

GLOBAL WARMING AND THE PROTECTION OF THE HUMAN ENVIRONMENTAL HERITAGE

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Abstract: *In a world profoundly divided by inequalities in economic and environmental development, in which the benefits of progress are so unequally shared, it is not easy to balance the demands of human development, defended by most of humanity, with the need to respect the environment, which is often harmed by disastrous national and international development policies. Faced with this situation, both global and regional responses have been formulated to produce sustainable development in spite of climate change and global warming. These are strategies which seek to preserve certain basic common environmental resources necessary for humanity. Such resources belong to the whole of humanity, must not be appropriated by any particular group, and form part of the heritage which must be passed on to future generations, and which is nowadays threatened by global warming, thus converting climate patterns into a common concern for the whole of humanity.*

1. INTRODUCTION

The warming of the Earth's atmosphere and surface produced by the emission of greenhouse gases represents, at this moment in time, a reality upon which there is a broad consensus among the scientific community. Its widespread consequences both on the global human environment and on its different essential component parts (water, air, the earth and living beings) have meant that global warming, as an element within the climate system of our Planet, has become a common concern of the whole of humankind, affecting as it does our common environmental heritage.

The modification of the climate which the Planet is undergoing as a result of human activities is a scientifically proven fact, although science does not mean certainty, as there are still many uncertainties, which are relevant when designing strategies and policies to be followed. But what scientists point out to us is undoubtedly alarming. Thus, the Intergovernmental Panel on Climate Change (IPCC)¹ warned, in a scientific report presented in 2007, that the Earth's temperature has risen 0.76°C since pre-industrial times, that this rise is accelerating, and that, if measures are not taken to prevent its probable causes (the emission of human-generated greenhouse gases²), the average temperature of the Earth could increase by between 1.8 and 4°C in the course of the present century, which may have important consequences on natural resources which are vital for our survival.

In the course of this paper we propose to present, firstly, the way in which the effects of global warming are shared unevenly from country to country according to their level of development, which in turn leads to different answers as to how vital ecological resources like water, air, the earth and living beings should be exploited (*Section 2*). Then we turn to what seems evident: beyond the situation of each individual State, changes in the climate system end up affecting all living beings, individually and collectively, and endanger the long-term survival of certain resources vital to humanity; this interrelationship causes, a new dimension to appear, in our opinion: the dimension

¹ The Intergovernmental Panel on Climate Change (IPCC) was set up by the World Meteorological Organization (WMO) and the United Nations Environmental Program (UNEP) in 1988. Among its main activities is that of carrying out periodical assessments about climate change, presenting special reports and technical documents about these questions and backing the framework of the United Nations Convention on Climate Change. These reports can be consulted at <http://www.ipcc.ch/>.

² The sum total of the CO₂ per year released by all nations is almost 10,000 million tons, and the United States, housing almost 8,000 of the 50,000 electricity generating plants in the world, is responsible for nearly 30% of the total. However, while the United States will only increase its emissions by about 21% in the next ten years, those of China will double and those of India almost triple. After the United States (2,800 million tons of CO₂ per year) and China (2,680 million tons), as major sources of CO₂, come Russia (661 million tons) and India (583 million tons).

of human heritage – which should be reflected in the judicial and institutional mechanisms which should be put in place for the protection of a climate system which has allowed life to develop on our Planet (*Section 3*).

2. GLOBAL WARMING AS AN ELEMENT OF COMMON BUT DIFFERENT RESPONSABILITIES OF THE STATES

Global warming is not only produced by the developed countries, where scientists and public opinion alert us to its dangers, but, more and more importantly, also in underdeveloped societies, where the degradation of the environment is coupled with endemic situations of extreme poverty. Even though, from the point of view of global solidarity, responsibilities are held in common, the truth is that, in line with Principle 7 of the Rio Declaration on Environment and Development, these responsibilities are differentiated according to a country's degree of development and the financial and technological resources available to it.

Thus it appears to be evident that not all countries that make up the International Community are equally prepared to face up to climate change and global warming. Not all of them can adopt the same measures to try to slow this process, not all of them can count on enlightened industries and administrations, disposed to and prepared to design and carry out measures. So it is important that the answers to these problems should be coordinated in a way that is integrated with social and economic development, and that the foremost and legitimate needs of the developing nations should be taken into account, so that sustained economic growth and the eradication of poverty can be achieved³.

In the same sense that it is true that not all countries are equally well adapted to climate change, it is also true that they do not all bear the same responsibility for global warming. In this sense, it must be stressed that historically, the developed countries are those that bear the greatest responsibility, given their larger ecological footprint, which places them in an uncomfortable position as regards shouldering the costs of its mitigation. More than three quarters of the CO₂ in the atmosphere originates in the developed world, containing less than 20% of the world's population. In the face of this reality, some developing countries insist that they cannot be obliged to adopt mitigating actions, as such actions will hinder their plans for development, as well as those for meeting the Millennium Development Objectives. Likewise, they argue that adopting such measures will depend on the level of international cooperation regarding the transfer of technology, capacitating and financing. In this sense, they point out that international cooperation is fundamental in order to face up to the tasks of mitigation and capacitating, but that these must be conceived as additional funds and not as a rechanneling of development funds. Proof of this is the position adopted by China, India and the G77 countries during the recent United Nations Conference on Climate Change (Bali, Indonesia, 3rd – 15th December 2007), where they declared that only voluntary reductions would be acceptable, at the same time as they defended the right to development and presented evidence that their gas emissions are lower than those of any existing developed country – while one Chinese person releases 4 tons of CO₂ per year, one American emits 20 ...

Predictably, global warming will produce even more social inequality in the world, due to the fact that rich countries have a better opportunity to address these issues than poor ones. Therefore, the agenda for mitigation of, and adaptation to, climate change should be closely linked to the development agenda, to the elimination of world poverty and the reduction of social inequalities, as the starting points for the First and Third Worlds are not the same. The United Nations Framework Convention on Climate Change and the Kyoto Protocol establish that all countries are obliged to initiate programs to limit their emissions (of contaminating gases), but that it is the industrialized ones that must provide resources to make this possible. Developing countries accused the industrialized countries, on the occasion of the United Nations Conference on Climate Change celebrated in Bali, of not fulfilling their commitment regarding technology transfer agreed to in Kyoto. The transfer of technology is essential for the most vulnerable countries to be able to adapt to the forthcoming changes caused by global warming, and many need to set in motion advanced warning systems, irrigation and drought-resistance infrastructures. So technology is one of the main tools used to fight climate change, and is one of the four fundamental pillars debated in Bali, together with the mechanisms of mitigation, adaptation and financing in order to palliate and face up to global warming.

In relation to this point, it is worth noting that a series of measures is available to reinforce the actions carried out by these countries in their fight against and adaptation to climate change, such as: - the broadening and rationalization of the Mechanism for Clean Development (MCD) provided for in the Kyoto Protocol of 1997 in

³ *Vid.* Preamble of the United Nations Convention on Climate Change. This Convention has entered into force in March 21st, 1994. The European Union is part to this Convention. In this sense, see: *Council Decision 94/69/EC*, of 15 December 1993, concerning the conclusion of the United Nations Framework Convention on Climate Change, OJ L 33, 7.2.1994, p. 11.

whole national sectors; - the improvement of access to financing by means of a combination of the different instruments available, with the aim of allowing developing countries to avail themselves of the “cleanest” electricity-producing facilities possible; - the introduction of a system controlling the rights of companies to emit gases in those industrial sectors that count on the necessary instruments to control such emissions; - the adoption of appropriate and quantifiable commitments by those countries reaching a level of development comparable to that of developed countries; - and the ability of the least developed countries to opt out of these commitments⁴.

3. THE NON-COMMERCIAL MANAGEMENT AND EXPLOITATION OF CERTAIN COMMON ECOLOGICAL RESOURCES IN THE INTERESTS OF HUMANITY, AND ITS RELATIONSHIP WITH GLOBAL WARMING

The natural resources found in the Earth are subject to an artificial division into spaces where they are submitted both to State sovereignty, and spaces which cannot be appropriated by the States, but exploitation involves numerous problems which overwhelm the compartmentalized world we live in, which is ecologically a single unit. The necessity to internationally regulate the exploration, exploitation and management of natural resources from the point of view of sustainable development gives rise to two difficulties. The first arises from the facts that, as a result of scientific and technological dynamism, certain legal norms quickly become obsolete, thus creating a gap between rules and reality. In this situation, which, by its very nature, will always exist, it will be necessary to go back to the principles which inspired those rules and resort to the procedures which will allow the peaceful solution of conflicts. The second difficulty arises from the fact that such regulation is a real crossroads where several increasingly autonomous branches of International Law meet. Such is the case of International Environmental Law, International Trade Law, the International Law of Development, or the International Law of the Sea, which can all mean the fragmentation or division into sectors of the International legal order. Faced with this situation, a complementary interpretation of these rights and an integrated application of the rules are both necessary.

On the other hand, in order to achieve sustainable development, the physical and biological resources which support human life and life on this Planet in general, need to be conserved. It is also necessary that the use of such resources should be responsible, balanced and efficient, all this in a context of a balanced climate, wherein all countries can adapt, independently of the level of development they have reached. It should not surprise us that, within an economic and social context where there is more and more inequality between the States, many countries have made the exploitation of natural resources an essential element of their development.

In this way, many resources may be, and are, perceived from an economic perspective, whereby they are viewed as objects to be appropriated and exchanged commercially, thus entering into the game of trading relations, juxtaposing commerce and environment, and prompting us to consider the issue of the necessity to reconcile commercial measures and measures to protect the environment. But on the other hand, within these natural resources, there are some which are vital for humanity and which traditionally were thought to be inexhaustible, such as water or air, for example, and which in consequence were considered as public resources, and thus resources whose use by some did not limit their use by others. Nowadays, this kind of natural resource is perceived in a different way, as a kind of limited resource, non-renewable and capable of being exhausted, and therefore, as a common economic resource which cannot be appropriated. They are resources belonging to the whole of humanity, cannot be appropriated, and form part of a heritage which must be passed on to future generations. These resources are affected by global warming and thus the latter becomes a common problem to the whole of humanity.

Therefore, a problem arises – that of the adaptation of the law to a highly dynamic and variable reality, which frequently demonstrates that what was foreseen in the past by the law is now not applicable, and that really the facts derived from technological advances and human progress are different and the necessities new. All of this makes it clear, in our opinion, that there are resources vital for humanity and there are problems that affect them, such as global warming. In this sense, one of the main challenges the world order faces these days is the search for the right response to human needs. It is essential that there should be more solidarity between States so that the fundamental interests of the International Community as a whole can be protected, and, no doubt, the vital resources and the climate system which make progress possible form part of the interests of humankind.

But, besides, and in relation with this, it seems to us that it is necessary to establish a difference in legal regulation between, on the one hand, those natural resources which can be exploited essentially with the aim of making their owners develop economically, and, on the other, certain natural resources which, due to their

⁴ *COM (2007) 2 final*: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions “Limiting Global Climate Change to 2 degrees Celsius – The way ahead for 2020 and beyond”, Brussels, 10.1.2007.

constituting essential elements for life and its conservation – and climate falls within this category – should be managed, independently of their geographical situation, in the benefit of humankind as a whole. We are in the presence of *res communis* things which, due to their character as being indispensable to life, belong to the whole human race, thus removing them from the list of general commodities. These are resources that nature has produced for the use of one and all, for today and tomorrow. These things are common property, more than simply the sum of the private interests of each State. In our opinion, the use of basic ecosystems should be regulated by international norms within permanent institutional frameworks. In this sense, we believe that the international cooperation aimed at combating and adapting to global warming should be channeled through international norms and within the framework of an effective International Organization with universal powers.

Due to the nature of exhaustible resources, water, the atmosphere or biological diversity, subject to the risks of use and abuse and of climate change some common rules are necessary to guarantee their common use and permanence. It is necessary to go beyond sovereign agreements and reciprocity, to reach the recognition of the common interest they have for the whole of humankind. However, it is clear that States are reluctant to accept a process whereby their objective responsibility and accountability is contemplated, together with the obligation to provide the economic and human instruments to control their activity internationally.

Nowadays, humanity, without being subject to International Law in a strict sense is the object of certain international norms, and, as such, enjoys a heritage of which the climate system and these vital resources form part. Transmitting the heritage to future generations, including the climate system and vital natural resources, should be our aim. This heritage should not be wasted or thrown away and there is one part (vital resources) and one context (the climate) which should be left untouched, otherwise the whole of the system will suffer. These are, definitively, unique irreplaceable reserves, which should be passed on to future generations independently of where they are to be found. There is a higher right, to be exercised and enjoyed over these reserves, above the right of States over their territory, as in the formula coined by R. J. Dupuy when he refers to the resources of the Earth, a higher right in the interests of the whole of humanity.

We are dealing with widening the notion of traditionally restricted judicial limits, as is that of a common human heritage, to include new situations where the actual survival of the human race and life on the Planet is at stake, and therefore not only the present quality of life but that of future generations. This approach stresses the principle of generational equality and the right of future generations to inherit and enjoy an environment in which they can survive.. It would be necessary, or at least convenient, to think of creating a permanent institutional structure, provided with financial capacity and empowered to initiate specific policies, supervise their application and sanction failure to comply. In this sense, the creation of an International Climate Authority, in line with the International Seabed Authority (ISBA), could build an International Organization with sufficient powers to make the different stakeholders negotiate and take any measures deemed necessary.

Vital resources, in our opinion, are not merely a concern for humanity, but should form part of a common environmental heritage of humankind, and as such should: be free of all State or private appropriation; be accessible to all and managed by an International Organization and not by the individual States; the economic benefits from their exploitation should be shared out with equality paying particular attention to the poorest countries (compensatory inequality); their exploitation should only be with peaceful aims; and the integrity, or wholeness, of the reserves should be protected for future generations (sustainable development).

These resources, moreover, are affected by the climate change and global warming which has already started. Faced with this situation, it is no good for some countries to adopt severe effective policies regarding global warming while others turn a blind eye or are economically incapable of applying necessary measures. The challenge is a global one, while the actors are not all prepared to the same degree, and the answers, as we have seen, largely ineffective or at least of variable effectiveness, while the interests affected are single, common ones: those of humanity as a whole.

In our opinion, in the case of resources such as water, the atmosphere and biological diversity, which are essential for humanity, the dimension of simple survival should be of primordial importance as against commercial interests. We are dealing with *res extra commercium*, which, in our opinion, is outside the range of mere business interests, given that these are not – or should not be – subject to commercial transactions according to the rules holding in the marketplace, but common to humankind.

In this sense, it can be argued that the climate system has a dimension as part of its patrimony which involves the idea of transmitting a life-bearing climate system to future generations.

4. CONCLUSIONS

The least-developed countries are, then, more vulnerable to climate change and global warming. So it is essential to reinforce their ability to adapt, and to encourage sustainable development. In agreement with the principle contained in the framework United Nations Convention on Climate Change that speaks of the “common but different responsibilities and their respective capacities” the developed countries must make most of the effort, but it will be impossible to control climate change and global warming without cooperation from the developing countries as well, since it is foreseeable that their emissions will overtake those of the industrialized world around 2020. In this line, the developed countries will need to take the initiative in the fight against global warming, considerably increasing their efforts to reduce the emission of greenhouse gases and also increasing their financial and technological cooperation with the developing countries. Meanwhile the latter, for their part, will have to adopt the path of sustainable development, incorporating environmental matters in their national development plans. In particular, developing nations should plan long-term development with low carbon emissions.

People are increasingly aware of the dangers of climate change, and of the necessity to protect the global climate against the overheating of the atmosphere. In this sense, it is estimated that the uncontrolled release of greenhouse gases produced, especially, by combustion in industrial plants and motor vehicles is producing an increase in the average temperature of the Earth which could surpass 2°, thus causing irreversible and potentially catastrophic changes. The ever-increasing demand for energy and food supplies makes the fight against climate change more difficult. This fight needs to be carried out from a multilateral point of view, with the United Nations being the most appropriate institution to lead it (or from an International Climate Authority integrated within the United Nations system). Efforts to reduce must be based, firstly, in the principle of solidarity and the need for sustainable economic growth. In this sense, a different focus is needed which will take into account the geographical location of the different States, the characteristics of their industries and their level of development.

But also, secondly, efforts to reduce should also pay attention to the principle of intergenerational equity which supports the notion of humanity. In this sense, the texts of International Law which we have mentioned, stress sustained development as their first priority, through which we try to guarantee satisfactory living conditions for present and future generations. And these conditions will only be achieved if we assure the survival of the Earth’s natural resources, both global and diverse, and the survival of a climate which will permit their permanence. We need to reach an environmental common ground which will provide sustainable economic prosperity. The States, but also other international subjects and actors, such as International Organizations, individuals and multinational companies, will be bound to protect the climate system in the benefit of present and future generations, based on equality and in agreement with common responsibilities.

The need to regulate internationally the exploration, exploitation and management of natural resources from the point of view of sustainable development generates two difficulties. The first one springs from the fact that certain legal norms quickly become obsolete as a consequence of scientific and technological dynamism, thus producing a gap between rules and reality. In this situation, which by its very nature will always recur, it will be necessary to resort to the principles which inspire those rules and resort to the procedures which will allow the peaceful solution of conflicts. The second difficulty arises from the fact that such regulation is a real crossroads where several increasingly autonomous branches of International Law meet. Such is the case of International Environmental Law, International Trade Law, the International Law of development, or the International Law of the Sea, which can all mean the fragmentation or division into sectors of the International legal order. Faced with this situation, a complementary interpretation of these rights and an integrated application of the rules are both necessary.

Obviously, approaching the notion of common human heritage from a formal legalistic perspective would exclude vital resources and the climate system. But, in our opinion, the evolution of the International Community, the dimension of these resources as part of our heritage, and the need to pass them on, would all make it possible to apply to them the fundamental principles of the common human heritage and free them, in this way, from all kinds of State or private appropriation, and would make them accessible to all, with their management carried out internationally and in an institutionalized way, taking particularly into account the unequal development of nations.

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