'Only One Earth' and Environmental Right Between Developed Countries and Emerging Countries: Italy and France in comparison with Vietnam[1]

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1. – Today, environmental rights do not seem to be the main problem for either "future generations" but also for "present generations".

This seems at least to be the case in certain "Western" Countries, which for a long time have been considered to be "developed", such as Italy at present which finds itself in a heavy economic crisis.

On the contrary, in the Countries which a few years ago were called "developing" ones if the environmental question, at the beginning, seemed like an obstacle the economic development and therefore neglected, it now begins to be a real worry.

On the other hand, benefiting from preferential economic development policies providing a shared environmental responsibility, the southern countries have special rules. They were treated more "favorably" regarding the economic dimension and less "rigidly" in terms of environmental rights than developed countries subject to more severe obligations. The principle of sustainable development[2] was understood in the same vein, as a standard aiming at rectifying the imbalances between rich and poor countries as well as between present and future generations.

The Member States which adopted the Rio Declaration on Environment and Development in 1992[3] including the principle of sustainable development, have in fact recognized the indivisibility of the fate of humankind from that of the Earth and undertook to cooperate in a spirit

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[1] Based on the paper presented at the Workshop: *Constitutional Environmental Rights,* Widener School of Law and Environmental Law Center, Wilmington, May 31, 2012, with some further reflections.

[2] Established for the first time in "Our Common Future", a report published by the World Commission on Environment and Development in 1987 (also known as the Brundtland report), the principle of sustainable development is defined as «development which meets the needs of the present without compromising the ability of future generations to meet their own needs». Later the "Rio Declaration on Environment and Development", proclaimed by the United Nations Conference on Environment and Development (UNCED) that was held in Rio de Janeiro in 1992, admitted this principle and gave it the political salience. The Declaration puts human beings «at the centre of concerns for sustainable development» (art. 1). More specifically, the art. 3 provided that: «the right to development must be fulfilled so as to equitably meet developmental and environmental».

[3] The United Nations Conference on Environment and Development (UNCED), also known as the Rio Summit, was held in Rio de Janeiro, Brazil, 3 to 14 June 1992. Here, more than 178 Governments at the UNCED adopted just the Rio Declaration on Environment and Development, Agenda 21 (a comprehensive plan of action related to sustainable development) and Statement of principles for the Sustainable Management of Forests.

of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. So, whereas equality and reciprocity were traditionally considered to be the basis of international relations, the application of sustainable development in an international framework led to a differential treatment of North and South regarding environmental pressures and financial resources. The purpose of introducing these principles was to increase the level of economic and social equity and to improve the quality of the population's life.

This is the basic idea of «common but differentiated responsibilities» between developed and developing countries – «in view of the different contributions to global environmental degradation»[4] (principle 7, Rio Declaration) – which has been widely adopted in a range of conventions and multilateral environmental agreements since 1992. However, the practice of integrating the «common but differentiated responsibilities» in a concrete way has been quite inadequate. The reason for this is to be also found in the dominant approach to the negotiations of multilateral environmental agreements which was not able to "foster trust" or to create really new levels of cooperation among States but has done the opposite[5]. In this regard one case can be the decision of the Canadian Government to withdraw from the Kyoto Protocol[6] (the action will become effective for Canada on 15 December 2012 in accordance with article 27[7]). This Protocol indeed places a heavier burden on developed countries under the principle of «common but differentiated responsibilities».

The concept of the common but differentiated responsibilities is now put in jeopardy also by the processes of globalization and market integration.

In this paper we shall then verify whether, and under which circumstances, the "diversified" responsibility between developed and developing countries concerning sustainability has given any relevant result; or whether the processes of economic globalization, based on principles of unfettered and free competition have weakened environmental protection together with the principle of sustainable development.

These problems are best considered through the surveys, first of all, the ratio between Trade and Environonment and, secondly, a comparison between legal orders belonging to different conceptions of law (like civilian vs. common law systems), but also between countries pertaining to the same legal "family" but bearing important differences as to their constitutional structure. In other words, in this paper we shall examine, on one hand, some northern countries such as, in particular, France and Italy, on the other hand, Vietnam unquestionably being an emerging country.

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[4] «States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command».

[5] See Report of United Nations Department of Economic and Social Affairs Division for Sustainable Development, *Sustainable Development in the 21st century, Synthesis,* 2012.

[6] *Kyoto Protocol on Climate Change* was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. It is linked to *the United Nations Framework Convention on Climate Change* but the difference from this is that the Protocol represents the first concrete attempt to limit greenhouse gas emission by industrialized countries, economies in transition and European community: the Protocol in fact "*commits*" industrialised countries to stabilize greenhouse gas emissions, unlike the Convention which "encouraged" them to do so.

[7] «At any time after three years from the date on which this Protocol has entered into force for a Party, the Party may withdraw from this Protocol by giving written notification to the Depositary».

As a further point, we shall try to show that the principle of differentiated responsibility has first stimulated economic growth in some countries, but now contributes to enhancing the crisis. It follows that only the return to an effective and equally distributed environmental protection may help to reduce the grave environmental and economic imbalances.

2. – The linkage between "Economic" and so "Trade" and Environment has been very evident for some time.

The importance of the contribution of trade to sustainable development and the environment has been recognized in several forums: 1992 Rio Summit, 2002 Johannesburg Summit[8] and 2005 UN World Summit[9]. However, this happens only at the level of general principle: yet it is generally recognized that international trade rules have significant impacts on environmental "law" and policy, at the domestic, regional and global levels while some economists, in their theoretical general equilibrium analyses[10], have extended the general equilibrium framework to encompass external factors and environmental resources.

In fact, if the principle of sustainable development recognizes that the only way to have long term economic progress is to link it with environmental protection, the connections between existing "rules" of the World Trade Organization (WTO)[11] and "rules" established in a few Multilateral Environmental Agreements (MEAs), while being admitted, prove to be not quite adequate.

For example, the oldest but still the fundamental convention for the regulation of international trade – the GATT[12] – has just provided for a number of specific instances in which WTO members may be exempted from application of its rules: so, it introduces – in Article XX titled "General Exceptions" – two exceptions for the protection of the environment but there is not any clear and real coordination and cooperation in trade and environment policies (as well as measures and rules); nor is there solicitation to conclude multilateral agreements in this regard. Moreover, there are no provisions for either the adoption of environmental management

[8] The World Summit on Sustainable Development – WSSD or Earth Summit 2002 – held in Johannesburg, South Africa, from 26 August to 4 September 2002, was convened to discuss "sustainable development" by the United Nations.

[9] The 2005 World Summit was held from 14 to 16 September in New York and brought together more than 170 Heads of State and Government.

[10] «General equilibrium theory is a formalization of the simple but fundamental observation that markets in real world economies are mutually interdependent». This theory is based on the analysis of the factors and mechanisms that determine «relative prices and the allocation of resources within and between market economies". See, L. Bergman-M. Henrekson, *CGE Modelling of Environmental Policy and Resource Management,* in K.G. Mäler-J.R. Vincent (eds), *Handbook to Environmental Economics,* Amsterdam Elsevier edition**,** 2005, p. 3.

[11] The WTO, as the successor to GATT, is a result of the Marrakesh Agreement. This, signed on 15 April 1994 from the Member states themselves to the GATT and entered into force on 1 January 1995, was the result of the "Uruguay Round of Trade Negotiations". Under the GATT, the multilateral trading system was developed through a series of trade negotiations or "rounds". The last round – the 1986-94 Uruguay Round – has led precisely to the creation of WTO. However, the agreements have continued to be renegotiated and new agreements have been approved. Since November 2001, many are now being negotiated under the Doha Development Agenda, launched by WTO trade ministers in Doha. At the Doha Ministerial Conference, members agreed to negotiate on the relationship between WTO rules and the multilateral environmental agreements. These negotiations take place in special sessions of the Trade and Environment Committee.

[12] The General Agreement on Tariffs and Trade (GATT), still the fundamental convention, is a multilateral instrument governing international trade from 1948 until the WTO was established in 1995.

standards[13] or the preventive-curative measures, like the "polluter pays" principle. This environmental policy principle – well known in the European Community framework[14], together with other principle, such as the "environmental management" principle – originally intended to allocate the costs of pollution to those who cause it, today, in an extensive way, can be understood as a general measure that also includes accidental pollution prevention and control and clean-up costs[15]. And if it is true that the first mention of this principle at the international level, was made by the 1972 OECD Recommendation[16], when the GATT already was adopted, it should be observed that even later, in this as in the other trade Agreements, the "polluter pays" principle was never inserted.

On the contrary, the exceptions provided in GATT are only reasons why a Party can invoke the application of national measures which limit world trade, in particular in those fields, since nothing in this Agreement can be «construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human, animal or plant life or health; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption». Rather, these measures having to satisfy the requirements of the *chapeau* of Article XX – or that it is not applied in a way which would constitute «a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail», and is not «a disguised restriction on international trade» – may require the Appellate Body[17] intervention to weigh also so as to determine whether a measure is "necessary" to protect human, animal or plant life or health, under Article XX(b) or "relating" to the conservation of natural resource, under Article XX (g).

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[13] For example like ISO 14001 or European Union Eco-Management and Audit Scheme (EMAS). These are some effective management tools related to "environmental management" which is a "voluntary" activity that has the goal to maintain and improve the state of an environmental resource affected by human activities. This tools are intended to help organizations: 1. minimize how their operations (processes etc.) that have negative effects on the environment; 2. comply with applicable laws, regulations, and other environmentally oriented requirements; 3. continually improve in the above. The question is the fact that the benefits of environmental policy measures are "non-economic". With regard a this question, see, L. Bergman, M. Henrekson, n. 9 above, 10.

[14] This principle is one of the fundamental principles of the environmental policy of European Community. It is, in fact, connected in the Treaty Establishing the European Community to both the Prevention principle and the precautionary principle. Art. 191 (ex-Art. 174.2) provides that: «Community policy on the environment shall aim at a high level of protection, taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay».

[15] See D. Amirante, *Diritto ambientale italiano e comparato. Principi*, Napoli Jovene, 2004, 33 ss. See, also, N. de Sadeleer, *Les principes du pollueur-payeur, de prévention et de précaution. Essai sur la genése et la portée juridique de quelques principes du droit de l'environnement,* Bruxelles Bruylant, 1999, 50 ss.

[16] OECD, Recommendation of Council on "Guiding Principles concerning International Economic Aspects of Environmental Policies", C/M(72)15(Final), adopted on 26 May 1972. In this Act it stated that: «The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called Polluter-Pays Principle. This principle means that the polluter should bear the expense of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state». Reaffirmed in the 1992 Rio Declaration, at Principle 16, this principle is mentioned also in Agenda 21 and the WWSD Johannesburg plan of implementation.

[17] The Appellate Body, established in 1995 in accordance with Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), is composed of seven Members who are appointed by the DSB. The Appellate Body hears appeals from reports issued by panels in disputes promoted by WTO Members.

Apart from criticism of the WTO jurisprudence[18] for such narrow methodology of textualist argument[19] – and for questions of competence, legitimacy[20] and transparency[21] – in this context we have doubts about concrete application of the sustainable development principle, a standard which might also be accepted by an «open, equitable and non discriminatory» international market, in accordance with Decision on Trade and Environment, adopted on 15 April 1994[22].

Recalling the preamble of the Marrakesh Agreement Establishing the World Trade Organization – which includes among its objectives «optimal use of the world's resources», «sustainable development» and «environmental protection»[23] – this 1994 Agreement, in fact, considers that «there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other». However, there was a subsequent significant change in the "report" between Trade and Environment.

If in that 1994 Agreement there is evoked, in short, the idea of "non-contradiction" between Trade and Environment, in a subsequent Act of 2001 it is asserted that the aims of safeguarding an open and non-discriminatory multilateral trading system and acting for the protection of the environment, in accordance with the promotion of sustainable development, «can and must be mutually supportive»[24]. Therefore, with a view towards enhancing the «mutual supportiveness of trade and environment», this Declaration lists several objectives aimed at negotiations concerning trade and environment[25], specifying «without prejudging their outcome». As a consequence, the cooperation between the WTO and MEAs was started and is still underway (WTO 2009). In a concrete context until now, these negotiations have been resolved in some proposals – but without a thorough and detailed discussion – to introduce something of a deviation from the "polluter pays" principle[26].

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[18] An analysis about how WTO tribunals have approached environmental themes in concrete disputes and provide selected excerpts of the most significant case is made by N. Bernasconi, London Osterwalder, D. Magraw, M.J. Oliva, E. Tuerk, M. Orellana, *Environment and Trade: A Guide to WTO Jurisprudence,* Routledge, 2005.

[19] See F. Ortino, *Treaty interpretation and the WTO appellate body report in US-Gambling: a critique,* in (2006) *Journal of international Economic law*.

[20] See R. Howse, *The legitimacy of World Trade Organization,* in J.M. Coicaud Heiskanen (eds), *The legitimacy of International Organizations*, Tokyo United Nations U., 2001. This author, in fact, considers that «despite formal democratic legitimacy, the social legitimacy of the rules themselves could easily be undermined by interpretations of those rules that do not themselves command legitimacy».

[21] See G. Kapterian, *A critique of the WTO jurisprudence on 'necessity',* in (2010) *International and Comparative Law Quarterly*, pp. 89-127.

[22] Adopted by ministers at the meeting of the Uruguay Round Trade Negotiations Committee in Marrakesh, the Decision on Trade and Environment called for the establishment of a Committee on Trade and Environment (CTE).

[23] «… the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development».

[24] DOHA WTO MINISTERIAL 2001: Ministerial Declaration WT/MIN(01)/DEC/1, 20 November 2001, adopted on 14 November 2001.

[25] Paragraph 31 of the Declaration mandates negotiations, particularly, on three issues: (i) the relationship between WTO rules and specific trade obligations set out in MEAs; (ii) procedures for regular information exchange between MEA secretariats and the relevant WTO committees; and (iii) the reduction or elimination of tariff and non-tariff barriers to environmental goods and services.

[26] See WTO, Committee on Trade and Development, WT/CTE/GEN/10, adopted on 11 April 2003.

On the other hand, at the level of the international market there are special provisions which give developing countries special rights: these are called «special and differential treatment»[27] seeking to confer differential and more favourable treatment to developing and «least developed country" Members without according such treatment to other contracting parties.

The concept of this regime if in the "denomination" calls to mind the principle of «common but differentiated responsibilities», essentially concerns the "trade". So, even though the «special and differential treatment» is an undoubtedly important regime and an integral part of the balance of rights and obligations in the WTO, in this approach it does not take into consideration that the level of development should be related to the level of rights and obligations under the multilateral trading system. In the framework of the application of such a fundamental issue, the problem is also that the same policies could be applicable to countries with varying levels of development, even considering the recent distinction between "developing" and "least developed" country.

Therefore, for some time, in particular at the start of the Doha Round[28], some developing countries themselves – in particular, the African Group – have requested a thorough review of the concept of the special and differential treatment regime in the WTO Agreements to «resolve the imbalances between developed country Members and developing and least developed country Members, to ensure equity in the totality of obligations and rights»[29], to create «a level playing field for unequal players in the multilateral trading system» because, in the opinion of these countries, trade in itself is not an end, but «rather a means to improving living standards, eradicating poverty and achieving sustainable development»[30].

3. – Italy and France both belong to the same legal family known as "civil law", including also Vietnam, traditionally opposed to the "common law". But although both countries share many fundamental elements, the place of environmental matters in their respective Constitutions reveals important differences .

Italy, indeed, never directly "constitutionalized" environmental protection.

The constitutional reform of 2001[31] included the environment in Title V with the main objective of redistributing legislative powers. Article 117, para. 2, s), in particular, states that «the protection of the environment, of the ecosystem and of the cultural heritage (*beni culturali*)» is one of the matters assigned to state's exclusive legislative power. Thus, since the Italian Constitution did not previously contain a precise definition of the term "environment"[32], even this reform did not settle the question of its exact meaning[33]. This shows at last to be problematic

[27] The special provisions include, for example, the longer time periods for implementing Agreements and commitments or measures to increase trading opportunities for these countries or provisions requiring all WTO members to safeguard the trade interests of developing countries.

[28] In paragraph 44 of the Declaration, Ministers noted the proposal in document WT/GC/W/442 by a group of developing countries for a Framework Agreement on Special and Differential Treatment.

[29] See WTO, Committee on Trade and Development Special Session, TN/CTD/W/3/Rev.2, adopted on 17 July 2002.

[30] See WTO, Committee on Trade and Development, TN/CTD/M/45, adopted on 11 October 2011.

[31] As introduced by the Constitutional law No. 3, adopted on 18 October 2001, "Modifiche al titolo V della parte seconda della Costituzione".

[32] The only constitutional rule which refers to the "environment" but as landscape is the article 9, Para. 2: «[The republic] Safeguards the landscape and the historical and artistic heritage of the nation».

[33] See E.A. Imparato, *Contenuti minimi della tutela ambientale, collaborazione e contrattazione tra Stato e regioni,* in *Diritto e gestione dell'ambiente,* (2002), p. 445 ss.

even for the itself allocation of legislative competence on environmental matter. Under the formal profile, then, the constitutional legislator has followed the traditional constitutional revision procedure, in accordance with article 138. Having been approved by a majority lower than the one required by this provision, the text of constitutional reform was subjected to "subsequent" confirmative referendum[34].

Regarding France, there are two important differences: the first is substantial, the second concerns the procedure of drafting the text about environmental protection[35].

Contrary to Italy, France started a constitutional reform refering "specifically" to environmental matters. The Environmental Charter – *Charte de l'environnement*[36] – has been adopted in 2005 at the issue of a long process. It was given constitutional status, including the acknowledgement of a "subjective" environmental right to "every person"[37] so that protecting the environment means protecting "necessarily" the "people". Therefore, adding a reference to the Environmental Charter in the Preamble[38] of the Constitution, on top of the hierarchy of legal standards, France shows her commitment to the environmental problem. This Charter then promotes the integration of French environmental law with Community law. It provides in fact, among others, the "polluter-pays" principle, the precautionary principle and links the protection and the care for the environment with a requirement of economic development and social progress.

Furthermore, in an original way for constitutional matters, this reform has given a large space to "public participation". Unlike Italy, in France this partecipative process has been initiated "before" the definitive drafting of the constitutional text. In parallel to the work of the Committee given in charge drafting up the Environmental Charter by the Ministry of the Environment and Sustainable development, a national "consultation" was called upon with special forms addressed to a great number of rapresentatives of different social and professional categories and others set up in a specially created website.

Public partecipation is well known in the French legal system. The oldest form is that of the

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[34] In fact, accordance with article 138: «(1) law amending the constitution and other constitutional acts are adopted by each of the two chambers twice within no less than three months and need the approval of a majority of the members of each chamber in the second voting. (2) Such laws are afterwards submitted to popular referendum when, within three months of their publication, a request is made by one fifth of the members of either chamber, by 500,000 electors, or by five regional councils. The law submitted to referendum is not promulgated if it does not receive the majority of valid votes.(3) No referendum may be held if the law has been approved by each chamber in the second vote with a majority of two thirds of its members».

[35] See E.A. Imparato, *Ambiente e riforma costituzionale in Italia e in Francia. Prime note per una comparazione,* in *Diritto e gestione dell'ambiente,* (2003), p. 531 ss.

[36] This Charter was approved on 1 March 2005 by means the Constitutional law No 2005-205. With regard to the content and legal effect, see M. Zinzi, *La Charte de l'environnement francese tra principi e valori costituzionali,* Napoli, Esi, 2011, p. 27 ss.

[37] This article provides that: «The laws and regulations organize the right of everybody to a healthy environment and contribute to ensure an harmonic balance between the urban and rural zones. Everybody has the obligation to try to safeguard and to contribute to the protection of the environment. Public and private persons must, in all their activities, comply with these demands».

[38] The preamble of the 1958 Constitution now reads as follows: «The French people solemnly proclaim their attachment to Human Rights and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004».

public hearing, later that of the *débat public*[39]. Both these cases of partecipation belong, however, to administrative proceedings and decisions[40]. The novelty here consists in public participation as part of a legislative process, what's more, at the constitutional level.

3.1. – Outside the constitutional domain, both countries enacted specific environmental laws since the end of the '70. Nonetheless, important differences may be noticed between France and Italy.

In France, the commitment to environmental issues begun with the law of 1976[41] but above all with the law of 1995, so-called *loi Barnier*[42], settling an enhanced environmental protection, with the *Code de l'environnement* of 2000[43].

The *Barnier*-statute stated already general principles of the matter and established a link between domestic rules and Community environmental law, in particular with the principles constituting the "triad" of its main assumptions in terms of environmental management. It also made public participation a statutory obligation for all major projects[44].

By contrast, the *Code de l'environnement*, which also incorporated the *loi Barnier* in his Article L. 110-1, represents a "global" normative text. Moreover, it is constantly updated, such that French environmental law is in fact regularly transformed. On top of it, with the "rationalization", reorganization and simplification of existing environmental as well as rules concerning the instruments of public participation, the French Environmental Code contributes to improve the trasparency, intelligibility and accessibility of those standards for citizens. Even though it does not provide many innovations with respect to previous rules, the *Code de l'environnement* constitutes an important model of "harmonization" of the domestic environmental rules as well as of the nearby rules[45]. With other words, it may as well offer a "unitary" framework for the substance of environmental law.

In the Italian legal system, on the contrary, the legal substance as well as its scholarly analysis is still "fragmented", even though an environmental Code exists today. At the beginning, the issue is addressed in several comprehensive legislative measures, the first of which is the

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[39] The *débat public* is a particular participatory instrument used for a public discussion in relation to industrial and infrastructure works of large dimension and national importance. In this regard, in particular, related to instruments of participation in environmental matters, see J.L. Autin, *Inchieste pubbliche e débat public nell'ordinamento francese,* in *Diritto e gestione dell'Ambiente,* (2001), p. 67 ss.

[40] See the interesting reconstruction of the development of these instruments made by D. Amirante, *Codification and technical rules in environmental law-Reflections on the French Experience,* in A. Biondi et al. (eds), *Scientific Evidence in European environmental rule-making,* The Hague Kluwer Law International, 2003, p. 103 ss.

[41] Law No. 76-629, adopted on 10 July 1976, «relative à la protection de la nature».

[42] Law No. 95-101, adopted on 2nd February 1995, regarding the «renforcement de la protection de l'environnement».

[43] The French environmental Code, approved on 18 October 2000 by means ordinance n. 2000-914, is divided into two parties: a legislative part and a regulatory part. The legislative part is divided into the following seven books (with its 975 articles): 1.Common provisions; 2. Physical environments; 3. Natural spaces; 4. Flora and Fauna; 5. Prevention of pollution, risks and nuisances; Provisions applicable in New Caledonia, French Polynesia, The Wallis and Futuna Islands, French Southern and Antarctic Territories and Mayotte; 6. Protection of the environment in the Antarctic.

[44] This act has introduced a new procedure for public participation, providing a preliminary public debate organised under the aegis of the *Commission Nationale du débat public*, a permanent institution and called to guarantee the procedure.

[45] See D. Amirante, n. 39 above, p. 106 ss.

law No. 349 of 1986[46]. It did however not contain all relevant rules, but mainly those concerning the creation of a Ministry of the Environment and environmental damage. The other laws were sectorial and related to the implementation of Community provisions, like, *inter alia,* the decree No. 22 of 1997, transforming some Community Directives regarding waste recycling and management[47]. Following the French example, an Environmental Code, intended to codify the matter, was enacted in April 2006[48], but presents significant differences both from a the methodological perspective as well in its substantive conception.

Whereas the French Environmental Code has been well able to organize and, coherently systematize the relevant rules in a larger ambit so as to enhance its "intelligibility", the result of the Italian codification seems to be much less successful. Even though subsequently amended[49] and incorporating the environmental principles of Community law, the Italian normative text is wanting in terms of harmonization and comprehensiveness. It is rather a "set of laws" gathering the existing legislation and its updates, but it lacks any systematic ambition, where even a littoral protection is missing.

It is to be noticed that France has a consolidated tradition for integrated legislation. To give an example, the Coastline Act of 1986 concerning littoral protection, the so-called *loi littoral*[50] is now included – it was first an environmental statute which has later been integrated with other related rules, like those on planning or rural development, originally assembled in their respective ambit of legislation – into the *Code de l'environnement*. The different elements are complementing each other: e.g., chapter IV is inserted "into Title IV of the book I of the Rural Code" according to art. 3.

In other words, although both Codes contain only existing legislation without important substantive innovations, the French Code evidently takes advantage of integrating laws already comprehensively conceived.

4. – In order to understand the Vietnamese environmental law and in its constitutional frame it appears necessary to present the social, cultural and political context, in particular after the Revolution of 1945, resulting from the development of a national liberation movement, first against the French colonial domination as from 1850, then against the Japanese invaders of 1940.

With the Revolution of August 1945, Vietnam was able to get rid of the French colonial regime and to establish a new state, the "Democratic Republic of Vietnam" – now the "Socialist Republic of Vietnam" – engaging in broad social and economic transformations. During the French colonial time, Vietnam's legal system was built on the French model, imitating its concepts and structures so far as to having been be considered as «subservient to the French system»[51]. However, even though Vietnam asserted it's will to repeal the colonial legal framework

[46] Law No. 349 of 8 July 1986.

[47] Decree No. 22 of 5 February 1997, the so-called "Ronchi Decree", implementing Directives 91/156/EEC, 91/689/EC and 94/62/EEC.

[48] Approved by means of *legislative decree*. 3 April 2006 n. 152.

[49] By means of legislative decree from 8 November 2006, n. 284 and legislative decree from16 January 2008, n. 4.

[50] The law 3rd January 1986 Coastal Act or *loi littoral*, n. 86-2, relates to the planning, protection and enhancement of the coast. See E.A. Imparato, *La tutela della Costa. Ordinamenti giuridici in Italia e in Francia,* Jovene, Napoli, 2006, pp. 1-356.

[51] See M.B. Hooker, *A Concise Legal History of South-east,* Oxford, Clarendon, 1978.

with the National Independence Declaration of September 1945, the Vietnamese legal system remains in many fields (like, for example, the Civil Law Codes of 1995 and 2005)[52] influenced by the French legal model. It is in this context, that after the first Constitution of 1946, three Constitutions have been adopted: one in 1959, the second in 1980 and the last one in 1992. It has been amended in 2001 and in 2006 and is still in force to this date.

These Constitutions have not, however, a legal force comparable to that of the Italian or the French Constitutions. Fundamental rights like free speech, freedom of opinion, religion or association have never been tenaciously enforced, «and at many points in modern Vietnamese history have been regularly and significantly violated»[53].

In this framework a prominent role is played by the Communist party – Vietnam is a one-party-state – and its relationship to the state and the Constitution[54]. Since 1980, article 4 of the Constitution states that the Communist Party is «the force leading the State and the society». It follows that law and legality is subjected to the decisions and directives of the party. Article 3 of the 1980 Constitution states that «the state manages society according to law and constantly strengthens the socialist legal system». It is still considered – and Vietnamese legal scholarship positively asserts – that building up «a socialist rule-of law state must be tied to the strengthening of the Party's leadership, which is a factor that drives the States operation in the apt direction in view of achieving correct goals while serving people»[55]. Even though article 2 of the 1992 Constitution proclaims with emphasis that «the State of the Socialist Republic of Vietnam is a State of the people, by the people, for the people», the Communist Party still claims that as «the vanguard of the Vietnamese working class and loyal representative of the interests of the working class, the working people and the whole nation, who adheres to Marxism-Leninism and Ho Chi Minh's thought, it is the force assuming leadership of the State and society».

Having made clear this fundamental feature we can now turn to the analysis of Constitutional rules, in particular those concerning environmental protection.

From this point of view, it appears that the Constitutional commitment to environmental issues began with the adoption of the 1980 text but – as we shall see – this does not happen through statutory enactments. Environmental issues were given some legislative relevance only as of 1994, much later that in Italy and France. At the constitutional level, there was no reference to the "environment" prior to 1980 i.e. in 1946 and 1959. At that time Vietnam had other priorities, namely the reconstruction of the society to achieve communist aims, the land reform and, last but not least, to carry out a revolution in the Country's South (over, as it is well-known, the traditional adversarial relationships with neighbouring states). Thus, in particular in the 1954-1976 period, the «legal system was immature, insyncronich and contained overlaps»[56], while laws necessitate their translation into reality.

In the subsequent period – from 1976 to1986 – there were two rationales for revising the

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[52] See B.S. Chimni, M. Masahiro, L. Thio, *Asian Yearbook of International Law*, Volume 14, London, Routledge, (2008), p. 134.

[53] See M. Sidel, *The Constitution of Vietnam: A Contextual Analysis (Constitutional Systems of the World)*, Hart publishing ltd., 2009, p. 5.

[54] See J.M. Brian Quinn, *Legal reform and its context in Vietnam*, in *Columbia Journal of Asian Law,* (2002).

[55] See D. Tri Uc, *The Socialist rule-of – law State of Vietnam – Major achievements over a sixty-year process of its building and development*, in *Social Sciences Information Review* (2007), p. 4.

[56] *Ibidem,* p. 12.

1959 Constitution, then for the adoption of the 1980 Constitution: the reunification of North and South Vietnam – the former Republic of Vietnam – in 1976 and accelerate economic growth. The second economic development plan – the first after the reunification (1977-1980) – promoted both agriculture and light industry and took for the first time environmental issues into consideration. Its article 36 established that «the State agencies, enterprises, cooperatives, people's armed units and citizens are obliged to implement policies to protect, improve and regenerate natural resources, protect and improve habitat». Even though law-making became more intense, the legal system was still incoherent and hence deficient, unable to adhere to reality[57]. This might also be one of the reasons why the quoted provision refers to "policies" and not to "laws".

In the mid-1980s, political attention appeared still more focused on the country's economic problems. Thus, when Vietnam decided to start a period of economic "openness" and to pursue a policy of economic liberalization under the auspices of a «socialist-oriented market economic» in 1986[58], the country began to adopt reforms regarding the legal system in order to make it more business friendly[59]. It amended the 1980 Constitution. Following Article 29 concerning the "protection of the Environment" in the previous text, the new Constitution of 1992 repeats the commitment to environmental issues but changes the wording regarding "obligation". Anticipating the enactment of environmental laws, reference is made not to "policies" but to "state regulations"[60]. It then proclaims that: «All acts likely to bring about exhaustion of natural wealth and to cause damage to the environment are strictly forbidden». In this period Vietnam undergoes a radical transformation from a planned to a globalized market-economy. Its rich and unique biological diversity may be affected by this development and the environmental impact conceivably caused by an increase in production. All acts possibly causing damage to this natural patrimony are hence "strictly forbidden".

4.1. – Further legislation has accorded high importance to environmental issues and elevated them to constitutional value. In 1993 the National Assembly approved the first general Law on Environmental Protection which entered into force on 10 January 1994. Before this, there are only sectorial legislations and regulations like, for example, a statute of 1949 on protection of forests or, closer to the 1994 law, the Aquatic Resource Protection Act of 1989. Thus, the Environmental statute of 1994 expressly proclaims in its Preamble to operate «pursuant to Article 29 and Article 84 of the 1992 Constitution of the Socialist Republic of Vietnam»[61]. In this way, it identifies tasks and procedures for state administration of environmental protection as well as obligations for organizations and individuals to prevent and take measures against «environmental degradation, environmental pollution and environmental incidents». Moreover, for the first time, it provides penalties for those who infringe environmental protection legislation (subsequently complemented by some specific decrees). Keeping French

[57] *Ibidem*, p. 4.

[58] Vietnam concluded the accession negotiations to WTO in 2006 and formally became its 150th member on 11 January 2007.

[59] See B.S. Chimni, M. Masahiro, L. Thio, n. 51 above, p. 134.

[60] In particular, it provides that: «State organs, units of the armed forces, economic and social bodies, and all individuals must abide by State regulations on the rational use of natural wealth and on environmental protection».

[61] The Law on Environmental Protection is passed on December 27th, 1993 by the National Assembly and is enacted by Decision 29L/CTN of the President of State. It is consisted of 55 Articles distributed in 7 chapters.

cultural Heritage in mind, the text ordained its French as well as its English translation in order to «facilitate the study of the Law and its application to economic, scientific, technological, cultural and social activities in the country».

In the meantime, industrial production has risen – passing from 20 to 37 percent of GDP between 1990 and 2000, in particular in sectors like oil and gas, electricity and textile – while trade liberalization led to a growth of manufactured exports from about 6 percent in the 1990s to almost one-third in 2002[62]. Heavy land degradation also follows these developments. *Depletion of fauna and flora, even loss of land productivity*[63] *made the deficiencies of the 1993 legislation and the necessity of a general revision evident*.

Subsequently, at the beginning of the third millennium, the increased awareness of the negative environmental impact of sustained economic growth led to a revision of the environmental law then in force, as well as to the creation of important new institutions – like the Ministry of Environment and Natural Resources. A National Strategy for Environmental Protection for the period 2001-2010 with the purpose of investigating environmental issues and risks and addressing environmental challenges inherent in economic growth[64].

In 2005, the new Environmental statute[65] – effective on July 1st 2006 – replaced the law of 1994. It has extended objectives[66], subjects of application, referring not only to organizations and individuals[67] and of regulation. It appears as a unique text, with 136 Articles (in 15 Chapters) concerning several fields: natural resources, maritime environment and even other water sources, waste management. In this framework, the law introduces new policy tools and remedies for pollution prevention and cleanup, and adjustments to cover environmental management in the private sector. The "sustainable development" objective of Agenda 21 has thus been introduced for the first time in this country[68]. Even though it does not bear the name, it introduces in substance something very similar to a "Polluter-pays" principle, in particular where it provides that whoever causes environmental pollution has to «pay compensation therefor and bear other liabilities as provided for by law» (Art. 4, Para. 5, called just "principles for environmental protection"). Expanding the rules on environmental impact assessments compared to the 1994 law, the new statute dedicated a whole Chapter to «strategic enviro-

[62] See World Bank, *Vietnam Country Environmental Analysis. Draft Concept Paper,* available on the internet at: worldbank.org.

[63] See Ministry of Science, Technology & Environment, *Report of the State of Environment in Vietnam by 2000*, available on the internet at: http://www.rrcap.unep.org/reports/soe/vietnam.

[64] In particular the National Strategy for Environmental Protection 2001-2010 identifies three over-arching objectives: to continue to prevent and control pollution; to protect, conserve and sustainably use natural and biodiversity resources; and to start improve the environmental management capacity of institutions, available on the internet at: vnwatersectorreview.com.

[65] Law on the Protection of the Environment of 29 November 2005, No. 52-2005-QH11.

[66] See article 1 which has established that «this law provides for activities of environmental protection; policies, measures and resources for environmental protection; rights and obligations of organizations, households and individuals in environmental protection».

[67] Under article 2 this law is applied to «state agencies, organizations, households and individuals in the country; overseas Vietnamese, foreign organizations and individuals carrying out activities in the territory of the Socialist Republic of Vietnam».

[68] Accordance with article 4, Para. 1: «Environmental protection must be in harmony with economic development and assure social advancement for national sustainable development; protection of the national environment must be connected with protection of the regional and global environment».

mental assessments, Enviromental impact assessment and environmetal protection commitment» (Chapter III), with detailed rules about objects, elaboration, contents and appraisal of Strategic environmental assessments and Enviromental impact assessment reports. New factors – like those of the "public access to environmental information" (art. 104) – are introduced.

However, notwithstanding all efforts made from this environmental protection law, the environmental situation of Vietnam is worsening[69]. The reason seems to lay in an insufficient monitoring[70] as well as in a lack of environmental integration at planning levels, while in its very technical structure the 2005 law is not global and integrative of all different environmentally relevant elements. On the other hand, the «growing tension between enviromental constraints and industrialization demands»[71] has recently resulted, i.e. in november 2010, in the enactment of the first law on environmental taxation[72], which took effect on January 2012.

Setting apart our doubts concerning the efficacy of these provisions with respect both to household welfare and the reduction of environmental pollution, one of their unwellcome effects could be that industries feel allowed to increase pollution as these environmental taxes could be seen as concrete steps for "compensation" from the international community. One should also consider the Clean Development Mechanism (CDM)[73], an arrangement established under the Kyoto Protocol. Being a Party to the United Nations Framework Convention on Climate Change (UNFCCC) since 1992 and having ratified its Convention in November 1994 and the Kyoto Protocol to the United Nations Convention on Climate Change in December 1998, Vietnam has actively been implementing the UNFCCC and Kyoto Protocols, making its own efforts to marshalling the impact of climate change in accordance with the principle of «common but differentiated responsibilities» as specified in the UNFCCC[74]. However, despite Vietnam's commitment at the international level[75], it has to be noted that domestically its National Assembly has performed poorly and enacted only few laws aiming at giving full effect to its international obligations.

5. Vietnam is an example of a development model for many *developing* countries. Significant political and economic reforms starting in 1986 have transformed this country from one of the poorest in the world into a one of the most active emerging states in East Asia in terms

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[69] For a detailed synthesis of environmental challenges, see Ministry of planning and investment, Ministry of Finance and Ministry of Science and technology in partnership with the European Commission, *Report Environmental Priorities for Vietnam and Assessment of Current Environmental Levies in Vietnam,* 2008, Section B, available on the internet at: files.foes.de.

[70] *Ibidem*.

[71] *Ibidem*.

[72] This law produces new taxes on coal, gasoline and other fossil fuels, pesticides and some other products.

[73] The CDM allowing industrialized countries with a Greenhouse Gas (GHG) reduction commitment (so-called Annex 1 countries) to invest in emission reducing projects in developing countries (Non-Annex-1).

[74] H.E. Mr. Nguyen Tan Dung, *Prime Minister of the Socialist Republic of Vietnam,* Vietnam Responds to Climate Change. About CDM projects, Vietnam has identified, for example, areas in which it will carry out like, *inter alia*, collecting and using associated gas as well as methane from rubbish dumps and coal exploitation; applying recycled energy, and afforestation.

[75] Vietnam, at international level, has begun to make efforts to preserve the environment with accession to the Convention concerning the Protection of the World Cultural and Natural Heritage in 1987. Since the late 1980s, this countries has ratified or acceded to eleven international environmental treaties, addressing environmental concerns relating to the conservation of biodiversity, regulation of transboundary pollution and prevention of desertification.

not just of economic growth but also of implementing and improving social services. At the same time however, and in particular in the aftermath of the current global crisis since 2008 there is also an increasing gap between the rich and the poor, while environmental degradation and climate change rises to alarming levels. Therefore the focus of political strategy should be addressing environmental sustainability and social equity. One should not forget, though, the fundamental issue of the unsystematic legislative approach, in particular with regard to public investment planning process and to regional plans for land and resource use[76].

As we have tried to show, this same issue, is yet equally present in the Italian system, unlike the French one which shows a global and integrative legislative and political strategy at. In Italy however, the crisis has shifted one's attention to another subject, i.e. economic and labour reforms.

Even though in Vietnam environmental issues were given some relevance at domestic legislative levels only as of 1994 – much later than in Italy or France – there is no doubt that this country, especially over the last decade, has made great efforts to increase its potential in the economic competition, while keeping with the exigencies of environmental protection. Another important change is.

Taking advantage of particularly favourable economic policies, according to the principle of «common but differentiated responsibilities», Vietnam has been able to attract foreign investors, while paying a high price to the environment. At present, though, the country is entering a «new strategic phase». The climate change and particularly the rise of the sea level, will affect Vietnam in a particularly severe way. Notwithstanding the pressures of the global crisis and globalisation in general, the country is forced to revise its position. The Socio-Economic Development Strategy (SEDS) 2011-2020 pays particular attention to structural reforms based also on sustainable development in accordance «a new internal perception which reflects the close link between fast development and sustainable development and considers sustainable development a requirement that run-through the Strategy»[77]. Developing and emerging countries can play a significant role in determining the success of environmental and global climate change policies[78].

Thus, the current global economic crisis should be seen as an opportunity to change the position of all States – Developed and Developing as well – regarding their common environmental responsibilities and thus to develop a green-economy, not differentiated but homogeneous and global. This crisis could be an important chance to strengthen long-term sustainable strategies and to address other issues – as those of poverty and climate change – in order to ensure a sustainable development, to achieve social progress, fairness and an healthy environment for future but also present generations[79].

The use of environmentally-friendly technologies, in other words, the development of a "green-economy" will increasingly be seen as «the major driving force to change the global economic and market structures and boost economic reforms» at the same time modifying the «the way of thinking that focuses on growth rate rather than growth quality»[80].

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[76] See *Vietnam Country Environmental Analysis. Draft Concept Paper,* available on the internet at worldbank.org.

[77] Prime Minister N. Tan Dung, *PM-highlights-development-strategy-for-20112020,* available on the internet at en.vietnamplus.vn.

[78] As recognizes the Conference of June 2001 to the United Nations framework Convention on Climate Change.

[79] See socialwatch.org.

[80] See above n. 78.

Abstract

This paper addresses the question whether, and under which circumstances, the 'diversified' responsibilities between developed and developing countries has given any relevant result concerning sustainability; or whether the processes of economic globalization, based on principles of unfettered and free competition have weakened environmental protection together with the principle of sustainable development.

International Law has allegedly promoted the convergence of free and fair trade with sustainable development through the principle of "common, but differentiated responsibilities". In fact, these standards have contributed to enhance the economic position of developing countries, but they have failed to integrate free and fair trade into a legally efficient environmental commitment. This can be shown through an analysis of the evolution of three legal systems, representing different legal traditions. The French legal seems the most advanced in terms of environmental protection in so far as it integrates these principles in a comprehensive legal framework with extensive rights in terms of citizen's participation. Italy has made important legislative efforts, but did not succeed in integrating its rules into a coherent whole. Both countries are presently under the menace of a financial crisis, which weakens the reach of environmental ambitions. Vietnam, on the other hand, has overcome years of war and of communist rule and could engage in highly efficient economic reforms. The still prevailing weakness of the rule of law has nonetheless weakened the implementation and enforcement of environmental standards and the present crisis pushes further in the same direction. Finally, even though the crisis induces a convergence of all three countries in favour of the economy and rather against the environment, it also fosters the need for the development of a green economy as the only way in order to overcome the shortcomings of the weaknesses of the present international as well as national legal frameworks.