

International  
**Rule of Law**



Symposium

# **International Rule of Law Symposium**

*A Plan for Action*

---

Monday, April 16, 2007 + Grand Hyatt New York + New York City, New York

## **Environmental Issues and the Rule of Law**

WHITE PAPER



**RULE OF LAW**  
**AND**  
**ENVIRONMENTAL ISSUES**

**1.0 Introduction.**

The American Bar Association and the International Bar Association convened a Rule of Law Symposium in Chicago in September 2006. As a result of the 2006 Symposium, ABA President Karen Mathis created several Working Groups to review existing ABA policies and resolutions related to the topics presented in Chicago. Among these were Environmental Issues and the Rule of Law.

The Environment Issues Working Group organized this White Paper to: (a) identify and illustrate certain fundamental principles that underlie the Rule of Law as it relates to environmental issues; (2) identify ABA policies and activities that directly or indirectly impact the Rule of Law in the environmental field; (3) propose a course of action for the ABA that would promote a greater understanding of those fundamental principles enjoying sufficient national and international acceptance to serve as a foundation for the ABA to address the Rule of Law in relation to the environment.

Because of the evolving nature of international environmental law certain disclaimers are in order. With regard to the fundamental principles discussed below it is important to note that the nations of the international community accept these principles in varying degrees. Indeed, it is safe to say that many of the principles are not yet universally accepted law in the international environmental law arena. Thus, the discussion in this White Paper is intended to be illustrative of the fundamental principles only; it is not intended to be an exhaustive discussion of the pros and cons or of the international acceptance and debate surrounding any particular principle. The White Paper does not represent or address the views of the United States government.<sup>1</sup> The White Paper is also not intended to be a treatise on international law; for example, whether existing international treaties involving environmental matters are or should be enforced through national laws or are so-called “hard” or “soft” laws.

---

<sup>1</sup> The United States government has not adopted all of the fundamental principles discussed in this White Paper nor ratified all of the treaties discussed herein.

## **2.0 Fundamental Principles.<sup>2</sup>**

### **2.1 State Sovereignty.**

In the context of environmental issues, state sovereignty holds that within its territory each nation-state has complete political and legal control over its environment and natural resources. There is a “fundamental tension between the state’s interest in protecting its independence . . . and the recognition that . . . regional and global environmental problems require international cooperation.”<sup>3</sup>

The 1972 UN Conference on the Human Environment in Stockholm, Sweden (“Stockholm Conference”) set forth a number of principles, including Stockholm Principle 21 which holds:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.<sup>4</sup>

### **2.2 The Duty to Cooperate – “Good Neighborliness”**

Stockholm Principle 24 states:

International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on an equal footing. Co-operation through multi-lateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.<sup>5</sup>

Cooperation is also part of the Rio Declaration of 1992, for example, Principle 27:

---

<sup>2</sup> The fundamental substantive and procedural principles presented in Section 2.0 are largely drawn from Ved P. Nanda and George Pring’s treatise *International Environmental Law & Policy for the 21st Century*, published by Transnational Publishers, Inc. The Working Group members thank Professors Nanda and Pring for allowing us to use their book’s excellent organizational structure and concepts as the organizational structure for Section 2.0 of this White Paper.

<sup>3</sup> Ved P. Nanda and George Pring, *International Environmental Law & Policy for the 21st Century*, §2.1.1 (2003) (hereinafter “Nanda/Pring”), citing David N. Hunter, et al., *International Environmental Law Policy*, 326 (1998).

<sup>4</sup> Stockholm Declaration of the U.N. Conference on the Environment, June 16, 1972, Principle 21 (hereinafter “Stockholm”).

<sup>5</sup> *Id.*, Principle 24.

States and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in this Declaration. ...<sup>6</sup>

Cooperation “is the basic building block on which rests all of the other international environmental law principles.”<sup>7</sup>

### **2.3 The No-Harm Rule.**

The No-Harm Rule limits state sovereignty and holds essentially that states have an obligation not to cause or allow environmental harm outside their borders.<sup>8</sup> Stockholm Principle 21 states:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.<sup>9</sup>

### **2.4 Sustainable Development.**

Sustainable development is one of the most significant developments in international environmental law.<sup>10</sup> Defining sustainability remains uncertain and controversial.<sup>11</sup> The Brundtland Commission defined it as “development that meets the need of the present without compromising the ability of future generations to meet their own needs.”<sup>12</sup> The 1972 Stockholm Conference began to address the tension between environmental protection and development in the need for developing countries to be allowed to move toward development. Principle 11 of the Stockholm Conference holds “environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries ...”

In 1992 the UN Conference on the Environment and Development in Rio de Janeiro (“Earth Summit” or “Rio Conference”) was charged by the UN General Assembly to “elaborate strategies . . . to promote sustainable and environmentally sound development in all countries.”<sup>13</sup> The resulting non-binding instruments, the Rio Declaration on Environment and Development, Agenda 21, and the Statement of Forest Principles, used the term sustainable development but did not define the term in “any simple, direct way.” One author, Professor Pring, has identified certain principles that he believes are the framework for sustainable development:

---

<sup>6</sup> Rio Declaration on Environment and Development, June 13, 1992, U.N. Doc. A/Conf. 151/26/Rev. 1 (Vol. I) (1992) (hereinafter “Rio” or “Rio Declaration”).

<sup>7</sup> Nanda/Pring, §2.1.2.

<sup>8</sup> Stockholm, Principle 21; Rio, Principle 2.

<sup>9</sup> See also, Nanda/Pring, §2.1.3, citing Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (July 8, 1996), ¶ 29, U.N. Doc. A/51/218, 35 I.L.M. 809 (1996) (*Nuclear Weapons Advisory Opinion*).

<sup>10</sup> Nanda/Pring, §2.1.4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, citing UN World Commission on Environment and Development, *Our Common Future* (1987).

<sup>13</sup> Nanda/Pring, §2.14 at 26; U.N. Doc. A/RES/44/228 (Mar. 22, 1990).

- (1) Human needs are paramount,
- (2) Environment and development must be integrated
- (3) There must be intergenerational equity
- (4) Likewise intra-generational equity
- (5) States have sovereignty over resources
- (6) Natural resources should be conserved and not be exhausted
- (7) International cooperation is essential
- (8) The precautionary principle should be applied<sup>14</sup>
- (9) The polluter-pays principle should be applied
- (10) Environmental impact assessment should become standard
- (11) Public participation in governance must be increased.

Professor Pring also argues that these principles will require increased regulation at the national, local and international levels.<sup>15</sup>

The single most important feature of sustainable development is its requirement that environmental, social and cultural factors must be linked to, considered with and integrated into all economic development planning and implementation.<sup>16</sup>

The ABA has adopted a policy resolution supporting sustainable development. *See* Appendix A, August 2003 Resolution concerning Sustainable Development.

## **2.5 Right to Develop.**

The right to develop includes two rights: One is the right of individual states to control their own economies and development, including exploiting their environment and resources; and second, that “states and individual people have a right to expect a minimum level of economic development or wealth.”<sup>17</sup> Rio Principle 3 states: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”<sup>18</sup>

However, Rio Principle 4 holds: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”<sup>19</sup>

---

<sup>14</sup> The “precautionary approach” is set forth in Rio Article 15, while the “precautionary principle” is less strictly defined.

<sup>15</sup> *Sustainable Development: Historical Perspectives and Challenges for the 21st Century*, in UN Development Program & UN Revolving Fund for Natural Resources Exploration, Proceedings of the Workshop on the sustainable Development of Non-Renewable Resources Towards the 21st Century (1998), George (Rock) Pring.

<sup>16</sup> Nanda/Pring, §2.14, at 27.

<sup>17</sup> Nanda/Pring, §2.15, at 27.

<sup>18</sup> *Id.*, at 28.

<sup>19</sup> Needs cite to Rio Conference.

## **2.6 Right to a Clean, Healthful Environment.**

Section 101(c) of the United States National Environmental Policy Act states in part: “The Congress recognizes that each person should enjoy a healthful environment...” Although the United States has enacted numerous laws to protect the public health and environment, courts in the United States have not created this as an express legal right.<sup>20</sup> Article 3 of the 1948 UN Declaration of Human Rights states: “Everyone has the right to life ...”<sup>21</sup> Stockholm Principle 1 declares “Man has a fundamental right to . . . adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being . . . .”

Rio Principle 1 holds that “human beings are at the centre of concerns about sustainable development. They are entitled to a healthy and productive life in harmony with nature.” Although some experts believe that the right to a healthful environment is becoming an international human right, it remains largely an aspirational goal.<sup>22</sup> However, certain countries, Mexico, Argentina, Chile, India, South Africa and Indonesia, among others, have incorporated the concept of a healthful environment into their Constitutions.<sup>23</sup>

## **2.7 Environmental Justice: Inter-generational and Intra-generational Equity.**

Environmental justice is made up of two principles: (1) intra-generational equity, that is, equitable treatment within the current generation, and (2) inter-generational equity, that is, the equitable treatment between generations. Professor Edith Brown Weiss has proposed three basic principles for intergenerational equity:

First, each generation should be required to conserve the diversity of the natural and cultural resource base .... Second, each generation should be required to maintain the quality of the planet so that it is passed on in no worse condition than the present generation received it. Third, each generation should provide its members with equitable rights of access to the legacy from past generations and should conserve this access for future generations.<sup>24</sup>

Rio Declaration Principle 3 endorses inter- and intra-generational equity values by calling on states to “equitably meet developmental and environmental needs of present and future

---

<sup>20</sup> *Id.*, §2.1.6, p. 28.

<sup>21</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Pt. I, Resolutions, at 71, U.N. Doc. A/810 (1948).

<sup>22</sup> Nanda/Pring, §2.1.6., at 29.

<sup>23</sup> Parvez Hassan, A Decade of Shehla Zia, ABA SEER International Environmental Law Committee Newsletter, vol.7, no. 2 at 13-14, 17 nn. 1,2 (May 2005) available at

<http://www.abanet.org/environ/committees/intenviron/archive/>; See also Human Rights and the Environment, Professor Dinah Shelton, Summary at <http://www.oas.org/council/cajp/docs/cp09488e05.doc>

<sup>24</sup> Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity 37-39 (1989).

generations.” Intra-generational equity is referenced in Rio Principles 5, 6, 7, 11, 14 and 20-22.<sup>25</sup>

## **2.8 Equitable Utilization of Shared Resources.**

Water courses, oceans, migrating wildlife, ecosystems, the atmosphere and the stratosphere are shared by one or more sovereign states.<sup>26</sup> The doctrine of “equitable and reasonable use” is based on a balancing of many equitable factors in addition to the first-in-time-first-in-right historic use rule. This principle has appeared in the 1997 UN Convention on International Watercourses which holds that states shall utilize shared international waters in “an equitable and reasonable manner” by balancing factors such as physical and ecological characteristics, social and economic needs, population needs, conservation, availability of alternatives, etc.<sup>27</sup> The principle of equitable utilization is not widely recognized in other areas such as atmosphere and wildlife.<sup>28</sup>

## **2.9 Conservation.**

Rio Principles 7 and 8 call upon states to cooperate “to conserve, protect and restore the health and integrity of the earth’s ecosystem and forgo “unsustainable patterns of production and consumption.” While conservation of resources appears to be a widely accepted internationally as an important goal, it has been adopted in binding form only in treaties with a discrete focus, such as conservation and preservation of natural areas, spectacular scenic wonders, endangered wildlife and plant species, etc.<sup>29</sup>

## **2.10 The Global Commons.**

The global commons are areas outside the boundaries of any state, such as high seas, the deep sea bed, Antarctica, and outer space, among others. Commentators have identified an emerging concept, the common heritage of humankind (CHH), which they define as areas and/or resources (1) beyond the jurisdiction and sovereignty of any state, (2) that exist for the common benefit of all, and (3) whose existence and use affects human beings around the world.<sup>30</sup> Several treaties have created CHH regimes including the 1967 Outer Space Treaty (“province of all mankind”), the 1979 Moon Treaty (“common heritage of mankind”), and the 1982 Law of the Sea Treaty (finding that the deep sea bed is “the common heritage of mankind”).

According to commentators, the defining aspects of an international “common heritage” resource are (1) it is free from sovereignty claims of individual nations, (2) it should be under global governance and management, (3) its use must be solely for peaceful purposes, (4) information about it should be shared, (5) its access and utilization is open, provided there is no

---

<sup>25</sup> *Id.*, at 31-32.

<sup>26</sup> Nanda/Pring, §2.1.8, at 32.

<sup>27</sup> Convention on the Law of the Non-navigational Uses of International Watercourses, May 21, 1997, G. A. Res. A-RES-51-229, 36 I.L.M. 700 (1997) (not yet in force); available at <http://www.un.org/law/ilc/texts/nnavfra.htm>.

<sup>28</sup> Nanda/Pring, §2.1.8, at 32.

<sup>29</sup> Nanda/Pring, §2.1.9, at 33.

<sup>30</sup> Nanda/Pring, §2.1.10, at 34

ecological harm, and (6) any economic benefit derived from it should be shared equitably by all states, not just the exploiter.<sup>31</sup>

## 2.11 Common Concern of Humankind

Certain commentators have also identified the “common concern of humankind” (CCH) as a counterpart to the CHH principle on the global commons and which argues that “the planet is ecologically interdependent and that humanity may have a collective interest (based on environmental concerns) in certain activities that take place or resources that are located wholly within state boundaries.”<sup>32</sup> According to its exponents, CCH means that the international community has the right and duty to take joint or separate action to prevent environmental harm which can adversely affect large segments of humanity. This includes examples such as ozone layer depletion, global climate change, extinction of endangered species, etc. CCH is in essence a doctrine of standing which would authorize states to take legal action on behalf of their citizens.<sup>33</sup>

Several international treaties have sought to protect resources that might be considered as CCH, for example, the 1992 UN Framework Convention on Climate Change<sup>34</sup> and the 1992 Convention on Biological Diversity.<sup>35</sup> The Montreal Ozone Protocol<sup>36</sup> and the Basel Hazardous Waste Convention<sup>37</sup> allow parties to challenge other parties’ noncompliance.<sup>38</sup> There is however insufficient international acceptance or legal practice to claim that customary international law now recognizes a broad CCH right exists for the international community to protect the environment generally other than the recognized global commons.<sup>39</sup>

## 2.12 Common But Differentiated Responsibilities (CBDR)

Developing nations believe their economies cannot afford the vast expense to develop environmental protection programs.<sup>40</sup> Rio Principle 7 acknowledged the dichotomy between developing nations and developed nations:

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

---

<sup>31</sup> *Id.*, §2.1.10 at 35, citing Christopher C. Joyner, *Comment, Legal Implications of the Concept of the Common Heritage of Mankind*, 35 Int’l & Comp. L. Q. 190, 192-195 (1986)

<sup>32</sup> Nanda/Pring, §2.1.11 at 36.

<sup>33</sup> *Id.*

<sup>34</sup> United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38 (1992), 31 I. L.M. 849 (1992), available at <http://www.unfccc.de/resource/convkp.html>.

<sup>35</sup> U.N. Doc. A/CONF.151/26 (vols. I-III) (1992)

<sup>36</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, opened for signature Sept. 16, 1987, effective Jan. 1, 1989, reprinted in 52 Fed. Reg. 47515 (1987), and in 26 I.L.M. 1541 (1987).

<sup>37</sup> The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 649

<sup>38</sup> The United States has ratified and implemented the Montreal Protocol through domestic laws and has ratified the United Nations Framework Convention on Climate Change, but the United States has not ratified the Basel Convention or the Biodiversity Convention.

<sup>39</sup> Nanda/Pring, §2.1.11, at 37.

<sup>40</sup> Nanda/Pring, §2.1.12.

environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressure their societies place on the global environment and of the technologies and financial resources they command.

Rio Principle 6 also calls for “special priority” to be given to “the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable ....” The CBDR Principle is gaining broader, but no means universal, acceptance. For example, the Kyoto Protocol on Climate Change provides specific greenhouse-gas-reduction requirements for developed countries only while establishing different reporting requirements for developed, developing and least developed countries.<sup>41</sup>

### **2.13 The Polluter-Pays Principle**

The polluter-pays principle arises out of mainstream economics and the argument that “prices for goods and services should internalize the full cost of their production including their cost to human health, environmental, natural resource, social, and cultural harms.”<sup>42</sup> The polluter-pays principle is set forth in Rio Principle 16: “National authorities should endeavor to promote . . . internationalization of environmental costs” so that “the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.” Like many of these principles, it is not yet universally accepted law in the international environmental law arena.<sup>43</sup>

### **2.14 State Responsibility and Liability**

There is a general principle of international law that states are responsible for violations or breaches of their duties or obligations under international law.<sup>44</sup> Both Stockholm Principle 22 and Rio Principle 23 contain “identical aspirations that states must cooperate to ‘develop further’ rules of liability and compensation.”<sup>45</sup>

### **2.15 Public Participation**

The right of citizens to participate is viewed as an essential component of sustainable development. Agenda 21 holds:

One of the fundamental prerequisites for the achievement of sustainable development is broad public participation and decision making .... This includes the need of individuals, groups and organizations to . . . participate in decisions, particularly those that potentially affect the communities in which they live and work

---

<sup>41</sup> *Id.*, at 39-40.

<sup>42</sup> Nanda/Pring, §2.1.13, at 40.

<sup>43</sup> *Id.*

<sup>44</sup> Nanda/Pring, §2.1.14, at 41.

<sup>45</sup> *Id.*, at 42.

[and to] . . . have access to information relevant to environment and development . . . [and] environmental protection measures.

Rio Principle 10 states:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

According to Nanda and Pring a “number of modern factors are accelerating the spread of public participation.”<sup>46</sup> These include:

1. The independence-democratization trends in the former Soviet block countries, Africa, Asia, and Latin America.
2. The adoption of the “sustainable development” principle in international environmental law.
3. The international NGO environmental movement and its insistence on political participation.
4. Incorporation of public participation requirements by major International Financial Organizations like the World Bank.
5. International human rights law recognition of political participation as a human right.
6. Increasing recognition of rights of indigenous peoples, local communities, and other previously marginalized groups, and
7. The Internet, which has greatly increased the public’s ability to obtain, analyze, and spread information and views.<sup>47</sup>

The recognition of a broad right to public participation in the United States started in the 1960s with Congress’ adoption of the Freedom of Information Act<sup>48</sup> and the amendments to the Administrative Procedure Act concerning government rulemaking.<sup>49</sup> Many federal and state environmental laws also have provisions for judicial review of final agency actions.<sup>50</sup>

---

<sup>46</sup> Nanda/Pring, § 2.2.1, at 44.

<sup>47</sup> *Id.*

<sup>48</sup> 5 U.S.C. § 552.

<sup>49</sup> 1225 U.S.C. § 553, *et seq.*

<sup>50</sup> *See, e.g.,* the federal Clean Water Act, 33 U.S.C. § 1369(b)(1).

Internationally, this issue gained prominence in the 1998 Aarhus Convention.<sup>51</sup> The importance of the Aarhus Convention, according to former UN Secretary General Kofi Annan, cannot be overstated:

The significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration .... As such it is the most ambitious venture in the area of “environmental democracy” so far undertaken under the auspices of the United Nations.<sup>52</sup>

The Aarhus Convention divided public participation into three distinct forms:

1. Access to information
2. Access to public participation and decision making
3. Access to justice.

#### **2.15.1 Access to Information**

The Aarhus Convention<sup>53</sup> is modeled on the United States’ Freedom of Information Act but focuses more exclusively on environmental concerns. It encompasses a number of articles including the broad goal of assuring “the right of every person of present and future generations to live in an environment adequate to his health or well being.” Article 2 of the Convention defines “environmental information” to include all aspects of the state of the environment and matters affecting it including economic analyses and assumptions as well as human health. Article 5.9 calls for states to implement centralized computerized national pollution inventory registries based on the model of the U.S. Toxic Release Inventory System. According to commentators, the Aarhus Convention is a “giant step in transparency and the effectiveness of individuals and NGOs can expect to have” in activities affecting their health and environment.<sup>54</sup>

#### **2.15.2 Public Participation in Decision-Making.**

Public participation provides the public the right to utilize the information that it obtains through access to information and to express its views, support, objections, etc. to the government.<sup>55</sup> While public participation was mentioned in the 1972 Stockholm Declaration, subsequent international agreements began routinely incorporating public participation elements, although the scope of this right varies.<sup>56</sup> The 1992 Rio Declaration, Principle 10 states:

---

<sup>51</sup> UN/ECE Convention on Access to Information, Public Participation and Decision-Making and Access to Justice to Environmental Matters, available at <http://www.unece.org/env/europe/pp/treatytext.htm>. The United States is not a party to the Aarhus Convention.

<sup>52</sup> Nanda/Pring, §2.2.1, at 46; See, <http://www.unece.org/env/pp>.

<sup>53</sup> The Aarhus Convention, supra, footnote 51.

<sup>54</sup> Nanda/Pring, §2.2.1.1, at 49.

<sup>55</sup> Nanda/Pring, §2.2.1.2 at 50.

<sup>56</sup> *Id.*, at 51.

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level each individual shall have . . . the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation . . . [Agenda 21 contains similar references.]<sup>57</sup>

In addition the 1993 NAFTA “Environmental Side Agreement”<sup>58</sup> “contains the most detailed public participation processes of any free trade treaty.”<sup>59</sup> The public participation provisions of the Aarhus Convention are also extensive, including requirements for states to

- Implement national procedures for public participation on a host of specific developments, including mining, energy, chemical, waste disposal, etc.; inform the public concerned early in the decisional process and in an adequate, timely, and effective manner;
- Specifically include environmental NGOs;
- Encourage private sector permit applicants to engage in dialogue with the public;
- Provide opportunities for public input;
- Take “due account” of public input in making the decision;
- Publicly announce the decision and the reasons therefore; and
- Include the public in legislative and administrative rule-making adoption.<sup>60</sup>

### 2.15.2 Access to Justice

According to commentators, access to justice in the international environmental law arena concerns “three different adjudication procedures”:

1. To challenge the refusal of access to information;
2. To seek prevention and/or damages for environmentally harmful activities; and
3. To enforce environmental laws directly.<sup>61</sup>

The 1992 Rio Declaration, Principle 10, states:

---

<sup>57</sup> See Agenda 21 ¶7.41b, 8.1, 23.2.

<sup>58</sup> North American Agreement on Environmental Cooperation (NAAEC, NAFTA’s “Environmental Side Agreement”), Sept. 14, 1993, U.S. – Can. – Mex., arts. 1(h), 2(1)(a), and numerous other articles, 32 I.L.M. 1480.

<sup>59</sup> Nanda/Pring, §2.2.1.2., at 51.

<sup>60</sup> *Id.*, at 51-52.

<sup>61</sup> *Id.*, §2.2.1.3, at 52.

Effective access to judicial and administrative proceedings including redress and remedy, shall be provided.<sup>62</sup>

Article 9 of the Aarhus Convention, Article 9 requires that states permit legal challenges to the substantive or procedural legality of any decision, act, or omission subject to the Convention, for example, regarding enforcement of national environmental laws. The last provision is “truly a groundbreaking provision internationally, akin to the ‘citizen suit’ or ‘citizen standing’ provisions typical in U.S. pollution laws.”<sup>63</sup> Most federal environmental laws in the United States provide for citizen suits to enforce those laws and legal rights to challenge both final agency action and inaction.<sup>64</sup>

### 2.15.3 Transboundary Impacts

The concept of transboundary impacts<sup>65</sup> is a substantive and procedural principle which cuts across all aspects of public participation and holds that states should treat both other states’ environments and people as well as they treat their own.<sup>66</sup> Substantively this concept seeks to stop one country from dumping its problems on another country’s environment. Rio Principle 14 says that states “should effectively cooperate to discourage or prevent the relocation and transfer to other states of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.”<sup>67</sup>

According to Nanda and Pring, procedurally, this concept “would require a state whose activities have trans-boundary environmental effects to provide the same public information, participation and justice-access rights to the affected citizens and interests in other states as it provides to its own people.”<sup>68</sup> Stockholm Principle 22 requires states “to cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction.” Some commentators argue that this right is currently found in treaty law as opposed to states’ internal law.<sup>69</sup>

### 2.16 Prior Notification, Consultation and Negotiation Duties.

According to certain commentators, the duty of “good neighborliness” has three sub principles where activities in one state could have had the potential to damage the environment outside of that state’s borders. Under this theory, the acting state is obliged to (1) give potentially affected states prior notification of the plans, then (2) engage in consultation or discussions of the plan, and “possibly even to” (3) negotiate in good faith alternatives to the plans<sup>70</sup> Rio Principle 19 holds that “states shall provide prior and timely notification and

---

<sup>62</sup> See also the 1993 Environmental Civil Liability Convention and the NAFTA Environmental Site Agreement.

<sup>63</sup> Nanda/Pring, § 2.2.1.3, at 53.

<sup>64</sup> See, e.g., federal Clean Water Act, 33 U.S.C. § 1365.

<sup>65</sup> Nanda and Pring refer to this as the concept of nondiscrimination. See Nand/Pring, § 2.2.1.4.

<sup>66</sup> *Id.*, §2.2.1.4, at 54.

<sup>67</sup> See also the 1978 UNEP Draft Principles on Shared Natural Resources and the 1986 WCED Experts Environmental Law Principles.

<sup>68</sup> Nanda/Pring, §2.2.1.4, at 54.

<sup>69</sup> Nanda/Pring, §2.2.1.4, at 55.

<sup>70</sup> Nanda/Pring, §2.2.2, at 55.

relevant information to potentially affected States on activities that may have a significant adverse trans-boundary environmental effect . . .” This principle is also reflected in the 1982 U.N. Convention on the Law of the Sea<sup>71</sup> and the 1997 U.N. Convention on International Water Courses.<sup>72</sup>

### **2.17 The Prevention Principle.**

The Pollution Prevention Principle requires anticipatory investigation, planning and action before undertaking activities which can cause environmental harm.<sup>73</sup> Many U. S. environmental laws, including the United States’ Pollution Prevention Act of 1990 and the Resource Conservation Recovery Act reflect strategies concerning pollution prevention (P2). The P2 concept can be found in Stockholm Principles 6 and 21 and Rio Principle 2.<sup>74</sup>

### **2.18 The Precautionary Principle or Approach.**

The Precautionary Principle attempts to address the scientific uncertainty underlying much of environmental regulation and public policy.<sup>75</sup> Rio Principle 15 incorporates the “precautionary approach,” although there is considerable debate concerning whether there is an international principle of precaution. Principle 15 states “where there 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.”

### **2.19 Duty to Conduct Environmental Impact Assessment.**

The Environmental Impact Assessment (EIA) process involves advanced investigation and analysis of proposed projects, plans, permits, policies, programs and other actions to fully inform decision makers and the public of potential environmental impacts, alternatives for achieving similar goals, and mitigation measures for reducing the impacts.<sup>76</sup> The U.S. National Environmental Policy Act pioneered this concept. Rio Principle 17 states there is an international obligation to adopt and implement EIA laws and programs at the national level and EIA is implied in Rio Principles 4 and 25.

### **2.20 Duty to Adopt Effective National Law and the Duty to Enforce**

International Environmental laws are only as effective as the states’ willingness to implement and enforce them.<sup>77</sup> Rio Principle 11 holds: “states shall enact effective environmental legislation” but it is qualified with the “common but differentiated responsibilities doctrine” holding that standards applied by developed countries may be inappropriate and too expensive for developing countries. International treaties generally must be implemented and

---

<sup>71</sup> UN Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982), 21 I.L.M. 1261 (1982), available at <http://www.un.org.Depts.los>.

<sup>72</sup> Convention on the Law of the Non-navigational Uses of International Watercourses, May 21, 1997, G. A. Res. A-RES-51-229, 36 I.L.M. 700 (1997) (not yet in force); available at <http://www.un.org/law/ilc/texts/nnavfra.htm>.

<sup>73</sup> Nanda/Pring, §2.2.3, at 57.

<sup>74</sup> *Id.*, at 57-58.

<sup>75</sup> Nanda/Pring, §2.2.4, at 58.

<sup>76</sup> Nanda/Pring, §2.2.5, at 60.

<sup>77</sup> Nanda/Pring, §2.2.6, at 60.

enforced through effective national laws. National capacity building is now widely recognized as necessary and is a feature of many modern treaty systems. National capacity building includes legislation, administration, institution building, management and enforcement systems, training of judges, prosecutors, investigators and other environmental officials, technology transfer, and funding.<sup>78</sup>

## **2.21 The Integration Principle.**

For environmental protection to work, “environmental considerations must be made an integral part of government and development decision making.”<sup>79</sup> The United States National Environmental Policy Act recognizes the importance of integrated decision making by requiring all U.S. agencies to “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts and planning and in decision making which may have an impact on man’s environment.”<sup>80</sup> Stockholm Principle 13 requires states to “adopt an integrated and coordinated approach to their development planning to ensure compatibility with environmental protection.”<sup>81</sup> Rio Principle 4 states the requirement that “environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”<sup>82</sup> Private sector business codes like the International Chamber of Commerce’s “Business Charter for Sustainable Development” use the concept of “integrated environmental management.”<sup>83</sup>

## **3.0 Supporting the Rule of Law Around the World**

One of the American Bar Association's goals is to support the rule of law around the globe. Toward that goal, for more than 15 years the ABA has implemented a broad array of programs in support of legal and judicial reform in transitioning countries around the world. Today, through these programs and projects and activities implemented by the ABA's Section of International Law, the ABA is supporting the efforts of judges, lawyers, legislators, government officials, legal educators, and non-governmental organizations around the world to build sustainable institutions that will promote and protect the rule of law into the 21st century. To coordinate these efforts, the ABA has established the Rule of Law Initiatives.

## **4.0 ABA-UNDP International Legal Resource Center**

### **4.1 Background**

The ABA-UNDP International Legal Resource Center “ILRC”, formerly the “Legal Resource Unit” was established in December 1999, based upon the common commitment of the American Bar Association and the United Nations Development Programme (“UNDP”) to support and promote good governance and the rule of law around the world. The mission of the ILRC is to provide a legal resource capability to serve UNDP global governance programs and

---

<sup>78</sup> *Id.*, at 61.

<sup>79</sup> Nanda/Pring, §2.2.7, at 62.

<sup>80</sup> 42 U.S.C. §4332(2)(a).

<sup>81</sup> Nanda/Pring, §2.2.7 at 62.

<sup>82</sup> *See, supra*, footnote 6.

<sup>83</sup> Nanda/Pring, §2.2.7, at 62

projects supporting legal reform and democratic institution building. The primary task of the ILRC is to assist UNDP Country Offices to identify candidates capable of providing legal advice, normally on a pro bono basis, on the drafting of legislation, judicial reform, building of legal institutions including professional groups and associations, and other legal dimensions of governance.

## **4.2 Areas of Work**

The ILRC-identified legal experts will support UNDP program countries in a wide array of substantive legal areas including, but not limited to:

- Reform of legal institutions and systems, including reform of constitutional frameworks
- Support to electoral bodies and drafting of electoral laws
- Improvement of legislative drafting and parliamentary practices
- Reform of public sector regulations and processes
- Strengthening anti-corruption measures
- Support for decentralization and strengthening of local institutions
- Development of the capacity of independent lawyers associations
- Legal education and judicial training
- Legal services to the indigent and underrepresented

## **4.3 Operation Philosophy**

The following philosophy guides the work of the ILRC:

- A. The ILRC will focus mainly on the identification of legal experts based upon requests from UNDP Country Offices and, in the case of UNDP's inter-country activities, from the appropriate UNDP Headquarters Units including Regional Bureaus.
- B. The ILRC will identify legal experts from a wide variety of sources in order to best serve UNDP program objectives in a given country bearing in mind language considerations, cultural norms and the legal traditions of the country to be assisted. In doing so, the ILRC will draw from the ABA's worldwide membership and will also network with the International Bar Association, and appropriate regional and national bar associations and professional organizations.
- C. The ILRC will promote the impartiality and neutrality inherently embodied in the UNDP, a multinational development agency, as two imperative components of

effective and sustainable development assistance in the often sensitive areas of policy dialogue and institutional development.

## **5.0 ABA Africa Law Initiative**

The ABA's Africa Law Initiative ("ABA-Africa") is a public service project of the ABA designed to provide assistance in support of legal reforms in Africa. To date ABA-Africa's work has supported rule of law reform by combating and documenting human rights abuses, providing continuing legal education for judges, lawyers and the police, and supporting governmental and NGOs with capacity building and sub-grants. ABA-Africa implements its programs through partnerships with bar associations, judges associations, ministries of justice, police and immigration agencies as well as NGOs.

Judicial independence is the bedrock of any meaningful judicial process. In Africa, lack of respect for and political interference with the judiciary continue to serve as challenges to the consolidation of judicial independence. Strong judges' and bar associations can serve as push back to interference with the judiciary. Through effective organizing and training, NGOs, judges' and bar associations can provide the appropriate political cover to ensure judges are permitted to engage in impartial fact-finding.

This council provides assistance throughout Africa, from short-term support in the form of seminars and legal workshops to long-term projects, including resident legal advisors, country wide judicial assessments and technical capacity building.

## **6.0 Asia Law Initiative**

The ABA's Asia Law Initiative ("ABA-Asia") is a public service project that provides technical assistance in support of legal reforms in the countries of Asia. Established in 1999, ABA-Asia has available to it the expertise and experience of the ABA's more than 400,000 members, as well as other legal experts in the United States and abroad, many of whom participate in ABA-Asia projects on a pro bono basis. ABA-Asia is therefore able to offer the highest level of practice expertise to address host countries' requests for assistance.

ABA-Asia is governed by a ten-member Council that includes U.S. Supreme Court Justice Anthony Kennedy and other distinguished American attorneys. The Council is chaired by Laura Stein, General Counsel of a Fortune 500 company. ABA-Asia also benefits from resources provided by an eleven-member advisory board that includes U.S. Court of Appeals for the Ninth Circuit Judge J. Clifford Wallace, Jerome A. Cohen of NYU School of Law and other notable attorneys.

While the ABA provides institutional support to ABA-Asia's project, funding to implement its projects comes from outside sources, including U.S. Government sources (e.g., The U.S. Agency for International Development ["USAID"] and the U.S. Department of State), and private sources, such as foundations. In addition, as part of the ABA, ABA-Asia is a party to a global cooperative agreement between USAID and the RIGHTS Consortium, a partnership of Freedom House, ABA, and the National Democratic Issue.

## **6.1 Forms in Which ABA-Asia Provides Assistance**

ABA-Asia provides assistance in a variety of forms, including:

- In-depth technical assistance projects coordinated by resident legal advisors who live and work in the host country on a long-term basis.
- Legal workshops and training programs conducted in the host country
- Specialized training programs conducted in the U.S.
- Assessments of and advice on proposed laws, procedural rules, and codes of ethics.
- Preparation of background materials and analysis on requested legal topics
- Formal assessments of a country's judicial reform efforts, of its legal profession reform efforts, and of its compliance with the International Covenant on Civil and Political Rights and the Convention on the Elimination of all Forms of Discrimination Against Women

## **6.2 ABA-Asia's Approach to Providing Assistance**

ABA-Asia adheres to the following principles in providing assistance:

- All projects are responsive to the needs and priorities of the countries of Asia, not those of U.S. participants and sponsors.
- All projects seeks to offer a comparative law perspective, in recognition of the fact that the American legal experience and traditions offer but one approach that participating countries may wish to consider.
- ABA-Asia seeks to establish effective partnerships among its project partners and other interested parties to ensure long-term impact and sustainability beyond the term of the project.
- ABA-Asia is a public service project and not a device for developing business opportunities. Accordingly, ABA-Asia has adopted strict ethical guidelines designed to ensure that technical advice offered by its participants is neutral and that conflicts of interest are avoided. Additionally, when feasible, participants in ABA-Asia projects serve on a pro bono basis.

## **7.0 Central European and Eurasian Law Initiative (CEELI)**

The Central Europe and Eurasian Law Initiative (CEELI) is the oldest and largest ABA program in support of legal and judicial reform in transitioning countries around the world.

CEELI is a public service project of the ABA that advances the rule of law in the world by supporting the legal reform process in Central and Eastern Europe, Eurasia and the Middle East. CEELI assistance is designed to be practical and ongoing, incorporating the following methods:

### **7.1 Resident Liaisons and Specialists**

CEELI provides lawyer Liaisons who reside in the host country for a period of one to two years. These liaisons work with the host country to identify legal reform priorities and coordinate CEELI's assistance.

CEELI currently has Liaisons stationed in Albania, Armenia, Belarus, Bosnia, Bulgaria, Croatia, Georgia, Kazakhstan, Kyrgyzstan, Macedonia, Moldova, Montenegro, Romania, Russia, Serbia, Slovakia, Tajikistan, Ukraine and Uzbekistan.

In response to requests for assistance in specialized areas of law, CEELI also provides U.S. legal experts for extended visits. These legal specialists have provided long-term assistance in Albania, Armenia, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, The Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Russia, Slovakia, Ukraine, and Uzbekistan on a variety of subjects, including constitutional drafting, court administration, foreign investment, white collar crime, legislative procedure, and local government.

### **7.2 Technical Legal Assistance Workshops and Training Programs**

CEELI has held hundreds of technical legal assistance workshops and training programs throughout the region. Held in the host countries, CEELI workshops typically focus on a particular area of the law or issue and involve the participation of experienced U.S. and West European lawyers or judges. Workshops are interactive, facilitating extended dialogue among participants, as well as providing assistance in legislative drafting, and systematic follow-up. Training programs focus on "train the trainer" techniques, in order to build indigenous training capacity. To date, CEELI has conducted more than 620 technical legal assistance workshops and training programs.

### **7.3 Legislative Assessments and Concept Papers**

CEELI also offers assistance by circulating draft laws in North America and Western Europe for comment. By relying primarily on ABA sections with appropriate expertise, CEELI has been able to provide expert assessments of more than 450 draft laws, including those addressing such key issues as antitrust, tax, foreign investment, criminal law, and land use, as well as the constitutions of fifteen countries. Legal assessments aid the legislative drafters by providing a critical analysis of the draft law, raising potential problem areas, and identifying areas not covered by the draft law.

Concept papers identify and discuss primary issues of law prior to the drafting process. The papers set forth alternative solutions to the issues raised and provide information regarding current trends in the law. The papers are written by working groups consisting of U.S. and foreign experts in the particular field.

#### **7.4 Regional Institution Building**

CEELI has played a vital role in creating and supporting indigenous institutions that seek to address local legal reform needs. In many cases, CEELI's work has focused on establishing new or strengthening existing institutions or training programs for local judiciaries. CEELI has also provided critical assistance to local bar groups in developing continuing legal education programs, to law students wishing to form student groups, to law faculty interested in modern teaching methods, and to women legal professionals seeking to form their own bar groups.

#### **8.0 Latin American Legal Initiatives Council (ABA/LALIC)**

The ABA Board of Governors created the Latin America & Caribbean Law Initiative Council ABA/LALIC (ABA/LALIC) has two primary roles. First, it offers support and coordination for projects initiated and managed by various other ABA entities doing work in Latin America. Second, ABA/LALIC has authority to initiate its own programs in the region, seek outside funding for such projects, and implement such projects once funding is obtained.

Although deeply committed to programmatic initiatives, ABA/LALIC is also able to function as a "think tank." It has the ability to reach out to a vast community of experts in the United States and abroad on a variety of issues. It recognizes that while the basic principles of justice and a democratic society are shared by many legal traditions, there is not one set model for democracy. Although certain components, such as independent judiciary and press, are essential to a democratic government, methods of advancing democracy must take into account a country's own legal traditions, historical experiences, and societal perceptions and trends. ABA/LALIC operates pursuant to four core values:

- A. As a general rule, all ABA international technical legal collaboration projects should be developed in response to an invitation from a host country or an international organization.
- B. The ABA aims to provide a comparative approach, and give neutral advice.
- C. The technical legal collaboration provided by the ABA is intended to be a public service activity, without private commercial objectives or benefits.
- D. Participants must abide by applicable conflict of interest guidelines.

The ABA recognizes today more than ever the importance of reaching out to, and working in partnership with, the legal community in Latin America. As such, it has appropriated basic operational funding for ABA/LALIC. The majority of the funds for ABA/LALIC's projects abroad are obtained from outside organizations. ABA/LALIC relies on local partners for the success of its initiatives. Local partners in each country provide technical know-how, and gauge the "pulse" of their country and its people.

ABA/LALIC is dedicated to collaborating with legal institutions throughout Latin America and the Caribbean in their ongoing efforts to strengthen the rule of law in this region of the world. ABA/LALIC maintains a database of experts in a variety of fields with an interest in serving in ABA/LALIC-sponsored projects.

## **9.0 American Bar Association Center for Human Rights**

The ABA Center for Human Rights was established by the ABA Board of Governors to serve as the coordinating entity within the ABA for issues respecting human rights. As the world's largest professional organization, the ABA speaks with an especially powerful and effective voice in advancing of the cause of human rights throughout the world.

The Center will work both within and outside of the ABA to enhance public education on human rights issues, to promote the Trial Observer Project and to coordinate the Rule of Law Letter Program. It will inform the ABA House of Delegates on human rights issues and ABA policy and it will provide technical assistance to outside organizations involved in the field.

## **10.0 Section of Environment, Energy, and Resources ("SEER") Activities**

### **10.1 Socialist Republic of Vietnam's Law on Environmental Protection – SEER International Environmental Law Committee**

This committee submitted comments on a proposed update of Vietnam's Law on Environmental Protection to the ABA-United Nations Development Program (UNDP) International Legal Resource Center. The update represented a comprehensive reworking of the country's 1993 environmental protection law, and incorporated decrees and implementation guidelines approved over the last decade. The committee's comments addressed environmental standards; hazardous waste management; environmental planning; poverty and the environment; liability and compensation; socialization of environmental protection activities; and the overall structure and scope of the law. The resulting legislation was presented to the Standing Committee of the National Assembly by Vietnam's Minister of Natural Resources and Environment, and endorsed by the Vice Chairman of the National Assembly Committee for Science, Technology and the Environment.

### **10.2 Transitional Islamic State of Afghanistan – SEER International Environmental Law Committee**

This committee, working with the ABA's Asia Law Initiative in partnership with the Afghan Embassy and the Center for International Management Education, suggested team leaders for the working group of experts that identified models for development of Afghanistan's environmental and natural resource laws, and proposed changes to those models that were consistent with the Afghan government's goals for the legislation. More recently, the committee formed a pro bono team to assist the Afghan government in development of environmental and natural resource laws. This team was part of the Afghanistan Transitional Commercial Law Project, and operated under the direction of the ABA's Asia Law Initiative and the Center for International Management Education. The team met in 2004 with the Afghan Minister of Irrigation and Environment and members of his staff. He identified several projects as priorities for the team's input, such as providing commentary on Afghanistan's draft environmental framework law and proposing language to strengthen the environmental article in the nation's draft constitution. The Minister also asked the team to consider revisions to the existing water law and to review environmental impact assessment models the nation may wish to consider.

The team provided the requested assistance, and thereafter reviewed and commented on drafts of documents forwarded by the Afghan government.

### **10.3 People's Republic of China –SEER International Energy & Resources Transactions Committee Working With the ABA-Asia Law Initiative**

The presidents of the ABA and the All China Lawyers Association signed a 5-year Memorandum of Understanding on Dec. 6, 2006.<sup>84</sup> The Chair of SEER's International Energy & Resources Transactions Committee, has worked with the ABA Asia Law Initiative and Chinese government agencies in the past on aspects of the rule of law and environmental review. The ABA-Asia Law Initiative's web site offers the following description of that group's activities: "In October 2005, ABA-Asia convened a training workshop on environmental public interest litigation with the Center for Legal Assistance to Pollution Victims ("CLAPV") and the Shandong Lawyers' Association, in Jinan, Shandong Province. Participants were drawn from a nationwide group of lawyers and judges, including the leading environmental advocates in China. The program's practical focus was on how to use existing procedural tools under Chinese law to develop successful advocacy strategies, including, but not limited to, litigation, media coverage, policy adoption and implementation, and public participation, for better enforcement of environmental laws. Patti Goldman, Managing Attorney of the Seattle office of EarthJustice, an American non-profit public interest law firm dedicated to protecting the environment and to defending the right of all people to a healthy environment, shared expertise and provided comparative insight into U.S. experiences developing and applying public interest litigation tools to protect the environment."<sup>85</sup> The Environmental Issues Working Group believes there would be additional opportunities for ABA work associated with the Rule of Law under the ABA-All China Lawyers Association Memorandum of Understanding.

### **11.0 Recommendations to ABA from the Environmental Issues Working Group**

In the past, many environmental challenges arose and could be resolved by agreements between two neighboring countries, or among a handful of nations sharing a threatened or impaired common resource. Some emerging environmental problems defy such localized resolution, because their cause and effect are widespread, if not global. The Working Group proposes that the ABA evaluate what lessons can be derived from agreements containing localized commitments and impact, and what new strategies and mechanisms are required to address broader problems. This approach need not be entirely separate from the case study suggestion above; those case studies could inform this approach. The objective of this approach would be to contribute to the dialogue on what is needed to solve "global" environmental problems, without becoming enmeshed in the complex details that characterize all such problems. Specifically, the Environmental Issues Working Group recommends that:

- 11.1** The Environmental Issues Working Group be directed to confer with the United States Department of State to determine what, if any, additional opportunities may

---

<sup>84</sup> See [http://www.abanet.org/abanet/media/release/news\\_release.cfm?releaseid=56](http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=56)

<sup>85</sup> See <http://www.abanet.org/aba-asia/projects/china.shtml#public%20interest>.

exist for cooperation to achieve the Rule of Law in the environmental field, and to seek its input on those mentioned in this White Paper.

- 11.2 The ABA President establish a task force to evaluate the existing array of ABA Rule of Law programs that have environmental aspects for the purpose of discerning concrete areas where future ABA efforts could be focused. The task force would not only include members of ABA entities with environmental responsibilities, led by SEER, the Standing Committee on Environmental Law, International, Business Law, TIPS, and IRR; but also the IBA, CBA and other non-attorney entities such as UNEP.
- 11.3 The task force would develop an action plan, and ABA entities engaged in formal activities involving the Rule of Law in the environmental field would be instructed to report periodically on the status and outcome of those efforts, so that a clearinghouse can be maintained for such information.
- 11.4 After the action plan is developed, the ABA convene a conference to explore opportunities and challenges relating to the Rule of Law in the environmental field, ensuring that the program presents a balanced cross-section of viewpoints.
- 11.5 If warranted by the action plan or the findings of such a conference, that resolutions be prepared for consideration by the appropriate ABA Sections, Divisions, Forums and Committees, and ultimately by the House of Delegates, related to the Rule of Law in the environmental field.
- 11.6 The ABA encourage and assist in the development of Internet-based educational tools furthering the Rule of Law in the environmental field.

## **12.0 Working Group Members – Rule of Law and Environmental Issues.**

*Lauren J. Caster*, Fennemore Craig, Phoenix, AZ

*Lee A. DeHihns, III*, Alston & Bird, LLP, Atlanta, GA

*Benjamin E. Griffith*, Griffith & Griffith, Cleveland, MS

*Sheila Slocum Hollis*, Duane Morris, LLP, Washington DC

*Howard Kenison*, Lindquist & Vennum, Denver, Colorado, Chair

March, 2007

## APPENDIX A

### **ABA POLICY RESOLUTIONS RELATING TO ENVIRONMENTAL LAW AND NATURAL RESOURCES LAW SUBJECTS**

As of March 2007<sup>86</sup>

August 2005: Encourages Congress and the President to take specific legislative, regulatory and other actions necessary to improve the structure of our country's domestic management and regulation of its marine resources in order to better protect the integrity of its marine ecosystems and to ensure ecologically sustainable use and development of its marine resources. (*NATIONAL OCEANS POLICY*)

August 2005: Urges Congress and the President to take specific legislative, regulatory and other actions necessary to improve the nation's domestic management and regulation of its marine resources for the benefit of present and future generations. (*PROTECTION OF MARINE RESOURCES*)

August 2005: Urges Congress and the President to promote effective international efforts to protect the world's marine ecosystems and ensure the ecologically sustainable use and development of the world's marine resources. (*OCEANS – INTERNATIONAL PROTECTIONS FOR MARINE ECOSYSTEMS*)

August 2003: urges Congress and the Administration to elevate protection of the environment of the U.S. to its highest level by enacting legislation elevating the U.S. Environmental Protection Agency to Cabinet-level status. (*ELEVATION OF USEPA TO CABINET STATUS*)

August 2003: recognizes that good governance and the rule of law are essential to achieving sustainable development; reaffirms its 1991 commitment to SD, and adopts the internationally accepted concept of SD, as recognized at the 1992 UN Conference on Environment and Development; encourages governments, including in the U.S., as well as businesses, NGOs and other entities, to promote sustainable development, including by adopting and implementing appropriate measures with respect to their own facilities and activities; urges the U.S. government to meet the targets and timetables contained in the Johannesburg Plan of Implementation adopted at the September 2002 World Summit on Sustainable Development, that are applicable to the United States and to which the United States agreed; resolves that the U.S. should enter into appropriate partnerships with governments, businesses, nongovernmental organizations, and other entities, to help foster sustainable development and to help achieve the targets and timetables to which the United States agreed; calls on the ABA to consider and promote sustainable development principles in the work of its entities, and encourage communication and cooperative action among them to better understand and promote the principles of sustainable development in relevant fields of law; and urges international, state,

---

<sup>86</sup> The ABA Policies listed in this Appendix A from August 1974 to the present remain active. ABA Policies prior to August 1974 may have been, and are presumed to be, archived.

local, tribal, and territorial bar associations to adopt similar resolutions. (*SUSTAINABLE DEVELOPMENT*)

August 2002: endorses the use of negotiation and settlement processes to resolve Indian reserved water right claims provided the concerned Indian Tribes elect to pursue such processes, as well as availability of adequate technical resources as an important precondition for achieving successful settlements, and urges Congress and the administration to support these settlement processes. (*INDIAN WATER RIGHT CLAIMS*)

February 2002: supports prompt ratification and implementation by the U.S. of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (*PRIOR INFORMED CONSENT*)

February 2002: supports prompt ratification and implementation by the U.S. of the Stockholm Convention on Persistent Organic Pollutants. (*POPS*)

August 2001: recommends that federal, state, local and territorial legislative bodies, departments and agencies responsible for environmental protection adopt and implement legal and policy incentives designed to support and encourage businesses, governmental agencies, and other entities subject to environmental regulation to implement voluntary environmental management systems (EMS); and encourages those bodies as well as businesses, governmental agencies and other entities subject to environmental regulation to recognize and champion voluntary EMS as an increasingly important means of enhancing compliance assurance and environmental stewardship supplementing existing and future environmental control regulations and enforcement. (*ENVIRONMENTAL MANAGEMENT SYSTEMS*)

August 2001: supports the greater use of “ombuds” to receive, review and resolve complaints involving public or private entities and endorses the “Standards for the Establishment and Operation of Ombuds Offices” dated August 2001. (*OMBUDS*)

August 1999: recommends that Congress promote the economic use of properties affected by environmental contamination, and reduce unnecessary litigation, by enacting legislation providing that upon the affected property's entry into and compliance with a State brownfields program, there should be no additional liability to the federal government or any other person under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, and that States be permitted to undertake alternative approaches to facilitate brownfields re-use, provided that the State in which the property is located takes certain public notice, clean-up, and resource allocation actions. (*BROWNFIELDS REDEVELOPMENT*)

August 1995: recommends incorporation of all appropriate scientific knowledge in governmental environmental decision-making, supports research and dissemination of results where scientific consensus is lacking, and urges designation of a scientific body to: assess knowledge, identify issues requiring further research and disseminate the results of such research. (*SCIENCE AND THE ENVIRONMENT*)

February 1995: promotes meaningful and effective involvement of all affected stakeholders and interests through public participation provisions of environmental laws and international environmental agreements and treaties and express authority for government to pursue innovative public participation approaches; urges fuller use of the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act and similar procedures at the state level and indefinite reauthorization of these statutes with certain clarifications. (*PUBLIC PARTICIPATION*)

February 1994: recommends changes in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) specifically in allocation of responsibility and liability, and clean-up procedures (*SUPERFUND REFORM*)

August 1993: urges efforts by federal, state and local governments, law schools and bar associations, and appropriate legislative and administrative changes, to achieve environmental equity for low-income and/or minority populations. (*ENVIRONMENTAL JUSTICE*)

February 1993: supports the efforts of the governments of the U.S., Canada and Mexico to establish, through NAFTA, principles, rules, procedures and institutions for conduct of trade and other economic relations among the participating countries designed to provide transparency, predictability, fairness and due process (*NAFTA*)

August 1991: urges international efforts to ensure that actions taken or within the control of the United Nations and/or each nation take into account preservation and protection of the environment for present and future generations ("*ABIGAIL*" - *GLOBAL ENVIRONMENT*)

August 1991: calls for investigation and prosecution of any Iraqi war crimes. Report includes harm to the environment as an example of a war crime. (*WAR CRIMES*)

February 1991: calls for clarification of the "security interest" under CERCLA by EPA and Congress, particularly as related to lenders, and participation by all concerned parties in any proceedings related to changes in the rules. (*CERCLA: LENDERS*)

February 1990: with respect to relevant federal legislation, supports exemptions for all fiduciaries under CERCLA (*CERCLA: FIDUCIARY LIABILITY*)

August 1976: supports participation in administrative and judicial proceedings by motivated and expert parties (*PUBLIC INTERVENTION/CITIZEN PARTICIPATION IN DECISION-MAKING*)

February 1974: recommends maintaining environmental standards during the energy crisis (*ENVIRONMENTAL CONTROLS*)

August 1974: recommends allowing the U.S. EPA to relax compliance standards temporarily (*EPA COMPLIANCE SCHEDULES*)

August 1974: supports legislation encouraging mining of public lands with regard to environmental protection (*MINING LAW REVISION*)

August 1974: urges amendment of the Clean Air Act to exempt new facilities or pollution control equipment from more stringent standards (*CLEAN AIR ACT*)

**The following ABA Policies may have been, and are presumed to be, archived:**

August 1973: urges formulation of a comprehensive national policy on the use of American mineral resources (*MINERAL POLICY*)

August 1973: support U.S. governmental action to protect against foreign appropriation of U.S.-owned mineral deposits abroad (*PRIVATE U.S. INVESTMENT IN FOREIGN MINERALS*)

August 1973 and 1972: supports creation of a federal Department of Energy and Natural Resources (*DEPARTMENT OF ENERGY*)

August 1972: supports a series of guidelines giving private citizens and organizations standing to sue for equitable relief to enforce environmental quality standards (*CITIZEN SUITS*)

August 1972: supports establishment of administrative procedures by environmental agencies to allow public participation at the earliest possible stages of administrative decision-making (*PUBLIC PARTICIPATION IN ADMINISTRATIVE DECISIONS*)

August 1972: supports U.S. ratification of the Convention on Civil Liability for Oil Pollution Damage, and of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (*OIL POLLUTION TREATIES*)

August 1972: urges that congressional mandated studies to achieve water quality use a systematic interdisciplinary approach, including the fields of law, economics, ecology, sociology, regional planning, engineering and architecture (*WATER QUALITY STUDIES*)

February 1972: supports a set of principles, including use of an effluent water pollution control standard, use of criminal penalties and civil remedies and emphasis on the role of the states in enforcement (*WATER POLLUTION*)

February 1972: supports legislation to preserve the historic role of the states in water resource development (*WATER RESOURCE DEVELOPMENT*)

February 1971: study effects of power plants and other facilities on the environment (*INDUSTRIAL FACILITIES*)

1971: supports a series of principles, including continued federal ownership of public lands in all but exceptional cases, coordination of responsibility and comprehensive planning in cooperation with state and local governments, permission of the maximum number of compatible uses of public lands, security of investment for users of public lands, and adequate environmental protections and administrative procedures (*PUBLIC LANDS POLICIES*)