

AMERICAN BAR ASSOCIATION
TASK FORCE ON INTERNATIONAL RULE OF LAW SYMPOSIA
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES
STANDING COMMITTEE ON ENVIRONMENTAL LAW
SECTION OF STATE AND LOCAL GOVERNMENT LAW
RULE OF LAW INITIATIVE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association urges governments, businesses,
- 2 nongovernmental organizations and other organizations to consider and integrate Rule of Law
- 3 initiatives with global environmental issues.

REPORT

The American Bar Association has established as Goal VIII of the Association's Mission Statement and Goals: To advance the rule of law in the world. The Association has activities underway to advance Goal VIII, which are collectively referred to as the "Rule of Law Initiative."

In August, 2003 the American Bar Association House of Delegates adopted a Resolution supporting the concept of Sustainable Development, which resolved, *inter alia*, that the ABA recognized that "good governance and the rule of law are essential to achieving sustainable development" and that the ABA should "consider and promote sustainable development principles in the work of its entities ... to better understand and promote the principles of development in the relevant fields of law."

The three years since the sustainable development Resolution have seen a dramatic rise in global concerns regarding the planet's environment. In 2005, the United Nations Environment Programme ("UNEP") issued *A Report of the Millennium Ecosystem Assessment: Ecosystems and Human Well-Being*. The Millennium Report concluded that, over the past 50 years, humans have changed ecosystems "more rapidly and extensively than in any comparable period of time in human history ... This has resulted in a substantial and largely irreversible loss in the diversity of life on Earth." The Report also found that the "degradation of ecosystem services could grow significantly worse during the first of this century..." The Report concluded that the challenge of reversing the degradation of the ecosystems will "involve significant changes in policies, institutions and practices that are not currently underway."

In February 2007, the Intergovernmental Panel on Climate Change concluded that advances in climate modeling now give "scientists very high confidence" of how human activities are causing global warming. *Contribution of Working Group I to the Intergovernmental Panel on Climate Change, Climate Change 2007: the Physical Science Basis, February 2007*. In a second report, the IPCC concluded that "many natural systems are being affected by regional climate changes, particularly temperature increases." *Working Group II Contribution to the Intergovernmental Panel on Climate Change, Fourth Assessment Report, Climate Change 2007: Climate Change Impacts, Adaptation and Vulnerability, Summary for Policymakers, April 6, 2007*, at 2. Moreover, the Summary concluded that "it is likely that anthropogenic warming has had a discernible influence on many physical and biological systems." *Id.* at 3.

UNEP's fourth annual report on the changing global environment identified several global environmental problem including climate change, the vulnerability of marine diversity outside of national jurisdictions, and the trans-boundary movement of chemical and hazardous wastes. *2007 Global Environment Outlook Yearbook*.

While the world's scientific understanding of the impacts of human activities on changes in the global environment and ecosystems improved, the ABA was, independently, increasing its efforts to implement Goal VIII of the ABA's mission statement and goals: To advance the rule of law in the world.

These two developments were brought together in September, 2006, when the ABA and the International Bar Association convened a Rule of Law Symposium in Chicago and included environmental issues as a key topic. Following the 2006 Chicago Symposium, ABA President Karen Mathis appointed six working groups, including a Working Group on Environmental Issues, to review existing ABA policies and resolutions as they relate to Rule of Law around the world.

In April 2007, in New York City, President Mathis convened a second International Rule of Law Symposium: A Plan for Action. The Environmental Issues Working Group prepared and presented a white paper at this second Symposium: *Environmental Issues and the Rule of Law*. As a “plan of action,” President Mathis requested that the Environmental Issues Working Group develop a proposed Resolution that would establish ABA policy to integrate and consider environmental issues into all ABA Rule of Law initiatives and activities.

The following sections drawn from the *Environmental Issues and the Rule of Law* White Paper support the Report and Recommendation are hereby incorporated in this Report.

1.0 Introduction

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.¹ 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.

¹ 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.

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2.0 Fundamental Principles²

A. 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.”³

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.⁴

B. 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.⁵

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

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

² 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.

³ 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).

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

⁵ *Id.*, Principle 24.

⁶ 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”).

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

C. 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.⁸ 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.⁹

D. Sustainable Development

Sustainable development is one of the most significant developments in international environmental law.¹⁰ Defining sustainability remains uncertain and controversial.¹¹ 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.”¹² 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.”¹³ 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:

- (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 Nanda/Pring, §2.1.2.

⁸ Stockholm, Principle 21; Rio, Principle 2.

⁹ 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*).

¹⁰ Nanda/Pring, §2.1.4.

¹¹ *Id.*

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

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

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- (7) International cooperation is essential
- (8) The precautionary principle should be applied¹⁴
- (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.¹⁵

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.¹⁶

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

E. 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.”¹⁷ 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.”¹⁸

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.”¹⁹

F. 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.²⁰ Article 3 of the 1948 UN Declaration of Human Rights states: “Everyone has the right to life ...”²¹ Stockholm Principle

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

¹⁵ *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.

¹⁶ Nanda/Pring, §2.14, at 27.

¹⁷ Nanda/Pring, §2.15, at 27.

¹⁸ *Id.*, at 28.

¹⁹ Needs cite to Rio Conference.

²⁰ *Id.*, §2.1.6, p. 28.

²¹ 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).

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.²² However, certain countries, Mexico, Argentina, Chile, India, South Africa and Indonesia, among others, have incorporated the concept of a healthful environment into their Constitutions.²³

G. 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.²⁴

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 generations.” Intra-generational equity is referenced in Rio Principles 5, 6, 7, 11, 14 and 20-22.²⁵

H. Equitable Utilization of Shared Resources

Water courses, oceans, migrating wildlife, ecosystems, the atmosphere and the stratosphere are shared by one or more sovereign states.²⁶ 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

²² Nanda/Pring, §2.1.6., at 29.

²³ 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>

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

²⁵ *Id.*, at 31-32.

²⁶ Nanda/Pring, §2.1.8, at 32.

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alternatives, etc.²⁷ The principle of equitable utilization is not widely recognized in other areas such as atmosphere and wildlife.²⁸

I. 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.²⁹

J. 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.³⁰ 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 ecological harm, and (6) any economic benefit derived from it should be shared equitably by all states, not just the exploiter.³¹

K. 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.”³² 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

²⁷ 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>.

²⁸ Nanda/Pring, §2.1.8, at 32.

²⁹ Nanda/Pring, §2.1.9, at 33.

³⁰ Nanda/Pring, §2.1.10, at 34.

³¹ *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)

³² Nanda/Pring, §2.1.11 at 36.

a doctrine of standing which would authorize states to take legal action on behalf of their citizens.³³

Several international treaties have sought to protect resources that might be considered as CCH, for example, the 1992 UN Framework Convention on Climate Change³⁴ and the 1992 Convention on Biological Diversity.³⁵ The Montreal Ozone Protocol³⁶ and the Basel Hazardous Waste Convention³⁷ allow parties to challenge other parties' noncompliance.³⁸ 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.³⁹

L. Common But Differentiated Responsibilities (CBDR)

Developing nations believe their economies cannot afford the vast expense to develop environmental protection programs.⁴⁰ 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 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.⁴¹

³³ *Id.*

³⁴ 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>.

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

³⁶ 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).

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

³⁸ 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.

³⁹ Nanda/Pring, §2.1.11, at 37.

⁴⁰ Nanda/Pring, §2.1.12.

⁴¹ *Id.*, at 39-40.

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M. 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.”⁴² 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.⁴³

N. 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.⁴⁴ Both Stockholm Principle 22 and Rio Principle 23 contain “identical aspirations that states must cooperate to ‘develop further’ rules of liability and compensation.”⁴⁵

O. 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 [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.”⁴⁶ These include:

⁴² Nanda/Pring, §2.1.13, at 40.

⁴³ *Id.*

⁴⁴ Nanda/Pring, §2.1.14, at 41.

⁴⁵ *Id.*, at 42.

⁴⁶ Nanda/Pring, § 2.2.1, at 44.

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.⁴⁷

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 Act⁴⁸ and the amendments to the Administrative Procedure Act concerning government rulemaking.⁴⁹ Many federal and state environmental laws also have provisions for judicial review of final agency actions.⁵⁰

Internationally, this issue gained prominence in the 1998 Aarhus Convention.⁵¹ 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.⁵²

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.

⁴⁷ *Id.*

⁴⁸ 5 U.S.C. § 552.

⁴⁹ 1225 U.S.C. § 553, *et seq.*

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

⁵¹ 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.

⁵² Nanda/Pring, §2,2,1, at 46; *See*, <http://www.unece.org/env/pp>.

i. Access to Information

The Aarhus Convention⁵³ 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.⁵⁴

ii. 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.⁵⁵ 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.⁵⁶ The 1992 Rio Declaration, Principle 10 states:

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.]⁵⁷

In addition the 1993 NAFTA "Environmental Side Agreement"⁵⁸ "contains the most detailed public participation processes of any free trade treaty."⁵⁹ 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;

⁵³ The Aarhus Convention, *supra*, footnote 51.

⁵⁴ Nanda/Pring, §2.2.1.1, at 49.

⁵⁵ Nanda/Pring, §2.2.1.2 at 50.

⁵⁶ *Id.*, at 51.

⁵⁷ See Agenda 21 ¶7.41b, 8.1, 23.2.

⁵⁸ 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.

⁵⁹ Nanda/Pring, §2.2.1.2., at 51.

- 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.⁶⁰

iii. 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.⁶¹

The 1992 Rio Declaration, Principle 10, states:

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

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. pollutions laws.”⁶³ 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.⁶⁴

P. Transboundary Impacts

The concept of transboundary impacts⁶⁵ 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.⁶⁶ 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

⁶⁰ *Id.*, at 51-52.

⁶¹ *Id.*, §2.2.1.3, at 52.

⁶² See also the 1993 Environmental Civil Liability Convention and the NAFTA Environmental Site Agreement.

⁶³ Nanda/Pring, § 2.2.1.3, at 53.

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

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

⁶⁶ *Id.*, §2.2.1.4, at 54.

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to other states of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.”⁶⁷

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.”⁶⁸ 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.⁶⁹

Q. 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.⁷⁰ Rio Principle 19 holds that “states shall provide prior and timely notification and 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 Sea⁷¹ and the 1997 U.N. Convention on International Water Courses.⁷²

R. The Prevention Principle

The Pollution Prevention Principle requires anticipatory investigation, planning and action before undertaking activities which can cause environmental harm.⁷³ 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 2.⁷⁴

S. The Precautionary Principle or Approach

The Precautionary Principle attempts to address the scientific uncertainty underlying much of environmental regulation and public policy.⁷⁵ Rio Principle 15 incorporates the “precautionary approach,” although there is considerable debated concerning whether there is an

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

⁶⁸ Nanda/Pring, §2.2.1.4, at 54.

⁶⁹ Nanda/Pring, §2.2.1.4, at 55.

⁷⁰ Nanda/Pring, §2.2.2, at 55.

⁷¹ 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>.

⁷² 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>.

⁷³ Nanda/Pring, §2.2.3, at 57.

⁷⁴ *Id.*, at 57-58.

⁷⁵ Nanda/Pring, §2.2.4, at 58.

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.”

T. 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.⁷⁶ 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.

U. 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.⁷⁷ 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 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.⁷⁸

V. The Integration Principle

For environmental protection to work, “environmental considerations must be made an integral part of government and development decision making.”⁷⁹ 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.”⁸⁰ Stockholm Principle 13 requires states to “adopt an integrated and coordinated approach to their development planning to ensure compatibility with environmental protection.”⁸¹ 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.”⁸² Private sector business codes like the International Chamber of Commerce’s “Business Charter for Sustainable Development” use the concept of “integrated environmental management.”⁸³

⁷⁶ Nanda/Pring, §2.2.5, at 60.

⁷⁷ Nanda/Pring, §2.2.6, at 60.

⁷⁸ *Id.*, at 61.

⁷⁹ Nanda/Pring, §2.2.7, at 62.

⁸⁰ 42 U.S.C. §4332(2)(a).

⁸¹ Nanda/Pring, §2.2.7 at 62.

⁸² *See, supra*, footnote 6.

⁸³ Nanda/Pring, §2.2.7, at 62

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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, including the ABA-UNDP International Legal Resource Center, the ABA Africa Law Initiative, the Asia Law Initiative, Central European and Eurasian Law Initiative (CEELI), the Latin American Legal Initiatives Council (ABA/LALIC) and the American Bar Association Center for Human Rights as well as several SEER activities involving updates to Vietnam's Law on Environmental Protection and assistance to the Transitional Islamic State of Afghanistan 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.

4.0 Conclusion

This resolution is necessary to clearly and affirmatively establish that the ABA supports integration and consideration of environmental issues.

Respectfully submitted,

Mark S. Ellis, Co-Chair
DiAnna P. Kempe, Co-Chair
Robert A. Stein, Co-Chair
Task Force on International Rule of Law Symposia

Lauren J. Caster, Chair
Section of Environment, Energy & Resources

R. Kinnan Goleman, Chair
Standing Committee on Environmental Law

Edward Joseph Sullivan, Chair
Section of State and Local Government Law

August 2007

GENERAL INFORMATION FORM

Submitting Entities: Task Force on International Rule of Law Symposium; Section of Environment, Energy, & Resources; Standing Committee on Environmental Law; Section of State and Local Government Law

Submitted By: Mark S. Ellis, Co-Chair, DiAnna P. Kempe, Co-Chair, Robert A. Stein, Co-Chair; Lauren J. Caster, Chair; R. Kinnan Goleman, Chair; Edward Joseph Sullivan, Chair, respectively

1. Summary of Recommendation(s).

Encourages the American Bar Association to urge governments, businesses, nongovernmental organizations and other organizations to integrate and consider Rule of Law Initiatives with global environmental issues.

2. Approval by Submitting Entity.

Approved by the Task Force on International Rule of Law Symposium on April 16, 2007 at International Rule of Law Symposium, A Plan for Action, New York City; Section of Environment, Energy, & Resources Council on May 4, 2007, Santa Fe, New Mexico; the Standing Committee on Environmental Law approved by email week of May 7, 2007; and the Section of State and Local Government Law approved by email week of May 7, 2007.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

In 2003 the ABA adopted a policy resolution reaffirming the ABA's 1991 commitment to sustainable development, and further encouraging governments, businesses and nongovernmental entities to promote sustainable development and recognizing that good governance and the rule of law are essential to achieving sustainable development.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

In 1993 the Association adopted a resolution supporting NAFTA and procedures and institutions for the conduct of trade in North America. In 1995 the ABA adopted a resolution promoting meaningful and effective involvement of all affected stakeholders and interest through the public participation provisions of environmental laws, international environmental agreements and treaties. In 2003 the Association adopted a policy resolution reaffirming the ABA's 1991 commitment to sustainable development, and further encouraging governments, businesses and nongovernmental entities to promote sustainable development and recognizing that good governance and the rule of law are essential to achieving sustainable development.

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5. What urgency exists which requires action at this meeting of the House?

The Association's Rule of Law Initiative is actively involved in advancing the rule of law issues, including an independent judiciary, around the globe. Environmental issues, such as global climate change and ecosystem degradation, affect citizens of each country on the planet. Through this policy initiative the Association will be able to play an effective role in promoting international cooperation on environmental issues through the ABA's Rule of Law Initiative.

6. Status of Legislation. (If applicable.)

There is no pending legislation dealing specifically with environmental issues in the rule of law. However, several bills are pending before congress related to global climate change which have implications for the ABA's rule of law initiative.

7. Cost to the Association. (Both direct and indirect costs.)

This resolution does not impose costs on the Association beyond those already being incurred to promote Goal VIII and advance the Rule of Law.

8. Disclosure of Interest. (If applicable.)

The cosponsoring entities engage in activities that will foster rule of law in the environmental field, including CLE programming, providing information of ABA activities to governments, NGOs and others as well as development of policy resolutions. No individual associate with this resolution will benefit personally from adoption of the resolution.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

As it was being developed, this Report with Recommendations was circulated to representatives of the Task Force on International Rule of Law Symposium, the ABA Section of Environment, Energy, & Resources, the Standing Committee on Environmental Law and the Section of State and Local Government Law. It is anticipated that other ABA Sections and entities such as the Rule of Law Initiative, Section of International Law, Section of Individual Rights and Responsibilities, Business Law Section, Judicial Division and Tort, Trial and Insurance Practice Section, with an interest in environmental issues and the rule of law will be contacted following this submission.

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

Howard Kenison, Chair ABA Working Group on Environmental Issues in the Rule of Law

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Denver, Colorado 80202

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11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

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EXECUTIVE SUMMARY

1. Summary of the Recommendation

Encourages the American Bar Association to urge governments, businesses, nongovernmental organizations and other organizations to integrate and consider Rule of Law Initiatives with global environmental issues.

2. Summary of the Issue that the Resolution Addresses

This recommendation recognizes the critical importance of environmental issues in the ABA's Rule of Law Initiative and activities and the importance that the ABA leadership, including President Karen Mathis and President-elect Bill Neukom place on this international issue.

3. Please Explain How the Proposed Policy Position will Address the Issue

This recommendation allows the Association to address critical global environmental issues through its Rule of Law Initiative.

4. Summary of Minority Views

Throughout the drafting of the Report and Recommendation and the original White Paper, the Working Group on Environmental Issues in the Rule of Law and the involved ABA entities, solicited and reviewed comments from interested ABA entities, many of which were incorporated into the final document. At this time the cosponsors have not received opposition or minority comments.