economy grew at a rate of 4.8% last year, adding 100,000 new manufacturing jobs." But "[j]ust since 1997, the number of people living in extreme poverty—defined as workers earning less than \$2 a day—has grown by four million, or twice the growth of the population." Joel Millman, *Is the Mexican Model Worth the Pain?*, WALL ST. J., Mar. 8, 1999, at A1, 1999 WL-WSJ 5443362. *Id.* For a detailed description of the Mexican crash, see GRAY, *supra* note 10, at 22. *But cf.* Kristof & Sanger, *supra* note 172, at A1 (noting that the worst-off in the worst-off country, Indonesia are still better off than they were ten years ago. Now, they have electricity, paved roads, and toilets.).

¹⁷⁶ As Applegate and Aman note, "[f]ree trade is both a friend and an enemy of sustainable development." Applegate & Aman, *supra* note 58, at 9.

¹⁷⁷ For a brief discussion of the impact of globalization on the changing role of international law, and more specifically, international environmental law, see Sands, *supra* note 137, at 537-38.

¹⁷⁸ See Terry L. Anderson & J. Bishop Grewell, *It Isn't Easy Being Green: Environmental Policy Implications for Foreign Policy, International Law, and Sovereignty*, 2 CHI. J. INT'L L. 427, 441 (2001) (arguing that "although pollution levels may increase as incomes begin to rise from very low levels, most pollution levels ultimately decline before annual income levels reach \$11,000 (in 1999 dollars)").

¹⁷⁹ See Charney, *supra* note 43.

under investor protection provisions of NAFTA.¹⁸⁰ While there are efforts underway to improve investor accountability, these efforts are subject to the same tensions that pervade the larger debate.¹⁸¹

2. New Threats from Old Conflicts

The persistence of Cold War tensions along new axes also poses threats. As Elder notes,

Ostensible agreement masks many old conflicts. Western industrialists seem to think [sustainability] means only more efficient resource use accompanied by sustainable material growth, with huge economic opportunities as Third World countries industrialize. Third World elites tend to agree, but are skeptical about we "first worlders" telling them to learn from our mistakes and to avoid destroying their forests or generating more greenhouse gases.¹⁸²

¹⁸⁰ Vicki Been, Globalization and Local Control, Oral Presentation at N.Y.U. Law School (April 5, 2002). Terri L. Lilley, Note, *Keeping NAFTA "Green" for Investors and the Environment*, 75 S. CAL. L. REV. 727, 733 (2002) (suggesting that *Metalclad* might be better understood as "a conflict over the level of government best suited to making environmental decisions" rather than "environmental concerns against free trade"). Such provisions have long been a feature of bilateral investment treaties ("BIT"s). NAFTA is the first multilateral treaty to incorporate them. Been, *supra*.

¹⁸¹ See, e.g., Lilley, *supra* note 180; *Actions Taken by UNCTAD in Assisting Developing Countries to Implement Agenda 21, Report by UNCTAD Secretariat*, U.N. Conference on Trade & Dev., Preparatory Sess., Background Paper No. 11, at 19, U.N. Doc. DESA/DSD/PC2/BP11 (2002) [hereinafter UNCTAD, Background Paper No. 11], available at, <http://www.unctad.org/trade-env/test1/publications/unctadreport.pdf> (urging the adoption of "environmental accounting" and UNCTAD's "develop[ment] of a methodology for environmental performance indicators ("EPI"s) linking environmental and financial performance indicators"); INT. INSTITUTE FOR ENV. AND DEV. (IIED), FINANCING FOR SUSTAINABLE DEVELOPMENT, 47 (2002) ("[I]nvestors are now becoming a powerful voice for disclosure [on environmental and social issues]. In October 2001, for example, the Association of British Insurers, whose members manage about \$1.5 trillion in assets, published their guidelines for companies to report on social, ethical and environmental risks.").

¹⁸² Elder, *supra* note 61, at 833.

While no one has polled non-elites, the relationship between conflict—whether intrastate, interstate, or between non-State actors and States and the environment is complex.¹⁸³ A rigorous explication is beyond the scope of this article, but two points are relatively clear: first, the Cold War legacy presents grave—and ongoing—environmental problems.¹⁸⁴ These range from the still-spreading ripples from damage already done to the storage challenges of the latest arms treaty between the United States and Russia.

The second clear point about the relationships between conflict and the environment is that armed conflict cannot be “sustainable;” its impact is devastating.¹⁸⁵ As set out in a recent symposium on the Environmental Law of War,¹⁸⁶ the use of force can destroy years of progress in hours; whoever wins, the environment loses.¹⁸⁷ A third, but far less clear proposition, is that environmental stewardship can help avoid or deter conflict.¹⁸⁸ This may be a strategically useful assumption, but it is problematic.¹⁸⁹ There seems to be

¹⁸³ See, e.g., Guruswamy, *supra* note 21, at 4-5 (“[S]ome thought that unfettered commerce would lead to global peace between the economic benefits of globalization would outweigh the cost of wars. However, this has not proven to be the case.”).

¹⁸⁴ See Greenpeace, Update 14 (2002) (describing the *Mayak* exhibit, an exhibit of photographs showing the “mass destruction perpetuated by the nuclear industry on surrounding populations,” including local populations in which one-third of the children are born with birth defects or other physical disorders), at <http://archive.greenpeace.org/pressreleases/nucwaste/2002May20.html> (last visited Jan. 29, 2003). See also Half Life, Living With the Effects of Nuclear Waste, <http://www.greenpeace.org/mayak> (last visited Feb. 27, 2003).

¹⁸⁵ See THE WORLD BANK, POST-CONFLICT FUND: GUIDELINES AND PROCEDURES 3 (1999) (explaining the role of the Post-Conflict Trust Fund, which has made grants of nearly \$400 million to support “a first step from violence and poverty to sustainable growth”).

¹⁸⁶ Symposium, *The Environmental Law of War*, 25 VT. L. REV. 649 (2001).

¹⁸⁷ See generally PHILIP SHABECOFF, NEW NAME FOR PEACE: INTERNATIONAL ENVIRONMENTALISM, SUSTAINABLE DEVELOPMENT, AND DEMOCRACY (1996); MOSTASA TOLBA & IWONA RUMNEL BULSKA, GLOBAL ENVIRONMENTAL DIPLOMACY (1998).

¹⁸⁸ See, e.g., Wendell Berry, *Thoughts in the Presence of Fear* (2001), at <http://www.organicconsumers.org/corp/wendellberry102201.cfm> (last visited Feb. 27, 2003) (“We do need a ‘new economy,’ but one that is founded on thrift and care, on saving and conserving, not on excess and waste. An economy based on waste is inherently and hopelessly violent, and war is its inevitable byproduct. We need a peaceable economy.”).

¹⁸⁹ See A. Dan Tarlock, *Ideas Without Institutions: The Paradox of Sustainable Development*, 9 IND. J. GLOBAL LEGAL STUD. 35, 44 (2001) (noting that “environmentalists somewhat

widespread consensus, for example, that avoiding dependence on foreign oil would enable the United States to avoid military actions to protect those foreign sources. The impact on stability in the Middle East, however, is unpredictable. Thomas Friedman suggests that "being a good global citizen" by ratifying the Kyoto Protocol, for example, would build interstate friendships crucial to the United States' war against terrorism.¹⁹⁰ While political "friendships", based on common values, languages and affinities, are obviously valuable, the importance of specific factors is more difficult to assess. Nicholas Robinson's recent expedition to the Middle East to teach international environmental law to university teachers,¹⁹¹ in contrast, may be more promising—and less subject to equivocation—since it at least has the potential to develop norms of environmental stewardship within those States.

III. FRAGMENTATION AND FLUX

A. *The Inevitability of Fragmentation*

The dynamics described in Parts I and II play out in an indefinite number of ever-changing contexts.¹⁹² According to David Harvey:

successfully have linked environmental destruction and the lack of [sustainable development] with political instability and possible civil unrest or war."). Jessica Tuchman Matthews, *Redefining Security*, 68 FOREIGN AFF. 162 (1989).

¹⁹⁰ See also JUNE ZEITLIN, WOMEN'S ENV'T AND DEV.ORG., *Pushing Multilateralism in Pursuit of Peace*, NEWS & VIEWS 1,3 (Dec. 2001) (noting that "within days of the [9/11] attacks, the U.S. administration rushed to approve almost \$6 million of the \$1 billion in unpaid dues owed to the UN and to appoint a new Ambassador," but that "if the U.S. genuinely wants to ensure safety at home, it must work in equal partnership with other nations to make the world a more secure place for all peoples.").

¹⁹¹ Interview with Nicolas Robinson, Professor of Law, Pace University, in Williamsburg, Va. (Mar. 21, 2002).

¹⁹² See, e.g., Henryk Kierzkowski, *Global Production Networks: Risks and Opportunities*, in WIDER ANGLE, *supra* note 6, at 8 (describing the "fragmentation of production"). Fragmentation at Earth Summit II "led to differences in approach and atmosphere as each section and each topic was treated very much on its own. This meant that it was difficult for participants to keep proper track of the overall shape and balance of the whole negotiation as it proceeded, and tried to guide it to a coherent and integrated deal." OSBORN & BIGG, *supra* note 22, at 29.

The most startling fact about postmodernism [is] its total acceptance of the ephemerality, fragmentation, discontinuity, and the chaotic But postmodernism responds to that fact in a very particular way. It does not try to transcend it, counteract it, or even to define the "eternal and immutable" elements that might lie within it. Postmodernism swims, even wallows, in the fragmentary and the chaotic currents of change as if that is all there is.¹⁹³

The scope of the enterprise, and the vast array of specific and distinct topics addressed, make fragmentation inevitable.¹⁹⁴ The concrete measures necessary to address the lack of water in sub-Saharan Africa¹⁹⁵ and the depletion of fisheries in the North Sea not only require different scientific applications, research and data, but the participation of very different communities in the problem-solving process.¹⁹⁶ While they may be united under the rhetorical rubric "sustainable development," and delegated to a similar level of implementation in the Agenda 21 process, strategies effective in one context¹⁹⁷ or location¹⁹⁸ may be irrelevant or even counterproductive

¹⁹³ HARVEY, *supra* note 16, at 44.

¹⁹⁴ See GURUSWAMY & HENDRICKS, *supra* note 2, at 40-41 (noting that "[t]he institutions and organizations enlisted to advance [international environmental law] are fractured, fragmented, and divided along functional, regional, bureaucratic, and geo-political lines").

¹⁹⁵ BROWN ET AL., *supra* note 51, at 48-49.

¹⁹⁶ Compare Sandra Postel, *Saving Water for Agriculture*, in BROWN ET AL., *supra* note 51, at 39 (describing increasingly prohibitive costs of inefficient irrigation) with Christopher J. Carr & Harry N. Scheiber, *Dealing with a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries*, 21 STAN. ENVTL. L.J. 45 (2002) (describing failures of regional fishery organizations and other, more promising approaches). Other issues, similarly, generate their own debates. See, e.g., Symposium, *Sustainable Development, Agriculture, and the Challenge of Genetically-Modified Organisms*, 9 IND. J. GLOBAL LEGAL STUD. 1 (2001).

¹⁹⁷ See Applegate & Aman, *supra* note 58, at 1-11 (introducing Symposium on *Sustainable Development, Agriculture, and the Challenge of Genetically-Modified Organisms*).

¹⁹⁸ See Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 679-80 (1999),

[T]he presumption favoring environmental taxes depends on the assumption that the regulator can compel polluters to comply by FIAT and that the regulator can impose the instrument directly

in another.¹⁹⁹ This inevitable fragmentation is encouraged, or exacerbated, by the frameworks adopted at Rio, the ongoing absence of consensus on multiple issues,²⁰⁰ and the political reality that governments tend to be reactive rather than proactive with respect to the environment.²⁰¹

Agenda 21, adopted at the Earth Summit in 1992, consists of several hundred pages setting out "a thorough and broad-ranging programme of actions demanding new ways of investing in our future to reach global sustainable development in the 21st century."²⁰² Characterized by one critic

on polluters without an intermediate level of government in the way. But neither of these assumptions—coercive FIAT or unitary regulation— is valid in the global legal context.

Id. at 683. See generally Sumudu Atapattu, *Sustainable Development, Myth or Reality?: A Survey of Sustainable Development Under International and Sri Lankan Law*, 14 GEO. INT'L ENVTL. L. REV. 265 (2002).

¹⁹⁹ See, e.g., Leah Sandbank, Note, *Dirty Laundry: Why International Measures to Save the Global Clean Water Supply Have Failed*, 13 FORDHAM ENVTL. L.J. 165, 205 (2001) (explaining why "the international community has simply been building ineffectively upon the same principles for at least thirty years"). What is "effective" may be problematic. As Tierney notes, "[s]aving a tree is a mixed blessing. When there's less demand for virgin wood pulp, timber companies are likely to sell some of their tree farms—maybe to condominium developers." Tierney, *supra* note 128, at §6, at 24.

²⁰⁰ See, e.g., Erling, *supra* note 44, at 41 (noting that "the European Union is at a somewhat more advanced stage [as to progress toward large-scale implementation]").

²⁰¹ For a sobering assessment of Rio Plus 5, see OSBORN & BIGG, *supra* note 22, (presenting a detailed account of the United Nations General Assembly Special Session ("UGASS"), or "Earth Summit II" or the 19th Special Session of the General Assembly," to review progress achieved in the implementation of Agenda 21.). The UN General Assembly concluded that "most ecological indicators show [ed] little or no improvement [in the five years] since Rio." HUNTER ET AL. *supra* note 1, at 14 (citing *Program for the Further Implementation of Agenda 21*, paras. 9-10, adopted by the Special Session of the U.N. Assembly, June 23-27, 1997). See also UNITED NATIONS ENV. PROGRAMME, GLOBAL ENVIRONMENTAL OUTLOOK 2000: UNEP'S MILLENNIUM REPORT ON THE ENVIRONMENT.).

²⁰² As the Johannesburg web site gushes,

[its] recommendations ranged from new ways to educate to new ways to care for natural resources, and new ways to participate in designing a sustainable economy. The overall ambition of Agenda 21 was breathtaking, for its goal was nothing less than to make a safe and just world in which all life has dignity and is celebrated.

at http://www.johannesburgsummit.org/web_pages/rio+10_background.htm [hereinafter Johannesburg web site] (last visited Sept. 10, 2002).

as “unsurpassed U.N. verbosity,”²⁰³ the recommendations of Agenda 21 are to be implemented and interpreted from no fewer than ten perspectives, representing the Major Groups of “stakeholders,”²⁰⁴ including nongovernmental organizations (“NGO”s).²⁰⁵ There is often little consensus within each constituency, let alone among, the teeming constituencies explicitly welcomed by Agenda 21, in each of its multiple contexts.

There is no silver bullet to remedy or to prevent environmental degradation.²⁰⁶ Indeed, basic disagreement regarding fundamental objectives persists.²⁰⁷ Even when there is agreement regarding a particular objective, there is often disagreement regarding the preferred methods for

²⁰³PANJABI, *supra* note 29, at 140.

²⁰⁴As identified in Agenda 21, these include: business and industry, farmers, local authorities, scientific and technological communities, children and youth, indigenous people, nongovernmental organizations, women, workers and trade unions. Agenda 21, U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151.26 (1992) [hereinafter Agenda 21]. See also THE WORLD BANK, THE FACES OF INCLUSION, *available at*, <http://www.worldbank.org/faces> (describing indigenous and Afro-Ecuadorian People's Development Project in Ecuador, Community Reintegration and Development Project in Rwanda, Microenterprise Lending in Bosnia and Herzegovina, Hyderabad Water Supply and Sanitation Project in India and Low-income Housing Project in Algeria). For a self-described “people's treaty that sets forth an important expression of the hopes and aspirations of the emerging global civil society,” see THE EARTH CHARTER INITIATIVE, THE EARTH CHARTER: VALUES AND PRINCIPLES FOR A SUSTAINABLE FUTURE, IBIS DANISH 92 GROUP, RIO + TEN PROCESS IN WEST AFRICA *at* http://www.worldsummit2002.org/texts/ProcessAfriqueQuest%20Anglais_.pdf.

²⁰⁵See, e.g., GREENPEACE, WHO TO BLAME TEN YEARS AFTER RIO? THE ROLE OF THE USA, CANADA, AND AUSTRALIA UNDERMINING THE RIO AGREEMENTS (Jan. 2002), *available at*, <http://www.archive.greenpeace.org/earthsummit.docs/blame.pdf> (describing the role of the United States in undermining the precautionary principle at the United Nations Environment Programme); WORLD WILDLIFE FEDERATION, EMERGING AGENDA FOR THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT: GUIDE TO ISSUES AND OPTIONS (including cogent statement on *International Governance of Sustainable Development* and position paper on *Roles of Business and Industry in Sustainable Development*).

²⁰⁶For a description of the legal techniques used to implement environmental principles and standards, originally developed at the national level but increasingly relied upon on the regional and global levels, see Sands, *Sustainable Development*, *supra* note 65, at 378-80. See also Part IV B.1.a, *infra* (describing range of regulatory instruments).

²⁰⁷See Elder, *supra* note 61, at 835. (“Given the considerable disagreement about both the physical extent and social causes of our environmental problem, prescriptions differ radically.”).

achievement,²⁰⁸ adding to disagreement which may become especially bitter *because* of the shared objective.²⁰⁹ This is exacerbated by the tendency of many governments to delay action (and expense) until the damage is done.²¹⁰ In sum, as Professor Sands concludes, “[t]he differences of approach—even between Europe and the United States—suggest that there may not be room for a single approach, that risk taking and risk assessment must be determined in the specific cultural and societal context in which they are being applied.”²¹¹

B. *Some Consequences*

The consequences of this fragmentation and flux are predictably mixed and unstable.²¹² The deliberate repudiation of a top-down approach preempts massive Bank-financed ecological disasters.”²¹³ Agenda 21, and

²⁰⁸ This may be grounded in disputes about factual assumptions or methodology. See Elder, *supra* note 61, at 836-37 (criticizing the Brundtland Report, for example, as “unduly optimistic in assuming sustainable growth rates of 4% per year, which yield a doubling time of 18 years,” noting that “between increases in population and per capita material consumption, two more doublings of demand could exceed the capacity of the world’s ecosystem”).

²⁰⁹ See, e.g., Interview with Francione, *supra* note 115, at 27-28 (explaining tensions among factions of animal rights activists).

²¹⁰ Tridico, *supra* note 61, at 212 n.47 (noting that most “major environmental acts of the United States were forced into existence as fragmented responses to environmental problems”), construed in James L. Oaks, *Developments in Environmental Law: What to Watch*, 25 Env’tl. L. Rep., (Env’tl. L. Inst.) 1039.

²¹¹ Sands, *supra* note 65, at 408. David E. Adelman & John H. Barton, *Environmental Regulation for Agriculture: Towards a Framework to Promote Sustainable Intensive Agriculture*, 21 STAN. ENVTL. L.J. 3, 40 (2002) (explaining the need for different approaches in developing and developed nations).

²¹² See, e.g., OSBORN & BIGG, *supra* note 22, at 58

Work on development of a set of core indicators has been carried out under the auspices of the CSD for the past few years. Although the principle is widely supported, problems arise given the difficulty in identifying the generic measures that are universally applicable and still have relevance in individual countries.

Id.

²¹³ PANJABI, *supra* note 29, at 121 (noting “[t]he problem with such massive schemes is that they destroy as much as they build. . .”). Examples of “bank financed ecological disasters are: “Sardar Sarovar Dam, India; Pak Mun Dam, Thailand; Kedung Ombo Project,

the frameworks it supports, disperse decision-making and funding so that these kinds of projects, embodying the modern metanarrative of “development,” are no longer conceivable.²¹⁴ As Professor Sands observes, however, “[t]he fragmentation of instruments and approaches inhibits the development of systemic, ecosystem-based approaches to resource conservation and sustainable use.”²¹⁵ The inability to assure systemic oversight means that there are few safeguards against the transfer of harm from one sector or location to another, or “to substitute one form of harm for another.”²¹⁶

The intersectoral approach of Agenda 21 attempts to address this, in part, by supporting watchdog efforts, particularly on behalf of vulnerable groups, such as women and indigenous people. Agenda 21 seeks to harness private markets, or at least make them accountable, through “bottom-up coordination,” rather than top-down management. This coordination is supposed to be achieved through “open governance, adequate information,

Indonesia; National Livestock Project, Batswana; Polonoreste and Grande Carajas Brazil; the Tropical Forestry Action Plan, in many places.” *Id.* See generally Erin MacDonald, Comment, *Playing by the Rules: The World Bank's Failure to Adhere to Policy in the Funding of Large-Scale Hydropower Projects*, 31 ENVTL. L. 1011 (2001). For a description of the Bank's dubious procedures in connection with the approval of the Pak Mun Dam in Thailand, see *id.* at 1025 (describing “a study showing, for the same cost of building the dam, that fifteen times as much power could be made available through conservation efforts and efficiency improvements”).

²¹⁴ The Global Environment Facility (“GEF”), for example, was established under Chapter 33 of Agenda 21. GLOBAL ENVIRONMENT FACILITY, GEF's CONTRIBUTIONS TO AGENDA 21: THE FIRST DECADE 3 (2000), available at http://www.gefweb.org/outreach-publications/Agenda_21_.pdf (last visited January 29, 2003). The GEF is the “designated ‘financial mechanism’ of the two principal global environmental treaties to emerge from the Earth Summit—the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change.” GEF's “over 650 projects stretch across more than 150 developing nations and countries with economies in transition. Nearly \$3 billion has been allocated to these initiatives, matched by almost \$8 billion more in co-financing.” *Id.*

²¹⁵ Sands, *Sustainable Development*, *supra* note 65, at 377. See also *id.* at 394 (describing a “fragmented institutional structure which is ill-equipped to meet future environmental needs. There has been at once an over-proliferation of institutions (in the form of a multiplicity of treaty-based secretariats) and an absence of an appropriately effective and sufficiently financed central institution”).

²¹⁶ *Id.* at 376.

cross-cutting institutions, complementarity, and high-lighting links."²¹⁷ The effectiveness of this approach remains to be demonstrated.²¹⁸

IV. FROM SUSTAINABLE DEVELOPMENT TO GREENER GLOBALIZATION

A. "*PIL of Resistance*"

Where untouched wilderness remains, it is probably "greenest" to leave it alone, or to buy it and put it in trust.²¹⁹ In contrast, when new development is contemplated, it is probably cheapest (at least in the short term) to develop without considering the environmental consequences.²²⁰ If nothing else, "sustainable development" provides opponents with enough rhetorical ammunition to challenge either course of action.²²¹

²¹⁷ Agenda 21, *supra* note 204. See also UNCTAD, Background Paper No. 11, *supra* note 181, at 9 (noting the potential contribution to sustainable development of the removal of "trade obstacles and distortions"). *Id.* at 9.

²¹⁸ Whether it *can* be demonstrated in the absence of systemic oversight is an open question. While it has been argued that the overall effect of fragmentation is a "moderating" one, similarly, it is unclear how this could be shown. While the outcomes of small, spatially scattered and temporally staggered projects are likely to be less dramatic than those of large, concentrated projects, it is not clear why the net effect of these projects should be more "moderate." Nevertheless, Professor Sands's characterization of this fragmented international law of sustainable development as "evolutionary, rather than revolutionary," seems apt, as long as we keep in mind that evolution, too, includes disasters. Sands, *Sustainable Development*, *supra* note 65, at 381.

²¹⁹ This is the philosophy of programs such as the Nature Conservancy's "Conservation by Design," "which helps . . . identify the highest priority places—landscapes and seascapes that, if conserved, promise to ensure biodiversity over the long term." The Nature Conservancy, About Us, at <http://www.nature.org/aboutus/howwework> (last visited January 29, 2003). While the environmental wisdom of such efforts may seem self-evident, the actual legal protection depends, of course, on the ability of the controlling political entity to enforce them. Thus, a *less* "green" solution, which brings more stakeholders into the process, may in fact be more sustainable over time. "[B]y joining together with committees, businesses, governments, partner organizations and people like you, we can preserve our lands and waters for future generations to use and enjoy." *Id.*

²²⁰ See Tarlock, *supra* note 189, at 39 ("It will not be enough to put a 'Save the Whales' sticker on the lumbering, gas-guzzling sport utility vehicle. The basic reason for the disconnect between [sustainable development] and [environmentally sustainable development] and governance institutions is that our current institutions are structured to encourage unsustainable resource use."). *Id.*

²²¹ See, e.g., Tarlock, *supra* note 189, at 41 (arguing that, "at least in the eyes of" the developed world sustainable development "is necessarily" environmentally sustainable development"). But see OSBORN & BIGG, *supra* note 22, at 37 (citing Martin Khor of the Third World Network).

[G]lobalization is undermining the sustainable development agenda. . . .

There is a vast terrain between these two extremes, however.²²² Much of it is not subject to any law; much is subject to law unlikely to be enforced. A modernist might be tempted to develop a formula for maximizing both values within particular contexts. However, PIL doubts whether any such formula is possible because the flux and fragmentation of postmodernity, as expressed through the cultural logic of late capitalism, precludes a metanarrative in which such a formula would have much utility or meaning.²²³ This does not mean that PIL—or sustainable development—is merely a relativistic word game, useless as a practical matter. On the contrary, while postmodernism may lead to “the black hole of” relativism,²²⁴ as Roy Boyne and Ali Rattansi observe, “[t]here is a postmodernism of ‘resistance’ as well as a postmodernism of ‘reaction.’”²²⁵ Thus, while the “ultra-greens” may worry that “sustainable development” is nothing more than grist for the corporate public relations mill,²²⁶ others see the term as

In particular, the 1994 Marrakech Agreements at the WTO appear to be overriding the 1992 Rio Agreements of UNCED and the WTO is now institutionalizing globalization. . . . Its paradigm emphasizes the gaining of more market share, profits and greed above all else, values that are opposite to sustainable development and global partnership.

Id.

²²² Even these “extremes” may be problematic. “There are profit-motivated reasons to push for more open trading regimes and for increased environmental regulation. Similarly, respect for the earth and its human inhabitants can result in preference for either the environment or more open trade. . . .” Lilley, *supra* note 180, at 741.

²²³ See *supra* note 81 and accompanying text (“[S]ustainable development” is *already* postmodern).

²²⁴ Alan Stone, *Questions and Comments*, in HUMAN RIGHTS AT HARVARD 55, 59 (1997). While some postmodernists relentlessly challenge normativity, see Schlag, *supra* note 81, at 444, others concede that the process of questioning, trashing, deconstructing, Awe always do stop.” J.M. Balkin, *Tradition, Betrayal and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1627 (1990).

²²⁵ Roy Boyne & Ali Rattansi, *The Theory and Politics of Postmodernism*, in POSTMODERNISM AND SOC. 29 (Roy Boyne & Ali Rattansi eds., 1990). See also Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT’L L. 351, 360 (1999).

To describe legal method as style . . . may be assumed to lead into [an] ‘anything goes’ cynical skepticism, the giving up of political struggle and the adoption of an attitude of blasé relativism. This would, however, presuppose the internalization of an unhistorical and reified conception of the postmodern in which the truth of skepticism would be the only truth not vulnerable to that skepticism.

Id.

²²⁶ “Ultra-greens claim . . . that [sustainable development] is positively dangerous, since it ties the environmental movement to the interests of Northern governments and multinational corporations.” HUNTER ET AL. *supra* note 1, at 212 (citing FAIRNESS AND FUTURITY).

providing a lexicon, a vocabulary with which to take into account a broad range of relevant factors.

From a PIL perspective, "sustainable development" is a floating bottom line; that is, an unstable bottom line that may vary over time from place to place, reflecting shifting consensus and ongoing dialogue. PIL is grounded in what Katherine Bartlett has called "standpoint epistemology," that is critical assessment based on ongoing experience and critical reflection informed by that experience.²²⁷ Thus, PIL accepts as a workable premise the notion that globalization and its promise of development can be greener, but it does so *contingently*, always insisting that the premise be recognized as "tentative, relational, and unstable."²²⁸ The premise is not that development can be "green," or even "green enough," but that the trajectory of development can itself be made "greener"²²⁹ than it would be without the rhetoric of sustainable development and those who make it their own.

1. Green "Sustainability"

In each of the local battles where environmental law becomes concrete,²³⁰ the questions must be asked: What is "greener?" How should the quality of water, air, and soil be measured? How should the environmental impact on ecosystems, habitats, and aesthetics be ascertained? By whom? How are these questions informed by a PIL perspective? For example, the

²²⁷ Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 872-77 (1990). As I have explained elsewhere, similarly, "[p]ostmodernists can and do support human rights, but they make the linkage between rights and concrete experience explicit and direct, insisting on contingency and ongoing interrogation. Thus, while postmodernism does not preclude a bottom line, it insists on bottom lines that are unstable and that may vary from place to place and over time to reflect shifting consensus and ongoing dialogue." Stark, *Women and Globalization*, *supra* note 41, at 555-56. See also Diane Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 5 (arguing for "universality understood as dialogue, in the sense of struggle, rather than as a disciplinary civilizing mission of Europe"). This resonates with Michel Foucault's notion of multiple sites of resistance. See MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1999*, at 142 (Colin Gordon, ed. & trans., Pantheon Books 1980).

²²⁸ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586 (1990).

²²⁹ HUNTER ET AL. *supra* note 1 at 211 (quoting FAIRNESS AND FUTURITY for the proposition that "[t]he important point is that in signing *Agenda 21* the majority of countries have rhetorically accepted that sustainable development *does* represent a new trajectory for development").

²³⁰ FOREMAN, *supra* note 99, at 4 (quoting Lois Gibbs for the proposition that "for the vast majority of groups in the Movement, the local fight is everything").

notion of “deep ecology,” that is, that an ecosystem should be protected regardless of any potential benefits to humans, is difficult to justify under the Enlightenment metanarrative, which makes man the center of the universe.²³¹ Once “man” is decentered, however, the deference to deep ecology urged by some indigenous groups (and some environmentalists²³²) becomes more intelligible.²³³

2. Development and globalization

From a PIL perspective, similarly, “globalization” not only includes the influx of capital, but more importantly, its long-term impact on local populations.²³⁴ Too often, the influx of foreign capital has enriched foreign investors at the expense of their hosts.²³⁵ This is the familiar dynamic of colonialism, and it persists, many argue, in the contemporary paradigm of development.²³⁶ Many have deplored the growing chasm between North and South.²³⁷ This gap, it is argued, precludes a sustainable future.²³⁸ As P. B.

²³¹ See *supra* note 36 and accompanying text.

²³² As Michael McCloskey observes, the definition of sustainable development adopted by the Brundtland Report frankly “is anthropocentric in nature. It focuses much more on development than sustainability. It is committed to harnessing nature to human needs and growth” and seems to assume that the problem only involves meeting the needs of human beings. McCloskey, *supra* note 56, at 154.

²³³ But see Rio Principle 1: “Human beings are at the centre [sic] of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” Rio Declaration, *supra* note 64, app. A, at 2.

²³⁴ Agenda 21 explicitly notes that “[a] specific anti-poverty strategy is ... one of the basic conditions for ensuring sustainable development.” Agenda 21, *supra* note 204, § 3.2, at 27. The OECD Development Assistance Committee suggests that halving absolute poverty in the world by the year 2015 is a key objective. OSBORN & BIGG, *supra* note 22, at 32.

²³⁵ See Guruswamy, *supra* note 21, at 5 (noting that “corporations are allowed to export the negative externalities of their products, such as pollution, risks of international pandemics, narcotics, and industrial wastes”); UNITED NATIONS INDUST. DEV. ORG., UNIDO IN BRIEF (2001) (describing UNIDO’s mission to help LDCs in their fight against marginalization in today’s globalized world”).

²³⁶ For an argument that the North is in fact indebted to the South, see Simms, *supra* note 98. (“The fact of ecological debt suggests . . . a fundamental realignment of who owes whom in the international economy. Third World debt pales into insignificance in the face of the ecological debts of industrialized countries.”). For a decentralized economic model, see Kenneth E. Boulding, *The Economics of the Coming Spaceship Earth*, ECONOMICS OF THE ENVIRONMENT (Robert Dorfman & Nance S. Dorfman eds., 3d ed., 1993).

²³⁷ See Part II.B.1., *supra*. But see David Dollar & Aart Kraay, *Globalization: Spreading the Wealth*, FOREIGN AFFAIRS 120 (Jan./Feb. 2002)) (arguing that the current wave of globalization “has actually promoted economic equality and reduced poverty”); ICC & WORLD BUSINESS COUNSEL FOR SUSTAINABLE DEVELOPMENT, BUSINESS ACTION FOR SUSTAINABLE DEVELOPMENT (2002), available at <http://www.basel-action.net/about/>

Narasimha Rao observes, "[w]e inhabit a single planet but several worlds. There is a world of abundance where plenty brings pollution. There is a world of want where deprivation degrades life. Such a fragmented planet cannot survive in harmony with Nature and the environment or indeed, with itself."²³⁹ The relationship between bridging that gap and improving compliance with environmental treaty norms has been shown.²⁴⁰ Bridging that gap is one of the "six core values" of sustainable development, often referred to as "equity."²⁴¹ There are substantial obstacles to doing so, however, including a long history of mutual distrust.²⁴² Even when the North and South agree in principle, moreover, it remains an open question whether either can translate such agreements into concrete terms. The North, for example, has reneged on many of its Rio promises.²⁴³ While the South has had no problem enriching its elites, similarly improving the standard of living of the broader population in the LDCs has proven to be more challenging.

index.shtml (describing "three goals: to ensure that the voice of business is heard in the preparations for [the World Summit], to identify where business can play a constructive role, . . . to demonstrate that business is already actively engaged in initiatives and partnerships to promote sustainable development.") UNEP, *INDUSTRY AND SUSTAINABLE DEVELOPMENT*, Background Paper No. 10 DESA/DSD/PC2/BP0 (explaining how and why the United Nations Environment Programme ("UNEP") "is facilitating the production of global industry sector reports").

²³⁸ In 1990, for example, "[t]he debt crisis has changed the overall inflow of finance from rich countries to poor into a perverse and increasing flow from poor to rich. Third World debtors now transfer over \$50 billion a year more to Western banks and governments than they receive in new loans and aid." PANJABI, *supra* note 29, at 118 (citing Ben Jackson, *Poverty and the Planet*, N.Y. TIMES, Jun. 6 1992).

²³⁹ PANJABI, *supra* note 29, at 96-9 (citing United Nations Document, *Agenda 21*, Chapter 15, Conservation of Biological Diversity, Introduction).

²⁴⁰ For a description of the linkage between "the provision of financial resources by developed countries and the fulfillment of treaty commitments by developing countries," see Sands, *Sustainable Development*, *supra* note 65, at 380.

²⁴¹ "Equity" has been identified as one of the "six core ideas" of sustainable development (the others are: environment—economy integration, futurity, environmental protection, quality of life and participation) and defined as "a commitment to meeting at least the basic needs of the core of the present generation (as well as equity between generations)." HUNTER ET AL., *supra* note 1, at 210-11 (citing FAIRNESS AND FUTURITY).

²⁴² "Finance debates at Earth Summit II were an unedifying dialogue of the deaf. . . . [A]ll this must be overseen by the CSD—the only institution with a mandate to see the connections among the multiple threads of environment and development, and promote overall coordination and consensus." Rob Lake, Royal Society for the Protection of Birds, *quoted in* OSBORN & BIGG, *supra* note 22, at 20.

²⁴³ See *supra* note 40.

B. *Postmodern Moves*

This section considers some recent suggestions for more effective sustainable development from a PIL perspective.²⁴⁴ More specifically, it examines a range of proposals that incorporate PIL's incredulity toward metanarratives,²⁴⁵ recognition of the "cultural logic of late capitalism,"²⁴⁶ and acceptance of fragmentation.²⁴⁷

1. Incredulity Toward Metanarratives

a. *Tailored Regulatory Instruments*

In a recent article on global environmental regulation,²⁴⁸ Jonathan Baert Wiener argues that tailored regulatory instruments are necessary because "[t]he choice of optimal regulatory instrument cannot be universal; rather, it must be contextual and contingent on the particular legal institutions of each polity."²⁴⁹ Like "common but differential responsibility,"²⁵⁰ this approach contemplates different mechanisms for achieving common aspirations.²⁵¹ Like "subsidiarity,"²⁵² contemplates a fit between the level of implementation and the appropriate mechanism. Unlike the former approaches, however, Professor Wiener focuses on the political organization of the respective polities.

²⁴⁴See *Developments*, *supra* note 24, at 1590 (disparaging the "grail of centralized supernational authority"). Other approaches may well be useful, especially in forms compatible with PIL, but this does not make them "postmodern." See, e.g., HUNTER ET AL., *supra* note 1, at 368 (describing the "framework" process through which multilateral treaties are "now routinely developed").

²⁴⁵See *supra* Part I.

²⁴⁶See *supra* Part II.

²⁴⁷See *supra* Part III.

²⁴⁸Wiener, *supra* note 198, at 679-80 (describing various regulatory instruments available in environmental law, including command-and-control technology requirements, incentive-based approaches (including Pigouvian price-based tools and Coasean quantity-based tools), and in the international arena, harmonized policies, pollution taxes, fixed performance targets, and tradeable allowances).

²⁴⁹*Id.* at 685.

²⁵⁰See *infra* Part IV B. 2a.

²⁵¹But see FOREMAN, *supra* note 99, at 3 (noting that "if pursued aggressively, environmental justice may exacerbate aspects of environmental policymaking that have been widely bemoaned (such as economic inefficiency, muddled policy priorities, the gap between expert and public perceptions of risk, and local inflexibility on siting issue)").

²⁵²See *infra* Part IV B. 2b.

b. *Principle of Nondiscrimination*

Article 21 of the Stockholm Declaration requires States to ensure that activities within their jurisdictions do not result in transboundary harm. While this is generally viewed as customary international law, as Thomas Merrill has pointed out, "little meaningful regulation of transboundary pollution actually exists."²⁵³ Instead, as John Knox explains in a recent lead article in the *American Journal of International Law*, the trend is to extend domestic Environmental Impact Assessment ("EIA") laws to extraterritorial impacts and to allow foreign residents access to domestic EIA procedures.²⁵⁴ Professor Merrill refers to these as "golden rules for transboundary pollution."²⁵⁵ Thus, the principle of nondiscrimination, as set out in a series of national laws and bilateral agreements, has in effect supplanted the metanarrative of liability for transboundary pollution.

2. The Cultural Logic of Late Capitalism

a. *Consciousness-Raising*

"Consciousness" is amorphous and difficult to measure, but it remains a crucial factor.²⁵⁶ While some deplore what they perceive as waning public interest,²⁵⁷ others argue that corporate efforts to appropriate the rhetoric of sustainability should be celebrated as signs of growing environmental consciousness. From a PIL perspective, the proliferation of debate is not necessarily a bad thing. It has the potential to generate more interest and greater public awareness. At the same time, the rhetoric of

²⁵³ Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 932 (1997).

²⁵⁴ Knox, *supra* note 96.

²⁵⁵ Merrill, *supra* note 253, at 931.

²⁵⁶ As Osborn and Bigg observe:

[I]t is not on [science, economics and policy analysis of sustainable development] that Earth Summit II and other international conferences have fallen short. The failure is much more a failure of dissemination of information in a vivid way, leading to a failure to mobilize public opinion and political pressure on a sufficient scale. The key task for those considering future occasions is to improve in this area.

OSBORN & BIGG, *supra* note 22, at 15.

²⁵⁷ See *id.* at 2 (noting that "public attention and the collective political will throughout the world to tackle [environmental crises] constructively, creatively and cooperatively also seems to have diminished since Rio"); Guruswamy, *supra* note 21, at 8 (noting "waning public confidence in government and corporations to 'do the right thing' about environmental issues").

environmentalism needs to be interrogated,²⁵⁸ especially when it is being used to sell cars.²⁵⁹

Consciousness-raising includes seizing opportunities generated, albeit inadvertently, by the “war on terrorism.” While presenting horrific risks, this campaign also provides an opportunity for generating an once inconceivable consensus. Americans are reconsidering their dependance on foreign oil.²⁶⁰ Despite politicians’ hysterical exhortations to buy, consume, and spend, Americans are hunkering down.²⁶¹

b. *Percolation*

Agenda 21 projects are proliferating on national as well as international levels.²⁶² Participation in such projects, as well as their percolation throughout various societies, not only raises consciousness, but mainstreams environmentalism²⁶³ and its incorporation at multiple levels of social organization, from volunteer river clean-ups²⁶⁴ to municipal

²⁵⁸ See Tierney, *supra* note 128, (describing study in six communities which “found that all but one of the curbside recycling programs, and all the composting operations and waste-to-energy incinerators, increased the cost of waste disposal”). *But see supra* notes 138-41 and accompanying text (explaining why Tierney’s critique fails in the international context).

²⁵⁹ See *supra* text accompanying notes 121-24.

²⁶⁰ See *supra* note 105.

²⁶¹ *But see* Jesse Eisinger, *Durable Rally?*, WALL ST. J., July 25, 2002, at C1, *available at* 2002WL-WSJ3401702 (“Capital spending, very quietly, has been improving—despite the common understanding that it isn’t.”).

²⁶² Osborn and Biggs write:

Some progress has been made since Rio, but only in particular areas and on particular subjects. . . . There has been a gradual extension and strengthening of international environmental agreements. At the national level some aspects of the environment have been improved in some countries. At the local level there has been an explosion of community activity throughout the world under the banner of Local Agenda 21 and similar programmes helping to make sustainability more of a reality.

OSBORN & BIGG, *supra* note 22, at 2.

²⁶³ *But see* Traci Watson, *For Most Americans, It’s Not Easy Being Green*, USA TODAY, Apr. 22, 1998 at 3a, *available at* 1998 WL5722343.

²⁶⁴ Karen Levy, *Clean Water Watchers*, SIERRA, Nov. 2001 at 49, *available at* 2001 WL9826492 (describing the Waterkeeper Alliance of volunteer water monitors to police local waterways). *See also* Waterkeeper Alliance, www.keeper.org (last visited Feb. 27, 2003).

recycling.²⁶⁵ Popular participation is key to the Agenda 21 process.²⁶⁶ While widely touted as a democratizing influence, it can complicate, sometimes fatally, the decision making process.²⁶⁷

3. Fragmentation

a. *Common But Differential Responsibility*

This refers to a treaty approach that explicitly contemplates different responsibilities, rights and timetables for different participants.²⁶⁸ The possibilities and risks of this approach were set out in a panel organized by Christopher Joyner at the Annual Meeting of the American Society of International Law.²⁶⁹ Edith Brown Weiss thoughtfully endorsed the differential responsibilities approach, with the caveat that "equity" be the lodestar.²⁷⁰ This approach could be further customized by taking into account different levels of risk perception.²⁷¹

²⁶⁵ But see John J. Fialka, *Recycling Faces a Heap of Trouble*, WALL ST. J., July 9, 2002 at A2, available at 2002WL-WSJ3399993 (noting that while "Americans overwhelmingly support recycling . . . they are doing it less than they did in the early 1990s").

²⁶⁶ See *supra* note 202.

²⁶⁷ For a comparative study of participation in the environmental impact assessment process, see William A. Tilleman, *Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community*, 33 COLUM. J. TRANS'L L. 337 (1995).

²⁶⁸ The principle of "common but differentiated responsibility" both "expresses the common responsibility of states to protect certain environmental resources" and "the need to take account of differing circumstances, particularly in relation to each State's contribution to the creation of a particular environmental problem and its ability to respond to" such threats. Sands, *Sustainable Development*, *supra* note 65, at 375. But see Susan Biniaz, Assistant Legal Advisor, United States Department of State, *Common But Differential Environmental Responsibility*, Panel, March 16, 2002 [hereinafter "Panel"] (criticizing "common but differentiated responsibilities" as "neither necessary nor helpful").

²⁶⁹ Panel, *supra* note 268.

²⁷⁰ Edith Brown Weiss, *Comments*, Panel, *supra* note 95. See *supra* note 241 (identifying "equity" as one of six core ideas of sustainable development).

²⁷¹ See, e.g., Vern R. Walker, *Consistent Levels of Protection in International Trade Disputes: Using Risk Perception Research to Justify Different Levels of Acceptable Risk*, 31 ENVTL. L. REP. (ENVTL. L. INST.) 11317 (2001).

b. *Subsidiarity*

This approach, drawing on the notion that there is some optimal level at which each project should and can be addressed, builds on European Union and United States federal experience.²⁷² The extent to which mechanisms for facilitating effective implementation can be institutionalized, as opposed to being tapped on an ad hoc basis, remains an open question.²⁷³ Whether government itself is “the level of organization at which to seek [the goals of sustainable society],”²⁷⁴ similarly, is a proposition that demands ongoing interrogation.²⁷⁵

c. *Unilateralism*

This might be acceptable in certain contexts,²⁷⁶ according to Professor Sands, if the State engages other affected parties in “serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements. . . before enforcing the [unilateral measure].”²⁷⁷

d. *Courts*

Americans often look to courts to establish normative parameters. International courts may also be useful for this purpose. The International Court of Justice (“ICJ”), for example, has affirmed the “general obligation . . . to ensure that activities within [States] jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”²⁷⁸ The ICJ

²⁷² See, e.g., GEORGE BERMAN ET AL., *EUROPEAN COMMUNITY LAW* 46-47 (1993).

²⁷³ As Professor Sands notes, however, “There is in international environmental law no equivalent to Article 3 of the Treaty establishing the European Community . . . which provides that ‘the Community shall take action, in accordance with the principle of subsidiarity, only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.’” Sands, *supra* note 65, at 388.

²⁷⁴ See Tridico, *supra* note 61, at 213.

²⁷⁵ See, e.g., Ferris & Zhang, *supra* note 141, at 451-52 (noting that “International standards often provide for higher levels of environmental . . . protections that existing Chinese standards demand”).

²⁷⁶ For a thoughtful overview, see Richard B. Bilder, *The Role of Unilateral State Action in Preventing International Environmental Injury*, 14 VAND. J. TRANSNAT’L L. 51 (1981).

²⁷⁷ Sands, *Sustainable Development*, *supra* note 65, at 393.

²⁷⁸ Legality of the threat or use of nuclear weapons, 1996 I.C.J. 226, 242 (July 8, 1996). The Court assumed the authority to address environmental issues in this Opinion. According to Philippe Sands, “it is now clear [that this obligation] is applicable at all times and to all

has also established an environmental chamber.²⁷⁹ Courts may also be effective in resolving otherwise intractable environmental dilemmas.²⁸⁰ In Canada, the Supreme Court affirmed the authority of municipalities to take strong measures in dealing with local problems.²⁸¹

CONCLUSION

PIL is consistent with, even conducive toward, a growing sense of active engagement with the long-term process of sustainable development. It demands, however, that such engagement remain incredulous toward metanarratives, alert to the cultural logic of late capitalism, and responsive to the inevitable flux and fragmentation of a postmodern world.

activities." Sands, *Sustainable Development*, *supra* note 65, at 369.

²⁷⁹ 1996 I.C.J. 93. GURUSWAMY & HENDRICKS, *supra* note 2, at 43-44.

²⁸⁰ Request for an examination of the situation in accordance with paragraph 63 of the court's judgement of December 20, 1974 in the nuclear tests (New Zealand v. France), 1995 I.C.J. 288, 306, (Sept. 22, 1995) (confirming the "obligations of States to respect and protect the natural environment").

²⁸¹ Marilyn Berlin Snell, *Keep Off the Grass*, SIERRA, Nov.-Dec. 2001, at 23, available at 20001 WL9826482 (noting decision by Canadian supreme court that municipalities can ban pesticide use on public and private property).