

Pace University

DigitalCommons@Pace

---

Pace Law Faculty Publications

School of Law

---

1-1-1996

## Fusing Economic and Environmental Policy: The Need for Framework Laws in the United States and Argentina

John R. Nolon

*Elisabeth Haub School of Law at Pace University*

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Comparative and Foreign Law Commons](#), [Environmental Law Commons](#), and the [Law and Economics Commons](#)

---

### Recommended Citation

John R. Nolon, Fusing Economic and Environmental Policy: The Need for Framework Laws in the United States and Argentina, 13 Pace Envtl. L. Rev. 685 (1996), <http://digitalcommons.pace.edu/lawfaculty/179/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# **Fusing Economic and Environmental Policy: The Need for Framework Laws in the United States and Argentina**

JOHN R. NOLON\*

## **Table of Contents**

Argentine National Constitution: Article 41.....	687
I. The Challenge of Achieving Sustainable Development in Argentina and the United States .....	688
II. Jurisdictional Problems in a Federal System ...	689
III. Reexamining Historic Approaches and Moving Forward: Purpose of Article .....	691
IV. Forces of Change .....	693
A. The Fusion of Environmental and Economic Policies in Argentina .....	693
1. Economic Policy.....	693
2. International Lending and Environmental Compliance .....	694
3. International Markets and Environmental Compliance .....	696
4. Foreign Investment and Environmental Compliance .....	698

---

\* John R. Nolon, J.D., University of Michigan School of Law, is a professor at Pace University School of Law and Co-Director of the Land Use Law Center. Professor Nolon directed a model watershed program for the President's Council for Sustainable Development. In 1995, Professor Nolon was awarded a Fulbright Scholarship to travel to Argentina to study that country's evolving environmental legal system.

This article was prepared as one of the author's contributions to an ongoing dialogue between colleagues in the United States and Argentina whose thoughts and recommendations for the development of framework laws are contained in this volume of the Pace Environmental Law Review. As a contribution to that dialogue, it is complete. As a contribution to legal scholarship on the subject, it is a work in progress.

5. Environmental Compliance: An Economic Imperative .....	699
B. Forces of Change in the United States: Failures in the Current System.....	699
1. Lack of Integration in Pollution Abatement Laws .....	699
2. Failure to Adopt a Comprehensive System.....	701
3. Failure to Integrate Economic and Environmental Policy .....	703
4. Lack of Impartial Standards Arbiter ....	703
5. Failure to Adopt New Theories of Systems Behavior .....	704
6. High Costs of Current System .....	705
7. Counterattack of Property Rights Legislation .....	705
8. A Collaborative Approach: The President's Council on Sustainable Development .....	707
V. Why a Framework Law? .....	709
A. Framework Laws in Latin America .....	710
1. Chilean Framework Law.....	711
2. Brazilian Framework Law .....	713
3. Mexican Framework Law .....	715
4. Venezuelan Framework Law.....	716
B. The National Land Use Policy Act in the United States.....	718
1. Federal Incentives .....	719
2. State Plans .....	719
3. Affecting the Causes of Environmental Pollution .....	720
C. Guidelines for National Land Use Policy ...	721
1. An Organizing Principle .....	721
2. An Open-Ended Process .....	722
3. Providing Information and Full Participation .....	723
4. A Coordinated and Integrated System ..	724

1996]	<i>FUSING ECON. &amp; ENVTL POLICY</i>	687
	5. Favoring Incentives to Cooperate Over Mandates to Conform to Rigid Standards.....	724
	D. A Basis for Action in Argentina and the U.S. ....	725
VI.	Considerations for Creating la Framework Law in Argentina.....	726
	A. Argentine Constitutional Provisions .....	726
	B. Four Approaches to Sustainable Development.....	729
	C. Assessing the Argentine Experience to Date .....	731
	1. Adequacy of the Current System.....	731
	2. Capacities within the Current System ..	732
	3. The Urgency of Economic Development and Expansion .....	732
	4. The Economic Relevance of Environmental Compliance and Territorial Planning .....	732
	5. The Importance of Controlling Non-Point Source Pollution .....	733
	D. A Strategic Approach .....	733
	E. Priorities for National Action .....	734
	1. Registry and Licensing .....	734
	2. Standard Setting Entity .....	736
	3. Negotiated Standards .....	737
	4. Territorial Planning .....	738
	5. Geographical Information System.....	739
	6. Impact Reviews and Permits.....	740
	7. Enforcement .....	741
	8. Incentives.....	742
VII.	Implementation .....	743
VIII.	Conclusion.....	744

*All citizens have a right to a healthy, well-balanced environment, suitable to human development and to economic development that does not compromise the needs of future generations. Citizens have a duty to preserve the environment. Environmental damage shall be remediated.*

*The government shall provide for the protection of this right, for the rational use of natural resources, for the preservation of the nation's historical and cultural heritage and its biological diversity, for the environmental education of the nation and for the provision of information on environmental issues.*

*Minimum standards for the protection of the environment shall be established by the federal government without altering the jurisdiction of the provinces which shall have the duty to establish complementary standards.*

*The entry of hazardous and radioactive wastes into the country is prohibited.<sup>1</sup>*

# I. The Challenge of Achieving Sustainable Development in Argentina and the United States

In response to the accords reached at the Earth Summit in Rio de Janeiro in 1992<sup>2</sup> and to international economic pres-

---

1. CONST. ARG., art. 41 as amended (1994). This translation is solely that of the author; it was developed by direct translation of the provisions of Article 41, influenced by the meaning of other constitutional provisions and by explanations provided to the author by Argentine constitutional lawyers. The full text, in Spanish, of the translated provision follows:

Todos los habitantes gozan el derecho a un ambiente sano, equilibrado, apto para el desarrollo humano y para que las actividades productivas satisfagan las necesidades presentes sin comprometer las de las generaciones futuras; y tienen el deber de preservarlo. El daño ambiental generará prioritariamente la obligación de recomponer, según lo establezca la ley.

Las autoridades proveerán a la protección de este derecho, a la utilización racional de los recursos naturales, a la preservación del patrimonio natural y cultural y de la diversidad biológica, y a la información y educación ambientales.

Corresponde a la nación dictar las normas que contengan los presupuestos mínimos de protección, y a las provincias, las necesarias para complementarlas, sin que aquéllas alteren las jurisdicciones locales.

Se prohíbe el ingreso al territorio nacional de residuos actual o potencialmente peligrosos, y de los radiactivos.

*Id.*

2. [I]ntegration of environment and development concerns and greater attention to them will lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. No nation can

tures,<sup>3</sup> the Argentine Constitution was amended in 1994. Article 41 of the Argentine Constitution now provides the people of Argentina with a right to a healthy environment.<sup>4</sup> It adopts the international definition of sustainable development as a means of protecting this environmental right, noting that the country's productive activities should satisfy present needs without compromising the needs of future generations.<sup>5</sup>

Resource use and conservation - production and protection - are fused in this new constitutional prescription. The Argentine congress is now struggling to define a national strategy for achieving sustainable development.

What remains to be done, in Argentina, as in the U.S., is to find the proper balance of authority and responsibility among national, provincial<sup>6</sup> and local governments, as well as between the private and public sectors, to implement these guarantees. What legislation the Federal Congress in Argentina will pass, and how the relationship between sectors and among these levels of government will evolve, is the drama that is unfolding in this South American country.

## II. Jurisdictional Problems in a Federal System

Article 41 contains several provisions that raise questions about the responsibility of national and provincial governments to achieve these new constitutional objectives. For example, they state that governmental authority, as a general proposition, shall protect the new environmental right, provide for the rational use of natural resources and preserve biological diversity.<sup>7</sup> In a single sentence that is less than

---

achieve this on its own; but together we can - in a global partnership for sustainable development.

*Agenda 21*, U.N. Conference on Environment and Development, preamble, U.N. Doc. A/Conf. 15 1/4, pt. II (1992), reprinted in *AGENDA 21: THE EARTH SUMMIT STRATEGY TO SAVE OUR PLANET* 28 (Daniel Sitarz ed. 1993).

3. See *infra* part IV, section A.

4. CONST. ARG., art. 41 as amended (1994).

5. *Id.*

6. The twenty-three provinces in Argentina function in that country's federal system similarly to our fifty states.

7. CONST. ARG., art. 41 as amended (1994).

clarifying on the division of responsibility, the amendment authorizes the national government to establish minimum standards for these purposes, but without altering provincial authority, noting that the provincial governments may complement nationally-established standards.

In both the United States and Argentina, the national and local governments enjoy limited powers while those of the states and provinces are more plenary. In both countries, the role of the federal government is to establish minimum standards regarding economic and environmental matters, and to take responsibility for interstate commerce, international agreements and foreign trade.<sup>8</sup> In the United States, property rights are defined by the states and the role of the federal government in resource and environmental protection is centered on protecting national interests.<sup>9</sup> In Argentina, provinces have primary authority over natural resources;<sup>10</sup> this jurisdiction is jealously guarded and appropriately protected by the new constitutional admonition that provincial authority should not be altered by legislation and initiatives at the federal level.<sup>11</sup>

Both countries labor under the enigma that jurisdiction regarding the environment and the economy is shared between the federal and provincial (state) levels of government. This concurrent authority has given rise in both nations to historic and continuing debates over the legitimate mission of

---

8. CONST. ARG., art. 75, para. 18, states that the National Congress has the authority to provide what is necessary for national prosperity, the advancement and well-being of the provinces and various matters of interprovincial commerce and international trade.

9. See Douglas R. Porter, *State Framework Laws for Guiding Urban Growth and Conservation in the United States*, *supra* this volume, at 547.

10. See Sabsay and Walsh, Payá and Bec, Argentine Symposium *supra* this volume. See also Article 124 of the Argentine Constitution: "The provinces have original jurisdiction over natural resources in their territories" (*Corresponde a las provincias el dominio originario de los recursos naturales existentes en su territorio*). CONST. ARG., art. 124. Despite clear evidence of significant levels of exploitation and exportation of endangered and vulnerable wild animals, the federal government has deferred to the provinces by only adopting a model Wildlife Protection Law which the provinces *may* adopt on a voluntary basis. Conservación de la Fauna [Wildlife Protection], Boletín Oficial [B.O.] Ley 22.421 (Arg.).

11. CONST. ARG., art. 41 as amended (1994).

each level of government. In their attempts to protect the environment, the various levels of government in both countries have created complex, overlapping federal, state (provincial), and local regulatory systems.

In the United States, for example, hazardous waste is regulated federally by the Comprehensive Environmental Response, Compensation and Liability Act,<sup>12</sup> by state statutes such as New York's Inactive Hazardous Waste Disposal Sites law<sup>13</sup> and local laws in some communities such as North Tarrytown's Environmental Protection and Abandoned Industrial Property Reclamation law.<sup>14</sup> In much the same way, all three levels of government in Argentina are involved in the regulation of hazardous wastes.<sup>15</sup> In both countries, this redundancy and confusion exists with regard to water quality regulation and other major environmental issues.<sup>16</sup> Important differences in standards and enforcement exist among these various environmental laws in both countries, making it difficult for regulated parties to determine their liabilities and understand their obligations. For businesses, this translates directly into greater cost and higher investment risks. Although these systems have enjoyed some success in stemming pollution<sup>17</sup>, grave questions have been raised about how well they work in light of the extensive costs and risks they impose on the private sector.<sup>18</sup>

### III. Reexamining Historic Approaches and Moving Forward: Purpose of Article

Since it must develop statutory responses to the duties imposed by Article 41, Argentina has an opportunity to reexamine these questions. In the United States, several bills

---

12. 42 U.S.C. § 9601-9675 (1994).

13. N.Y. ENVTL. CONSERV. LAW § 27-1301 (McKinney 1994).

14. NORTH TARRYTOWN VILLAGE CODE, ch. 17A (1994).

15. See Horacio Payá, Argentine Symposium Speech, *supra* this volume, at 593.

16. See Carlos Ben, Argentine Symposium Speech, *supra* this volume, at 587. See also Payá, Argentine Symposium Speech, *supra* this volume, at 593.

17. See Jeffrey Miller, U.S. Symposium Speech, *supra* this volume, at 513.

18. See Dr. Alistair Hanna, U.S. Symposium Speech, *supra* this volume, at 531.



pending in Congress that challenge environmental laws by protecting private property rights and a recent report by the President's Council on Sustainable Development call for a re-evaluation of the U.S. system.

In an effort to discover the best legal strategies to respond to these new challenges, seminars were conducted among experts in economic development and environmental protection in both the United States and Argentina.<sup>19</sup> The observations and recommendations of these experts have been summarized and published<sup>20</sup> and will be referenced as appropriate.

---

19. These seminars were held in White Plains, New York on March 2, 1995 and Buenos Aires, Argentina on April 19, 1995.

At the United States seminar, the participants were: 1) Mr. Richard Barth, President, Chairman and Chief Executive Officer of Ciba Geigy and Member, President's Council on Sustainable Development; 2) Dr. Alistair Hanna, McKinsey & Company, Director of Stamford Office; Ph.D., Nuclear Physics and Member, Hudson River Advisory Board on Sustainable Development; 3) Jeffery Miller, Former Chief of Enforcement of the U.S. Environmental Protection Agency, Professor of Environmental Law, Pace University School of Law; 4) John Nolon, Fulbright Scholar in Argentina, 1994-95; Professor of Law, Pace University School of Law and Participant in President's Council on Development Choices, 1978-79; 5) Dean Richard Ottinger, Former U.S. Congressman, U.S. House of Representatives, Creator of the U.S. Peace Corps, Founder of the U.S. Energy Law Center, and Dean, Pace University School of Law; 6) Nicholas Robinson, Founder of the Environmental Legal Studies Center, Professor of Environmental Law, Pace University School of Law and Editor of Oceana Press Edition of Agenda 21.

At the Argentine seminar, the participants were: 1) Julio Barberis, Esq., Commission on the River Platte; 2) Eugenia Bec, Esq., Environmental Attorney, Intern at the Center for International Environmental Law; 3) Carlos Ben, Manager of Institutional Relations for Aguas Argentinas; 4) Horacio Carmona, Independent Environmental Consultant; 5) Jeffrey Dobovek, Ciba, Plant Manager; 6) Dr. Raimondo Florin, Executive Director, Business Council for Sustainable Development; 7) Diego Gallegos, Esq. Executive Director, Orthonological Association of Plata; 8) Arq. Rodolfo Pedro Gassó, President, Professional Council of Architecture and Urbanism; 9) Horacio Payá, Esq., Bruchou, Fernández, Madero y Lombardi; 10) Pedro Tarak, Executive Director, Fundación Ambiente y Recursos Naturales (FARN); 11) Carlos Vigil, Counsellor on Environmental Matters for the Southern Continent Common Market (MERCOSUR) and President of the Convocation for Environmental Defense; 12) Daniel Sabsay, Esq., Constitutional Lawyer and Author; 13) Juan Rodigo Walsh, Marciel, Norman & Asociados, Director of Special Projects for FARN; 14) Federico Zorraquín, President, IPAKO and Founder, the Forest Life Foundation; 15) Dr. Charles Shaw, McKinsey & Company, Director of Argentine Office.

20. U.S. and Argentine Symposium Speeches, *supra* this volume.

This article attempts to synthesize what was learned in these two seminars, the research conducted in preparation for them, and the ongoing discussion among the participants. It begins with a summary of the forces in both countries that call for a change in the legal system, shows how these forces urge each country to consider adopting a "framework law for sustainable development" and ends with description of how such a law could be adopted in Argentina to carry out the constitutional mandates contained in Article 41. These recommendations also may chart an appropriate direction for legal reform in the United States.

#### IV. Forces of Change

##### A. The Fusion of Environmental and Economic Policies in Argentina

###### 1. Economic Policy<sup>21</sup>

Inflation, currency devaluation, aggravated international trade deficits, elevated governmental deficits, increasing foreign debt, and high domestic unemployment have characterized Argentina's economic condition over the past two decades and have shaped its current economic policy. As recently as 1989, inflation in Argentina reached 200% per month. Since then, Argentina has nationalized private foreign debt, switched to an alternate currency (then switched back), and privatized numerous government enterprises, all in an effort to achieve some degree of economic stability.

These severe problems, and the severe measures adopted to correct them, illustrate the critical importance of economic stability, credit availability, trade surpluses, economic expansion, job creation and export enhancement. Argentina is currently riveted on these economic matters. Environmentalism is becoming an important issue as environmental problems

---

21. This information regarding Argentina's economic conditions and current policies was obtained from a report prepared by Stephen Binder, entitled *The Plan Cavallo, 1991-1995, An Introduction to the Argentine Macroeconomic Stabilization Program* (Mar. 5, 1995), and from interviews with its author.

and public concern for them mount.<sup>22</sup> The economic imperatives of this recovering country absolutely require, however, that environmental strategies be coordinated with economic policies.<sup>23</sup>

The sources of investment and credit must have a sense of confidence in the business climate of the country. Securing international credit, competing in international markets and attracting foreign investment are key economic strategies of the national and provincial governments. As the following comments demonstrate, these considerations strongly urge Argentine legislators to create a competent and predictable system of environmental regulation within an overall policy of sustainable development.

## 2. International Lending and Environmental Compliance

In urging Argentina to adopt a competent system for environmental protection, one of the principal influences on Argentina is the international lending community.<sup>24</sup> To illustrate, the Overseas Private Investment Corporation (OPIC),<sup>25</sup> a U.S. lending and insurance organization, imposes strict environmental standards on the projects it assists.<sup>26</sup> Under U.S. federal law, OPIC must perform an environmental assessment of assisted projects<sup>27</sup> and must refuse to assist any project that "will pose an unreasonable or major environmental hazard."<sup>28</sup> OPIC may apply the standards of the host country unless they are insufficient, in which case the stan-

---

22. See Sean F. Nolon, *The State of the Argentine Environment: An Overview*, *supra* this volume, at 609.

23. See Sr. Federico Zorraquín, Argentine Symposium Speech, *supra* this volume, at 583. "[T]he nature and pace of industrial activity, which has been increasing over the past four years, must be respected by any new environmental program as it develops." *Id.* at 584.

24. The author acknowledges his gratitude to Frederic C. Rich, Esq. of Sullivan & Cromwell in New York City, for much of the information contained in this section regarding the environmental standards of international lenders and insurers.

25. 22 U.S.C. § 2191 (1994).

26. See *Id.* § 2191(3).

27. See *id.* § 2199(g).

28. *Id.* § 2191(n).

dards of the World Bank or the U.S. Agency of International Development must be used. As a consequence of these requirements, environmentally insensitive projects will not be assisted by OPIC and, in the absence of "sufficient standards" in Argentina, outside standards will be used to judge environmental compliance.

Another U.S. based lender, the Export-Import Bank of the United States, handles requests for its financial support in much the same way.<sup>29</sup> Under its Environmental Procedures and Guidelines,<sup>30</sup> applicants must submit an Environmental Screening Document. The Bank's Board of Directors is authorized to grant or withhold financial support after taking into account the beneficial and adverse environmental effects of proposed transactions.<sup>31</sup> The Bank offers special enhanced support for environmentally beneficial projects.<sup>32</sup>

These Export-Import Bank requirements clearly reward applicants from countries where environmental compliance regimes guarantee environmental sensitivity. Where businesses have no environmental license, no certification of environmental compliance, and no way of showing that their activity takes place in an environmentally sensitive business climate, they are not going to be as competitive in seeking Export-Import Bank support.<sup>33</sup>

The World Bank has similar requirements. Projects proposed for financing by the Bank, if they may result in significant environmental impacts, are subjected to an environmental assessment.<sup>34</sup> The Bank expects the borrower to consult with affected groups and local non-governmental organizations regarding the environmental impacts of the

---

29. See 12 U.S.C. §§ 635-635t (1994).

30. Export-Import Bank of the United States Environmental Procedure and Guidelines. Frederic C. Rich, *Environmental Regulations, Procedures and Guidelines Applicable to Limited Recourse Project Finance*, Inter-office Memo of Sullivan & Cromwell in New York City, at 1 (on file with the author).

31. 12 U.S.C. § 635i-5(a)(2) (1994).

32. *Id.* § 635i-5(b).

33. Similarly, the Export-Import Bank of Japan will decline an application for financing if the project is revealed to be harmful to the environment. See Rich, *supra* note 30, at 5.

34. *Id.* at 3 (citing World Bank Operational Directive 4.01, at 5).

proposed project and regarding methods of mitigating them; the applicant's report must contain in its conclusions language that is meaningful to the groups being consulted.<sup>35</sup> A multilateral funding source, the International Finance Corporation, requires the projects it funds to be environmentally sensitive and to follow World Bank environmental guidelines and policies.<sup>36</sup>

Quite obviously, countries that have provisions for competent environmental impact assessments and require consultation with affected groups are going to enhance the competitiveness of their projects that seek limited World Bank and International Finance Corporation funds.<sup>37</sup>

### 3. International Markets and Environmental Compliance

In the seminar held in Buenos Aires in April of 1995, two participants noted that significant private sector pressures also urge Argentina to adopt a competent system for environmental compliance. One example discussed involved the rejection of Argentine leather goods by a private sector European importer. After the goods arrived, it was discovered that they were treated with a dye that is deemed to be carcinogenic and banned in Europe. By not adhering to accepted international standards, manufacturers in Argentina may suffer needless loss, as did the domestic leather company in this illustration.<sup>38</sup>

Environmental standards of this sort are established by the International Organization for Standardization (ISO), an

---

35. *Id.*

36. *Id.* at 4 (citing International Finance Corporation Directive, Environmental Analysis and Review of International Finance Corporation Projects, at 7).

37. For example, the Multilateral Investment Guarantee Agency (MIGA), ensures that the objectives of the World Bank Operational Directive 4.01, regarding environmental compliance, are followed in its operations. See Rich. *supra* note 30, at 4.

38. See Jeffrey Dobovek, Argentine Symposium Speech, *supra* this volume, at 606. Another participant, Horacio Carmona, made the same point.

international federation founded in 1946.<sup>39</sup> Its purpose is to promote international standards facilitating the exchange of goods and services and to prevent situations like this rejection of Argentine leather goods from occurring.<sup>40</sup> ISO standards, when issued, are guidelines; however, they may become requirements as a practical matter as they become accepted as international commercial standards.<sup>41</sup> Both the United States and Argentina are member nations of the ISO federation.<sup>42</sup> The standards relevant to this discussion are the ISO 9000 series, which are focused on quality control of company products and services.

Without being certified by an eligible third party as being in compliance with the standards contained in the ISO 9000 series, companies may not be allowed to sell their products in foreign markets.<sup>43</sup> This was the fate of the Argentine leather goods discussed above. Failure to obtain certification under these standards can have far reaching consequences. Government controlled industries in Europe, for example, require their foreign vendors to adopt and follow the ISO standards.<sup>44</sup> The European community is incorporating ISO standards in its mandatory requirements for the sale of construction, telecommunications and appliance products in member nations.<sup>45</sup>

ISO is in the later stages of developing a new standard, known as the 14000 series.<sup>46</sup> This new series will require

---

39. Christopher L. Bell & James L. Connaughton, International Environmental Standards 1, (unpublished manuscript, on file with the *Pace Environmental Law Review*). The importance of the International Organization for Standards (ISO) to Argentine businesses was first called to the author's attention by Horacio Carmona. Horacio Carmona, Argentine Symposium Speech, *supra* this volume, at 597.

40. See Bell, *supra* note 39, at 1.

41. *Id.*

42. The ISO has more than ninety member countries. Douglas B. Weinfield, *Environmental Management, ISO 14000: An Overview*, LAR-330 MANUFACTURERS ALLIANCE 1 n.3 (1995).

43. Third party certification, or registration, is done by independent entities that, in turn, must be accredited as legitimate. There is no formal international system for accrediting these critical third parties. *Id.* at 3.

44. See Bell, *supra* note 39, at 3.

45. *Id.*

46. See Weinfield, *supra* note 42, at 1.

companies, as a condition of certification, to demonstrate compliance with new standards in the areas of environmental management systems, environmental auditing, and environmental performance evaluation.<sup>47</sup>

One of the biggest obstacles to compliance with ISO standards is lack of information on the part of the companies that will be disadvantaged by their adoption and enforcement internationally.<sup>48</sup> This is yet another pressure on governments in countries like Argentina that are trying to expand their export markets to create a climate that encourages environmental compliance as part of the process of doing business. Environmental compliance, seen in this context, becomes an urgent matter of economic development and expansion of great concern to the national government.

#### 4. Foreign Investment and Environmental Compliance

Finally, foreign investors in Argentina are aware of their potential environmental liabilities. The constitution and laws of most countries, including Argentina, require some degree of environmental compliance. Increasingly, as the discussion above of the adoption of ISO standards demonstrates, international standards are dictating what that compliance means.

Foreign investors bring these expectations, in addition to their own standards of investigating the environmental risks of investment,<sup>49</sup> to the bargaining table when they discuss

---

47. *Id.*

48. Paul Scicchitano, *Environmental Management Looms as Next Hurdle for Companies*, COMPLIANCE ENGINEERING, Sept./Oct., 1995, at 83.

49. Although there is no provision in Argentine statutory law for citizen suits against private companies for environmental violations or damages, the civil courts can order private business operations to cease, where environmental violations are alleged. In *Schroder v. Secretariat of Natural Resources & Human Environment*, the court issued an order which stopped operations because of deficiencies in the environmental impact review process that was used. See Juan Rodrigo Walsh, *Commentarios a Fallo: "Schroder, Juan c/ Estado Nacional (Secretaria de Recursos Naturales) s/ Amparo Ley 16.986,"* LA LEY, SUPLEMENTO DE DERECHO AMBIENTAL, Dec. 6, 1994, at 7. Article 41 gives citizens some additional standing to bring suit with respect to these matters, and compounds the economic risks that an administratively uncertain environmental protection system engenders. See *infra* note 197.

the acquisition of, investment in, or loan to, an Argentine enterprise. The behavior of investors globally indicates that economic investment and environmental compliance are fused in their investment and underwriting standards.

#### 5. Environmental Compliance: An Economic Imperative

Economic reality in Argentina mandates that the nation's environmental compliance system achieve competitiveness for its projects seeking international loans and for its companies doing business abroad, while not imposing undue costs, delays or uncertainties on the private sector and those seeking to invest in the Argentine economy. Political reality requires that a proper and workable role be charted for each level of government and that the legal systems they employ to manage the use and conservation of the country's land and natural resources be coordinated and economically realistic.

#### B. Forces of Change in the United States: Failures in the Current System

Economic and political forces have caused a reexamination of environmental law in the United States as well. This was evident in the seminar held in White Plains, New York. At this seminar, two environmental law professors, a professor of land use law and two private sector leaders described and evaluated the results of 25 years of environmental legislation in the United States.<sup>50</sup>

##### 1. Lack of Integration in Pollution Abatement Laws

In this seminar, it was observed that the U.S. environmental statutes focus on single environmental issues or single polluting industries.<sup>51</sup> They were adopted as problems arose and never linked together. Generally, these laws establish national uniform standards for each environmental problem and for each polluting industry. These national

---

50. See *supra* note 19.

51. See Miller, U.S. Symposium, *supra* this volume, at 513.



standards are then enforced either by federal or cooperating state agencies against particular polluting facilities.

This system has been successful in eliminating much of the pollution coming from large facilities and restoring some important environmental systems to health.<sup>52</sup> However, it has become complex, cumbersome, and inefficient. In the last few years, attempts to eliminate the remaining pollution emanating from major facilities have proven very costly to the private sector.<sup>53</sup> The system does not link segments of the environment, overlooks some important aspects of the environment and moves pollution from one environmental medium, such as the air, to another, such as the water.<sup>54</sup> This national system does not address the significant amount of pollution that comes from smaller, ordinary land uses. This is because it has not been linked to the state and locally administered land use system.<sup>55</sup>

It was concluded that the environmental regulatory system would be more effective today if it had been created origi-

52. *Id.* at 515.

53. *Id.* at 516.

54. Professor Miller's observations on this point are reinforced by the announcement accompanying the formation of a prestigious study group at Yale University to produce "an entirely new set of policy tools for protecting the environment." It reported that "the environmental laws enacted over the past two decades have been successful in addressing threats from single point source pollution, and single chemical and production concerns. . . . [H]owever those laws are no longer effective in dealing with more subtle environmental concerns such as non-point source pollution." *University Group to Launch New Environmental Policy Reform Effort*, INSIDE E.P.A. WKLY. REP., Jan. 12, 1996, at 2.

55. A recent article about the seriousness of non-point source pollution in Massachusetts reinforces this observation. "It has become increasingly apparent in recent years that the most significant source of water pollution in Massachusetts is that insidious offender "non-point source" pollution. . . . Non-point water pollution in Massachusetts comes from diverse and widespread sources." Attempting to regulate individual property uses is said to be problematic because "ordinary citizens see such regulatory activities as impinging on their property rights." "The failure of states to create an integrated approach to development decisionmaking" is identified as one of the major failures of the state to control non-point source pollution. This article recommends examining the state growth management programs discussed and evaluated by Porter, *supra* note 9. M. Allison Hamm, *The Massachusetts Experience with Non-point Sources: Regulators Beware!*, NAT. RESOURCES & ENV'T, Winter 1996, at 47.

nally as a unitary and comprehensive system.<sup>56</sup> Three strategies should be considered to create the missing linkages: address all pollution from major facilities as a unitary matter; regulate pollution comprehensively within defined geographic areas; and link federal and state environmental regulation with state and local land use regulation.

## 2. Failure to Adopt a Comprehensive System

At the White Plains seminar, it was pointed out that in the early 1970s, before the nation's individual pollution prevention laws were passed, the U.S. Senate approved legislation that articulated a national policy that would have created this type of unitary and comprehensive approach.<sup>57</sup> This policy, called the National Land Use Policy Act, was narrowly defeated in the House of Representatives and failed to become law.

This Act provided incentives to states to encourage them to adopt land use plans.<sup>58</sup> These plans were to identify geographic regions for planning and to target certain areas for economic growth and others for environmental conservation.<sup>59</sup> Federal and state agencies would have been created to coordinate all government resources and regulations with the state plans.<sup>60</sup> The state plans would have allowed coordination of municipal regulation of development patterns at the local level. These state plans would have been the basis for negotiations between the state and federal government regarding interstate environmental and economic matters.

This proposal respected the differences in legal authority between the national and state governments, while providing a mechanism for integrating economic and environmental

---

56. Hanna, U.S. Symposium Speech, *supra* this volume, at 531.

57. For further information on the National Land Use Planning Act, see John R. Nolon, *National Land Use Planning: Revisiting Senator Jackson's 1970 Policy Act*, LAND USE L. & ZONING DIG., May 1996, at 3; Jayne E. Daly, *A Glimpse of the Past, A Vision for the Future: Senator Henry M. Jackson and National Land Use Legislation*, URB. LAW., Winter 1996, at 7.

58. Nolon, *supra* note 57, at 5; Daly, *supra* note 57, at 9.

59. Daly, *supra* note 57, at 10.

60. *Id.* at 10-12.

policy.<sup>61</sup> The state plans were to coordinate the activities of all federal, state and local agencies whose resources and energies could have been dedicated to its accomplishment.<sup>62</sup> Private sector leaders would have been involved in the creation of state plans and could make investments based on these plans. This would have provided for some of the integration of economic sectors and levels of government that is missing today.

At an earlier seminar held in White Plains, one participant noted that nine of the fifty states have adopted state growth management statutes since 1970 even though the National Land Use Policy Act was not adopted.<sup>63</sup> These states have integrated local land and resource planning into a "larger framework of intergovernmental responsibilities for managing growth and development . . . . In essence, the nine states have fundamentally reconfigured their approaches for dealing with urban development issues to emphasize intergovernmental responsibilities and actions."<sup>64</sup> Unfortunately, in the absence of a national land use policy, only nine states have taken this type of action and their approaches differ significantly from one another.<sup>65</sup>

---

61. See Nolon, *supra* note 57, at 4-5; Daly, *supra* note 57, at 35-39.

62. Daly, *supra* note 57, at 10-11.

63. See Porter, *supra* this volume, at 547. Mr. Porter, President of the National Growth Management Institute, first delivered this paper at a seminar on Growth Management held in White Plains at a conference sponsored by the Land Use Law Center of the Pace University School of Law in 1993. Mr. Porter notes several common elements of these state framework laws: 1) states adopt their own land use plans, including a statement of goals and objectives; 2) they require that the activities of their own administrative agencies conform with the goals and objectives; 3) states establish standards for local land use planning, including the elements, such as housing, transportation, open space, that local plans must contain; 4) they provide some administrative mechanism to ensure some consistency between local plans and state goals; and 5) they create some appeals process for resolving conflicts between local and state plans. *Id.*

64. *Id.* at 548-49.

65. *Id.* at 548.

### 3. Failure to Integrate Economic and Environmental Policy

An industrial leader at the White Plains seminar, who served on the President's Council on Sustainable Development, agreed that a unitary system of pollution abatement was needed, but that this too must be linked to economic policies.<sup>66</sup> It is necessary to examine what is happening to the nation's natural resources as a consequence of national economic policy. Income from resource exportation, which causes environmental damage, is needed to balance our heavy demand for imports. Without dealing with this balance of payments issue, the tension that causes conflicts between jobs and the environment will not be resolved. The approach considered in the early 1970s, when a National Land Policy Act was proposed, would have been a step in the right direction, because national economic policy considerations could influence state plans and the resource exploitation and conservation that they promote.

### 4. Lack of Impartial Standards Arbiter

It was also recommended at the White Plains seminar that both the U.S. and Argentina create a scientifically-based

---

66. See Barth, U.S. Symposium Speech, *supra* this volume, at 525. Mr. Barth noted the irony involved in the interest of the President's Council in the ongoing clash between development and conservation interests in the Florida Everglades. As noted in the discussion on the National Land Use Policy Act, see Nolon, *supra* note 57, at 4, its proponent, Senator Jackson, used the Florida Everglades as a prime example of what was wrong with the national and state land and resource management apparatus. In the early 1970s the disconnected and costly nature of the system was apparent in the Everglades where three different levels of government were pursuing policies and projects there that were in clear conflict with one another. *Id.* See *infra* text accompanying note 145.

In the absence of a coordinated planning process, the conflicts were not resolved and the Everglades controversy continues in 1996. See John H. Cushman, Jr., *Clinton Backing Vast Effort to Restore Florida Swamps*, N.Y. TIMES, Feb. 18, 1996, § 1, at 2. This article notes that remedial strategies include a two-cent tax on every pound of sugar produced in the Everglades region and a \$500 million one-time federal contribution in addition to a \$100 million annual cost to the federal government of ongoing conservation efforts. These are costs that could have been avoided or contained by the Jackson proposal of a quarter century ago. *Id.*

institution to resolve the constant debates between environmental and business interests regarding the capacity of the environment to accept pollution, the dangers of pollution, the amount of pollution in specific environments, and standards for pollution control.<sup>67</sup> At least in the United States, where the courts are used to resolving these disputes, tensions will be hard to ease between these two interests without an honest and credible institution of this type. Although Argentina has been less litigious in the environmental arena, recent successful citizens suits indicate that an arbiter of standards and compliance would be helpful there also as a means of avoiding confusion as well as litigation.<sup>68</sup>

#### 5. Failure to Adopt New Theories of Systems Behavior

A business analyst at the White Plains seminar explained that those creating a new legal system for sustainable development should draw from what is known about systems behavior in the business and scientific communities.<sup>69</sup> It was explained that thinking about systems behavior evolved from studies in the physical sciences. The current legal "system" for protecting the environment is based on system theories that have been rejected in recent years by science. Newer theories suggest that systems need to be closely integrated for order and efficiency to emerge out of the chaotic patterns of behavior observable in them.<sup>70</sup>

U.S. companies are changing their management systems to become more integrated, to connect organizational components so that they constitute fluid systems, to gather the intelligence that exists at all levels, and to be able to react efficiently to new information and change.<sup>71</sup> This private sector reorganization is consistent with new scientific thinking. Public environmental control systems that are rigid and whose components are disconnected prevent this type of self-organizing behavior and the efficiency it tends to achieve.

---

67. Barth, *supra* note 66, at 529.

68. *See supra* note 49.

69. *See* Hanna, U.S. Symposium Speech, *supra* this volume, at 531.

70. *Id.* at 544-46.

71. *Id.*

## 6. High Costs of Current System

Predictably, the current legal system for pollution abatement imposes extremely high costs on U.S. industries.<sup>72</sup> In some industries, these costs are so high that they exceed most other costs of doing business; lately these costs have been increasing at an exponential rate.<sup>73</sup> This is due, in part, to the fact that industry leaders have not been involved in shaping the regulations and have been given little choice in deciding how to meet their objectives. Private sector leaders must become more involved in creating regulatory systems and businesses must be given flexibility in meeting environmental standards. The legal systems that deal with land and resource use must also be integrated with pollution abatement laws and the regulations and functions of local, state and national agencies must be integrated as well.

## 7. Counterattack of Property Rights Legislation

Recent legislative activity in the United States to protect property rights is, in significant part, a reaction to the disorganized and costly state of the U.S. environmental protection system.<sup>74</sup> When adopted, these bills make the process of enacting environmental and health regulations much more time-consuming, costly and complex. These bills take one of four forms:

1. First, there are compensation statutes that require the government to compensate landowners whose property values have been diminished by a regulation beyond an established percentage of value, such as 25% or 50%.

---

72. In the United States, we find that huge sums of money are being spent to resolve problems that we never expected to confront. Stockholder wealth in major companies is being destroyed at a rapid rate. This could have been avoided if we had set up a system that was much more integrated from top to bottom; one that understood at the grass roots level what the issues were and that was flexible and responsive. If such a system had been created in the first place, we would be doing much better today.

*Id.* at 532.

73. Hanna, U.S. Symposium Speech, *supra* this volume, at 531.

74. For a complete description of these statutes see John R. Nolon, *Takings and Property Rights Legislation*, ALB. L. ENVTL. OUTLOOK, Winter 1996, at 61.

2. Second, there are assessment statutes that require agencies to conduct cost-benefit assessments, or risk assessments, involving elaborate and comparative analyses of the costs and benefits of proposed regulations.

3. Third, there are review statutes that require the Attorney General, or other official, to conduct a review of the potential of proposed regulations to effect a taking of private property with varying consequences.

4. Finally, there are hybrid laws that include two or more features of the above provisions.

Certain features of these bills demonstrate a negative, or retributive quality: they impose on regulators the types of burdens the proponents of these statutes believe have been imposed on private property owners. These features penalize agencies by taking from their annual budgets the funds needed to compensate private owners for diminutions in property values caused by the regulations of those agencies. This mimics the complaint of the proponents that regulations tend to use penalties, rather than incentives, to achieve their ends. These negative features make the regulatory process unduly complex and burdensome on the regulators in apparent retribution for the burdens of time and money imposed by regulators on property owners.

Other features of these bills are progressive and helpful. They require regulators to state clearly and to quantify the benefits that proposed regulations will achieve and to measure those benefits against the costs imposed on the private sector. They speed up the regulatory process and facilitate compliance with regulations by involving regulated parties in the creation of the regulations and by giving them market-based and flexible options for complying with the standards of the regulations.

By the end of 1995, nearly all state legislatures were considering, had passed or had rejected, at least one of these types of statutes. In the following 18 states, some such legislation has been enacted: Arizona, Florida, Idaho, Indiana, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana,

North Dakota, Texas, Tennessee, Utah, Virginia, Washington, West Virginia and Wyoming.<sup>75</sup>

#### 8. A Collaborative Approach: The President's Council on Sustainable Development

During 1995, nearly two dozen property rights bills were considered at the federal level. These federal proposals contained most of the features of those considered at the state level: compensation requirements for diminished property values, complex new requirements that federal regulators must meet and greater synchronization between the regula-

---

75. This trend in the states began in 1991 with the enactment of a Washington bill that required the Attorney General to review regulations to determine whether they have potential for effecting a regulatory taking. WASH. REV. CODE ANN. § 36.70A.370 (West Supp. 1996). Since then, Delaware, Indiana and Tennessee have adopted bills of this type. DEL. CODE ANN. tit. 29, § 605 (Supp. 1994); IND. CODE ANN. §§ 2-5-18-1 to -11, 4-22-2-29, -32, -40 (Burns Supp. 1995); TENN. CODE ANN. §§ 12-1-201 to -206 (Supp. 1995).

In 1992, Utah adopted a statute that requires state agencies to conduct assessments of their regulations' potential to effect takings. UTAH CODE ANN. §§ 63-90-1 to -4 (Supp. 1995). Since then, Arizona, Idaho, Kansas, Missouri, North Dakota, Virginia, West Virginia and Wyoming have adopted statutes of this general type. These statutes may exempt certain emergency or public health protection regulations from their coverage. ARIZ. REV. STAT. ANN. §§ 37-221 to -223 (1993); IDAHO CODE §§ 67-8001 to -8004 (1994); KAN. STAT. ANN. §§ 77-701 to -711 (Supp. 1996); MO. REV. STAT. § 536.017 (1994); N.D. CENT. CODE § 28-32-02.5 (Supp. 1995); VA. CODE ANN. § 9-6.14:7.1 (Michie Supp. 1996); W. VA. CODE §§ 22-1A-1 to -6 (1994).

In 1994, Mississippi enacted the first state statute requiring compensation to property owners whose property values are diminished by state regulation. 1994 Miss. Laws ch. 647 (codified as amended in scattered sections). Since then, Florida, Louisiana and Texas have adopted such statutes. FLA. STAT. ANN. §§ 70.001 to .080 (West Supp. 1996); LA. REV. STAT. ANN. §§ 3:3601 to 3624 (West Supp. 1996); TEX. GOV'T CODE ANN. §§ 2007.001 to .045 (West Supp. 1996).

In November of 1995, by a 60-40% margin, voters in Washington State rejected what would have become the nation's most sweeping property rights protection measure. The rejected Washington initiative would have required compensation to property owners for any diminution of value caused by public benefit regulations unless the regulated activity is a public nuisance; it would also have required agencies to conduct extensive takings impact assessments of land use regulations. This follows a 1994 vote by Arizona voters rejecting, by the same margin, a less sweeping property rights protection measure. See David Postman, *Wash. State Rejects Land Rights Law; Defeat May Slow Down National Legislation*, WASH. POST, Nov. 11, 1996, at E1.



tions and the needs of the private sector. None of these bills have been adopted by the full Congress.<sup>76</sup>

After three years of study, the prestigious President's Council on Sustainable Development recommended against many of the reforms contained in these federal property rights proposals. Instead, it called for an evaluation of the current system, the retention of what works within that system and improvements to make the system more collaborative<sup>77</sup>, cooperative, flexible and comprehensive.<sup>78</sup>

The Council's report endorses "a shift of environmental power and responsibility away from the government and toward individuals and enterprises."<sup>79</sup> It states that "regulations that specify performance standards based on strong protection of health and the environment - but without mandating the means of compliance - give companies and commu-

---

76. They include S. 605, 104th Cong., 1st Sess. (1995) (Omnibus Property Rights Act of 1995); S. 343, 104th Cong., 1st Sess. (1995) (Comprehensive Regulatory Reform Act of 1995); H.R. 9, 104th Cong., 1st Sess. (1995), which includes separate titles on risk assessment, regulatory reform and private property rights protection; H.R. 961, 104th Cong., 1st Sess. (1995) and S. 851, 104th Cong., 1st Sess. (1995) (Clean Water Act amendments); and H.R. 2275, 104th Cong., 1st Sess. (1995), S. 1364, 104th Cong., 1st Sess. (1995) and S. 768, 104th Cong., 1st Sess. (1995) (Endangered Species Act reauthorization).

77. "The most important finding of the Council, the report said, is that new approaches can work only if they are based on collaboration and consensus." THE PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, SUSTAINABLE AMERICA, A NEW CONSENSUS FOR PROSPERITY, OPPORTUNITY, AND A HEALTHY ENVIRONMENT FOR THE FUTURE 6 (Feb. 1996).

Note that the provisions of property rights acts that call for peer, or industry, review of regulations, before they are adopted, can be seen as a technique of achieving this collaboration and consensus. Provisions of property rights proposals that make the regulatory process more costly and complex and allow businesses to challenge regulations in court were not endorsed by the President's Council. *Id.*

The recommendations of the U.S. President's Council parallel those of the private sector Business Council for Sustainable Development as outlined by Sr. Federico Zorraquín and Dr. Raimondo Florin. See Zorraquín, Argentine Symposium Speech, *supra* this volume, at 583. See also Dr. Raimondo Florin, Argentine Symposium Speech, *supra* this volume, at 581.

78. John H. Cushman, Jr., *Adversaries Back the Current Rules Curbing Pollution*, N.Y. TIMES, Feb. 12, 1996, at A1.

79. *Id.*

nities flexibility to find the most cost-effective way to achieve environmental goals.”<sup>80</sup>

The Council’s report contains the language of consensus that can guide lawmakers toward the creation of a comprehensive legal system. “To achieve our vision of sustainable development, some things must grow - jobs, productivity, wages, capital and savings, profits, information, knowledge and education - and others - pollution, waste and poverty, energy and material use per unit of output - must not.”<sup>81</sup>

The language of the Council’s report suggests that there are two levels of reform. The first calls for greater responsiveness and flexibility within the current system of environmental protection. The second calls for some method of linking economic and development policies with this regime for environmental protection. How else can a “vision of sustainable development” be achieved?

The Council’s central conclusion, around which the consensus of its diverse membership was based, is that “pollution is waste, waste is inefficient, and inefficiency is expensive.”<sup>82</sup> Neither Argentina nor the United States can afford a legal system that is not aimed at, and competent to achieve, efficiency. Borrowing the Council’s phrase, the national legal systems of the two countries must become integrated and coordinated because complex and redundant legal systems are wasteful.

## V. Why a Framework Law?

There are three avenues that legal reform can take. First, it can attempt a fundamental change in the current system. Second, it can improve it more gradually, in a piecemeal fashion. Third, it can provide a framework within which greater efficiency can be achieved and from which change within the system can evolve. This article suggests that Ar-

---

80. *Id.*

81. THE PRESIDENT’S COUNCIL ON SUSTAINABLE DEVELOPMENT, SUSTAINABLE AMERICA, A NEW CONSENSUS FOR PROSPERITY, OPPORTUNITY, AND A HEALTHY ENVIRONMENT FOR THE FUTURE 6 (Feb. 1996).

82. *Id.* at 3.

gentina and the U.S. should consider adopting a framework law, which articulates clearly the roles and duties of each level of government and the private sector and establishes the processes through which those roles can evolve and mature.<sup>83</sup> This approach avoids the great political barriers to radical reform while creating a reliable framework within which evolutionary change can occur.

By suggesting and proposing a national framework law for sustainable development, an opportunity is created for the representatives of various interest groups to resolve the fundamental tensions among them and to codify that agreement in law. The negotiations surrounding the development of such a framework proposal can occur as this integrated and comprehensive proposal is discussed and designed or they can occur, and reoccur, each time a single statute or project is proposed or is reauthorized, as is happening today.

#### A. Framework Laws in Latin America

At least four Latin American countries have adopted framework laws that integrate various environmental pollution laws and economic development policies and attempt to coordinate the roles of the federal, state and local governments in their implementation. These include two countries, Brazil and Mexico, that have decentralized federal systems like Argentina's and two, Chile and Venezuela, that have more centralized national governments.<sup>84</sup>

---

83. As described by the United Nations Environment Programme, a framework law 'lays down the basic legal principles without attempting to codify all relevant statutory provisions. It normally starts with a declaration statement of national environmental goals and policies, followed by institutional arrangements designating the competent governmental authorities and commissions and the common procedural principles for environmental decision making . . . applicable to all sectors.' Framework laws also generally leave preexisting legislation in place and are broader in scope than the environmental laws in the United States.

Lawrence J. Jensen, *Environmental Protection in Latin America: A Rapidly Changing Legal Framework*, 8 NAT. RESOURCES & ENV'T., Fall 1993, at 23.

84. This description of the framework laws adopted in Brazil, Chile, Mexico and Venezuela is based on a facial examination of the statutes as originally adopted, not on the implementation or subsequent amendment of those stat-

Brazil's framework law,<sup>85</sup> the earliest of the four, was enacted in 1981; Chile's, the most recent, was adopted in 1994.<sup>86</sup> The primary thrust of the laws enacted in Brazil, Chile and Mexico<sup>87</sup> is to coordinate governmental initiatives to protect the environment. Venezuela's law<sup>88</sup> is aimed more squarely at economic development through land use planning as the method of coordinating resource use and conservation. The Chilean and Brazilian laws do not deal with economic development or land use management as a technique for coordination, while the Mexican law incorporates features of economic and territorial planning in its approach. Because of their widely varying approaches to creating a more comprehensive system, the approaches taken in these nations provide a menu of options for other countries considering the adoption of framework laws.

### 1. Chilean Framework Law<sup>89</sup>

Chile's environmental framework law became effective in March of 1994. The two principal features of the Chilean law are the creation of a centralized national agency, the National Commission on the Environment (CONAMA), and the extensive use of environmental impact assessments. The law coordinates environmental review with the permitting of projects that might have a significant effect on the environ-

---

utes. As such, this discussion provides evidence of provisions that were adopted at a single point in time in these Latin American countries and, to this degree only, is a comment on their political feasibility.

85. National Environmental Policy, Diário Oficial, Lei 6938, (Braz.), *available in* WESTLAW, ENFLEX-BR Database (hereinafter Brazil Law No. 6938).

86. Ley Bases del Medio Ambiente [The Law on General Bases for the Environment], Official Gazette of the Republic of Chile, Ley 19.300 (Chile), *reprinted in* 1 J. ENVT'L. POL'Y & L. LATIN AM. & CARIBBEAN 163 (1994) (hereinafter Chilean Law 19.300).

87. Venezuelan Land Use Planning Act, Gaceta Oficial de la República de Venezuela, Ley 3.238 (Venez.), *reprinted in* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, 33 FOOD & AGRIC. LEGIS., Dec. 1984, at 9 (hereinafter Venezuelan Law).

88. La Ley General del Equilibrio Ecológico y la Protección al Ambiente [The General Law of Ecological Equilibrium and Environmental Protection], Diario Oficial de la Federación, arts. 1-194, Jan. 28, 1988 (Mex.), *available in* WESTLAW, ENFLEX-MX Database (hereinafter Mexican Law).

89. Chilean Law 19.300, arts. 1-92.

ment.<sup>90</sup> Projects that present a certain level of environmental risk are subject to a full environmental impact study.<sup>91</sup> Projects with less impact are subject to an environmental impact declaration, involving a lower level of study and review.<sup>92</sup>

Environmental reviews under the Chilean system are conducted by the National Commission on the Environment when a project has potential impacts on more than one region.<sup>93</sup> When the impact is internal to a particular region, a Regional Environmental Commission in that jurisdiction conducts the environmental assessment.<sup>94</sup> Permits are issued by the reviewing commission if the project complies with applicable environmental standards established by the National Commission on the Environment.<sup>95</sup> The liability of offending parties under this system is based only on intentional or willful violations, not strict liability based on ownership or operation.<sup>96</sup>

The Chilean law calls for air pollution emission reduction plans in priority areas, where national quality standards must be met; it uses taxes on emissions and tradable emission permits, among other techniques, to achieve compliance.<sup>97</sup> Resource management plans must be submitted for certain natural resource areas with unusual scenic, biological, habitat or renewable resource value.<sup>98</sup> With these exceptions, the law evidences little attempt to channel growth and development forces and to balance them with open space and natural resource conservation.

---

90. These include, water supply and storage systems, power lines and substations, electric power plants, nuclear reactors, transportation terminals, development projects, mining operations, carbon fuel facilities, manufacturing facilities, agro-industrial facilities, hazardous materials handling operations, sanitation projects and operations dealing with the application of chemicals. *Id.* at tit. II, para. 2, art. 10(a)-(r).

91. *Id.* art. 11(a)-(f).

92. *Id.* art. 18.

93. Chilean Law 19.300, tit. II, para. 2, art. 9.

94. *Id.*

95. *Id.* art. 16.

96. *Id.* tit. III, para. 1, art. 51.

97. Chilean Law 19.300, tit. II, para. 6, arts. 45-7.

98. *Id.*

The Board of Directors of the National Commission on the Environment are officials of the national government.<sup>99</sup> The Commission has an interdisciplinary advisory board, however, composed of scientists, representatives of nongovernmental organizations, universities, businesses and labor organizations.<sup>100</sup> Its role, as the name implies, is strictly advisory to the Commission.<sup>101</sup>

Citizens and non-governmental organizations are involved in the environmental review system directly.<sup>102</sup> They are permitted to submit observations regarding projects under review and allowed an administrative remedy to challenge the issuance of a permit if their observations are not appropriately considered.<sup>103</sup> Citizens are not permitted to sue offending polluters, but they may petition the municipality with jurisdiction over the offender to enforce applicable standards.<sup>104</sup> If the municipality refuses, it is deemed to be jointly and severally liable for the violations.<sup>105</sup>

## 2. Brazilian Framework Law<sup>106</sup>

The Brazilian law demonstrates an early commitment to sustainable development. Its objectives, articulated in 1981, include enhancing the existing environment, reclaiming damaged environments and ensuring sustainable socio-economic development.<sup>107</sup> It dedicates itself to achieving sustainable development, consistent with environmental consciousness.<sup>108</sup> The duties of the federal government include setting

---

99. *Id.* tit. VI, para. 2.

100. *Id.*

101. Chilean Law 19.300, tit. VI, para. 2.

102. See Diego Gallegos, Argentine Symposium Speech, *supra* this volume, at 599, for an example of the salutary role that a non-governmental organization played in resolving an environmental controversy in Argentina.

103. Chilean Law 19.300, tit. II, para. 3, arts. 28-9.

104. *Id.* tit. III, para. 1, art. 54.

105. *Id.*

106. Brazil Law No. 6938. Of the four national models described here, Brazil's is perhaps most relevant for Argentina. Both nations are members of the MERCOSUR, the common market of the southern continent, and have similar, decentralized federal governments.

107. *Id.* art. 2.

108. *Id.*

environmental quality criteria and standards, encouraging appropriate research and development, education, defining and protecting priority areas, and preserving natural resources and maintaining ecological equilibrium.<sup>109</sup>

Two national agencies are established by the Brazilian law. One is established as a cabinet department; the other is interdisciplinary, composed of industry, labor and non-governmental representatives, state officials, and environmental professionals.<sup>110</sup> The interdisciplinary group establishes pollution standards and criteria for the licensing of pollution generators.<sup>111</sup> Licenses are issued by the states, except for petrochemical, chemical and nuclear facilities which are issued by the cabinet agency.<sup>112</sup>

The cabinet level agency serves additional functions. The issuance of licenses to potential polluters by the states is done under its supervision.<sup>113</sup> It also monitors and supervises compliance with environmental quality standards.<sup>114</sup> This national cabinet agency maintains a registry of all persons and entities with technical expertise in pollution control and environmental management, and the manufacturers and suppliers of pollution control equipment.<sup>115</sup> It also has responsibility for protecting areas and matters that are the subject of international agreements or responsibilities.<sup>116</sup>

Enforcement, the administration of fines and other sanctions, is shared with local and state governments. National enforcement responsibility is given to the cabinet agency, which may also intervene when the states and municipalities do not enforce standards within their jurisdictions.<sup>117</sup> The interdisciplinary agency has final review authority over the fines and sanctions imposed by the cabinet agency.<sup>118</sup> Liabil-

---

109. *Id.*

110. Brazil Law No. 6938, art. 6.

111. *Id.* art. 9.

112. *Id.* art. 10.

113. *Id.* art. 11.

114. Brazil Law No. 6938, art. 11.

115. *Id.* art. 17.

116. *Id.* art. 18.

117. *See id.* arts. 6-9, 14.

118. Brazil Law No. 6938, art. 8(III).

ity for violations of standards is strict; violators are held accountable for damages caused irrespective of fault.<sup>119</sup>

### 3. Mexican Framework Law<sup>120</sup>

The Mexican law, adopted in 1988, combines many of the features of the laws of the other three countries, Chile, Brazil and Venezuela. The Mexican governmental system is federal, but it is somewhat more centralized than Argentina's and Brazil's. The majority of Mexico's 32 states, including the Federal District, have their own environmental laws. The 1988 Act requires that state and local laws must be at least as stringent as applicable federal regulations and standards.<sup>121</sup>

The framework law establishes a cabinet level agency to coordinate the functions of the other national cabinet departments.<sup>122</sup> It establishes an environmental impact statement as a prerequisite for permits.<sup>123</sup> This system is administered at both the federal and state level, depending on the degree of environmental impact of the project or activity under review.

A national registry is established of businesses and individuals that perform environmental services.<sup>124</sup> There is an educational program to be administered primarily through the formal school system of the country.<sup>125</sup> Provisions call for the designation of various types of protected areas and their management directly or through cooperation agreements, with special permits required for development within them.<sup>126</sup>

The Mexican framework law focuses on territorial, or land use, planning as a means of accomplishing sustainable development. The law recognizes the relationship between "human settlement" patterns and the preservation of ecologi-

---

119. *Id.* art. 14(IV).

120. Mexican Law, arts. 1-194.

121. *Id.* tit. I, ch II.

122. *Id.* ch. III, art. 8.

123. *Id.* ch. V, art. 32.

124. Mexican Law, tit. I, ch. V, art. 32.

125. *Id.* arts. 39-41.

126. *Id.* tit. II.



cally important areas.<sup>127</sup> It sets forth provisions for permits and financial incentives to encourage the "proper location of productive activities."<sup>128</sup> It also recognizes the relationship between these issues and the location of urban infrastructure, services and the provision of housing. The law calls for federal, state and local cooperation regarding urban development and housing policy in order to maintain, improve, or restore the balance of human settlements with natural elements and assure improvement of the quality of life.<sup>129</sup>

#### 4. Venezuelan Framework Law<sup>130</sup>

The last set of concerns in the Mexican statute is the focal point of Venezuela's framework law: The Land Planning Act of 1983.<sup>131</sup> Venezuela, like Brazil and Argentina, has a federal, but less decentralized governmental structure. It defines land planning as the regulation of the siting of human settlements and the development of the territory with a view toward securing harmony between the welfare of the people, the use of natural resources and the protection of the environment.<sup>132</sup> This, again, represents an early commitment to the principles of sustainable development.

The concerns of this framework law are broad indeed. They include the optimum use of the territory, harmonious regional development, integrated agricultural development and country planning, efficient process of urbanization, the layout of transportation networks, environmental conservation and the rational use of natural resources.<sup>133</sup>

The principal mechanism relied on to achieve these multiple objectives is an integrated system of land use planning at the municipal, regional and national level. The law establishes a national Land Use Planning Committee to work with

---

127. *See id.* tit. I, ch. V, arts. 23-7.

128. Mexican Law, tit. I, ch. V, art. 19.

129. *Id.* ch. II.

130. Venezuelan Law, arts. 1-78.

131. It is the author's understanding that the provisions of this law have not been implemented effectively in Venezuela.

132. Venezuelan Law, tit. I, § 2.

133. *Id.* § 3.

the national Ministry of the Environment and Natural Resources on the creation and implementation of land use plans at all three levels of government.<sup>134</sup> Included in this national committee are cabinet officers who typically do not participate in the coordinating bodies under the other framework laws.<sup>135</sup> These include, for example, the ministers of transportation, urban development, energy and mines, and agriculture.<sup>136</sup>

In the Venezuelan framework law, there are provisions for the formation of regional planning commissions and the creation of regional land use plans.<sup>137</sup> Requirements for town plans to insure that they comply with national standards are set forth.<sup>138</sup> It is understood that the national pattern of land development and conservation will be set by these local plans which makes it important that they consider and accommodate regional and national objectives, including environmental protection.

Under this system, the permitting of development activities is based on their compliance with land use plans.<sup>139</sup> Violators are subject to fines and sanctions as in the other systems.<sup>140</sup> The national government has extraordinary authority over nationally protected areas<sup>141</sup> and over land use planning when regional and local agencies do not meet their obligations under this system.<sup>142</sup>

In 1976, the Venezuelan Congress passed the Basic Environmental Act that created a national plan for conservation, protection and improvement of the environment, as part of the overall national plan. Article 1 states that the purpose of

---

134. *Id.* tit. III, ch. I, § 20.

135. *Id.*

136. Venezuelan Law, tit. III, ch. I, § 20.

137. *See id.* ch. III.

138. *Id.* ch. VI.

139. *See id.* tit. IV, ch. IV.

140. Venezuelan Law, tit. VI.

141. These include national parks, forest reserves, national security and defense, wild fauna reserves, refuges and sanctuaries, national monuments, tourist areas and areas placed under special administration under international treaties. *Id.* tit. II, ch. V.

142. *Id.* tit. III.

this legislation is to establish "guidelines for the conservation, protection and improvement of the environment to upgrade the quality of life as part of the nation's comprehensive development policy."<sup>143</sup>

## B. The National Land Use Policy Act in the United States

Before these four Latin American laws were adopted, an attempt was made in the United States to create a framework law, also called the National Land Use Policy Act,<sup>144</sup> that would have helped to coordinate environmental, land use and economic policies. Recent experience suggests that had such a law been adopted before the complex structure of environmental law was cobbled together, the cost, complexity and confusion of the current system could have been lessened. For this reason, a description of the National Land Use Policy Act proposed in the U.S. and the events surrounding its consideration is merited.

Over 25 years ago, Senator Henry Jackson proposed both the National Land Use Policy Act and the National Environmental Policy Act,<sup>145</sup> under which environmental impact reviews were first required, because he was frustrated by the conflicts and confusion concerning critical economic and environmental programs at the national, state and local level. One example, of many he cited, involved three agencies of the federal government working at cross purposes in the Florida Everglades.<sup>146</sup> One of them was preserving the area as a park, the other altering the landscape for flood control, the third funding airport construction. One of these was responding to the request of a local government in Florida, the other a Floridian county, and the third the State of Florida. None knew what the others were planning or doing. In effect, four levels of government were at odds about the area's future.

---

143. Ley Organica del Ambiente [Basic Environmental Law], art. 1, 1976 (Venez.)

144. S. 3354, 91st Cong., 2d Sess. (1970).

145. 42 U.S.C. §§ 4321-4370d (1994).

146. *See supra* note 66.

Senator Jackson realized that the National Environmental Policy Act (NEPA), which he proposed and which was adopted in 1969, helped to solve problems like the Everglades example. Under its provisions, all involved federal agencies were required to consider the impacts of their actions on the physical environment before acting. This provided one common denominator to organize federal activity. However, it would not have altered the fundamental conflicts in the land use objectives pursued by each of the federal agencies and the state and local governments involved in the Florida Everglades and elsewhere.

The National Land Use Policy Act was directed at controlling this type of inefficient and self-defeating agency behavior. It proposed to create a framework to coordinate the impact of federal and state actions on land use. It was a fusion proposal focused on both land resource use and conservation. It would have lessened the conflicts Senator Jackson saw emerging in cases like the Florida Everglades by requiring that both development and conservation objectives be considered in advance of specific conflicts and controversies.

### 1. Federal Incentives

The Act provided several powerful incentives to states to encourage them to create strategic land use plans, based on local input and public participation. The incentives in the Act included direct federal grants to the states, the provision of a network of data needed to plan efficiently and a commitment that federal actions of all types would conform to state land use plans after they were adopted and accepted.<sup>147</sup>

### 2. State Plans

State plans were to designate areas for growth and areas for conservation. Federal resources would then have to be directed to encourage growth and conservation in accordance with the state plan.<sup>148</sup> The Act would have designated a federal agency to coordinate federal action; states were en-

---

147. See Daly, *supra* note 57, at 10.

148. *Id.* at 12.

couraged to establish coordinating agencies for the same purpose.<sup>149</sup>

### 3. Affecting the Causes of Environmental Pollution

Such an approach aims at the cause of much environmental pollution. By asking the states to designate conservation areas, government resources and regulation can abate development pressures in those areas and greatly reduce the air and water pollution, wetlands disappearance and habitat destruction that comes with development.

Much of the environmental legislation passed in the 1970s was aimed at pollution abatement and expressly disclaimed having any impact on the land use authority of state and local governments. Typical is a provision of the Clean Air Act which states that nothing contained in the Act infringes on the existing authority of local governments to plan or control land use.<sup>150</sup> Experience has shown, however, that pollution abatement and land use control are hard to separate. Federal statutes that require development activities in or near wetlands to obtain permits, that prohibit or regulate development in tidal wetlands and coastal areas, and that affect development around water bodies and water courses amount to direct regulation of land use in and around these resources.

Despite the federal disclaimer, these statutes, and others affecting coastal zone management, safe drinking water and resource conservation, deal with the use of the land and its resources. By changing the category of a stream under these regulations, for example, an environmental agency can drastically lower the density at which land development can proceed in the vicinity of that stream and alter significantly the uses or densities allowed by local land use law. These environmental laws have established a variety of prescriptive standards regulating discrete slices of the environment that are impacted by the way land is used: the development pace and pattern created by local and state land use regimes. The

---

149. *Id.* at 10-13.

150. 42 U.S.C. § 7431 (1994).

two are fundamentally the same, though in federal legal fiction, they are distinct enterprises.

### C. Guidelines for National Land Use Policy

By focusing on the use of the land, the National Land Use Policy Act dealt with the causes, rather than the effects, of environmental pollution. By providing incentives to states to prepare state plans and designate development and conservation areas, and promising to use federal resources to promote state plans, the Senator's proposal respected the current understanding of the proper role of the states, and their localities, in land use matters.

Senator Jackson believed that the National Land Use Policy Act must contain new procedures and machinery to lessen the conflicts, the wasteful delays, and the inefficient results which he felt the land use competition generates.<sup>151</sup> The Act, he asserted, would require effective methods for implementation and make implementation an integral part of the planning process.<sup>152</sup>

For its time, the National Land Use Policy Act was a prescient proposal. The first draft of that statute contained guidelines for a national land use policy that remain vital and instructive today.

1. It Was Based on an Organizing Principle: The new "wisdom" of the scientific and business communities teaches us about the close connections that exist within the environment, between economic development and environmental conservation, and between man and nature.<sup>153</sup> The focal

---

151. The author conducted research on the National Land Use Policy Act under a grant from the Henry M. Jackson Foundation which included interviews with several individuals who worked with Senator Jackson on the National Land Use Policy Act from whom observations of this kind were obtained. These individuals include William Van Ness, who was Chief Counsel of the Senate Committee on Interior and Insular Affairs; Grenville Garside, Jackson's Legislative Aid; Wally Bowman of the Congressional Research Service; and Dan Dreyfus and Suzanne Reed, two staff members of the Senate Committee on Interior and Insular Affairs.

152. *Id.*

153. See MURRAY GELL-MANN, *THE QUARK AND THE JAGUAR* (1994); ILYA PRIGOGINE & ISABELLE STENGERS, *ORDER OUT OF CHAOS: MAN'S NEW DIALOGUE*

point for the National Land Use Policy Act made these connections. In Senator Jackson's view, that focal point is the use of the land. He argued the point eloquently:

To a very great extent, all environmental management decisions are intimately related to land use decisions. All environmental problems are outgrowths of land use patterns.<sup>154</sup>

Public policies are too often defined and carried out in fragmented, narrow scope programs by mission-oriented agencies.<sup>155</sup>

At the present time a whole host of agencies are deeply involved in land use planning . . . . Most of these plans are necessary and desirable. The problem is however: To date, no one in the Federal Government has ever put these plans together to see if they are consistent, to see if they make sense, and to see if they are compatible with local goals and aspirations. As a result, there are needless and costly conflicts between agencies and departments of the Federal Government, between State and Federal Government, and between State and local government.<sup>156</sup>

2. It Provided An Open-Ended Process: The National Land Use Policy Act established an open-ended process rather than dictating adherence to a fixed set of objectives.

The most important feature of the Act, however, and I might add, the least recognized, is that it establishes new decision-making procedures for all agencies of the Federal government. Some of these procedures are designed to establish checks and balances to insure the potential environmental problems will be identified and dealt with early

---

WITH NATURE (1984); TOM PETERS, *LIBERATION MANAGEMENT: NECESSARY DISORDER FOR THE NANOSECOND NINETIES* (1992).

154. Henry M. Jackson, *Environmental Policy and the Congress*, 11 Nat. Resources J. 403, 412 (1971).

155. *National Land Use Policy: Hearings on S. 3354 Before the Senate Committee on Interior and Insular Affairs*, 91st Cong., 2d Sess. (1970), App. 3, at 392, 394 (*A view from Capitol Hill*, address by Senator Henry M. Jackson to the Princeton University Conference, Princeton, N.J., Mar. 9, 1970).

156. 116, Cong. Rec. 1757, 1759 (1970), Senator Jackson introducing S. 3354, The National Land Use Policy Act of 1970.

in the decision-making process and not after irrevocable commitments have been made.<sup>157</sup>

The change in thinking about systems behavior in the scientific and business communities over the course of this century corroborates this approach.<sup>158</sup> End-state, "traditional" planning relies upon the principles of determinism, mankind's ability to know and predict outcomes. Newer planning and management approaches are more focussed on open-ended processes than on end-state visions, and rely on the inherent intelligence that exists, and arises out of, systems that are functioning organically.

3. It Provided Information and Called for Full Participation: Systems theories, today, emphasize the importance of gathering and respecting the intelligence available from within all of the components of a system. Senator Jackson proposed the efficient use of all reliable and objective data. He called for citizen participation at the grass roots level to fill the inevitable gaps in the data network. This "practical wisdom" not only provided information, but could serve to balance the various interests within the system.<sup>159</sup>

---

157. *National Land Use Policy: Hearings on S. 3354 Before the Senate Committee on Interior and Insular Affairs*, 91st Cong., 2d Sess. (1970), App. 3, at 392, 393 (A view from Capitol Hill, address by Senator Henry M. Jackson to the Princeton University Conference, Princeton, N.J., Mar. 9, 1970).

158. See Hanna, U.S. Symposium Speech, *supra* this volume, at 531. See also GELL-MANN, *supra* note 153.

159. In the Senator's words:

The history of conservation and environmental concern has been a history of specific, isolated confrontations - a history of focussing on the issue of crisis of the moment, wilderness preservation, and oil spill or air pollution. A comprehensive management approach to environmental administration has not been achieved. our institutions and procedures still condition us to fight brush fires.

*National Land Use Policy: Hearings on S. 3354 Before the Senate Committee on Interior and Insular Affairs*, 91st Cong., 2d Sess. (1970), App. 3, at 392, 393 (A view from Capitol Hill, address by Senator Henry M. Jackson to the Princeton University Conference, Princeton, N.J., Mar. 9, 1970).

Another distinguished United States politician made similar observations. "I know of no safe depository of the ultimate power of society but the people themselves, and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education." Letter from Thomas Jefferson to Charles



4. It Established a Coordinated and Integrated System: The National Land Use Policy Act, which established a clear role for each level of government and insured that their activities would be coordinated. It would have integrated local, state and federal systems. Planning was to emerge from the local level to be memorialized in a state plan, which was under constant review. The federal role was to provide incentives, data, assistance and training to encourage and help the states in their coordinating role. The states would have provided a common forum for localities to organize their regulatory regimes and capital budgets so that all three levels of government could cooperate to encourage development in designated growth areas and to encourage land and resource preservation in conservation areas. In other words, Jackson advocated a framework that was competent to integrate resource allocation and regulation into a coherent process.<sup>160</sup>

5. It Favored Incentives to Cooperate Over Mandates to Conform to Rigid Standards: State participation in this planning process was voluntary. Senator Jackson believed strongly that the role of the federal government was to provide effective incentives to encourage state involvement and to assure that this integrated system came into being and functioned efficiently. Incentives were his technique for building a healthy and organic land use system, one that gathered intelligence from all its components, one that was integrated and within which efficiency resulted from the interplay among all decision-makers and affected parties. Emphasizing planning, he felt, by providing incentives to encourage it, would lessen the "needless and costly conflicts between agencies and departments of the Federal Governments, between

---

Jarvis (Sept. 28, 1820), in BARTLETT'S FAMILIAR QUOTATIONS, at 473 (Little Brown & Co., 14th ed. 1968).

160. In Senator Jackson's words:

A national land use policy can provide a framework within which the spectrum of proposals to utilize environmental resources can be balanced against one another and measured against the demands they collectively impose upon the government. A common structure is needed within which the public can compare alternate proposals to achieve environmental goals.

Jackson, *supra* note 154, at 413.

State and Federal Government, and between State and local government.”<sup>161</sup>

In order to make intelligent decisions which are not based on the emotion of conservation's cause célèbre of the moment or in the error of simply perpetuating past practices, there is a very real need to develop a national capacity for constructive criticism of present policies and the development of new institutions and new alternatives for the management of land, air, water and living space.<sup>162</sup>

The current systems for environmental protection in the U.S. and Argentina are top-down, standard driven, centralist and not integrated with the local processes that spawn the land use patterns that cause, or can prevent, much of the environmental pollution the federal system is designed to abate. The new paradigm, emerging from the scientific and business communities, requires a constant feedback process within an integrated system. Integration, today, refers not simply to intergovernmental coordination, but a profound fusing of public and private sector planning and processes. It is through pervasive interaction within entire systems that mutually efficient behavior - order and efficiency - evolve. These concepts of efficiency and integration should be reflected in modern processes of resource allocation and regulation.

#### D. A Basis for Action in Argentina and the U.S.

For national lawmakers in the two countries, the critical challenge is to define and advocate a new system of resource use and regulation. The relatively new term “sustainable development” provides, conceptually, this type of integration and a basis for the reform of our legal systems. Argentina now confronts the challenge of codifying its constitutional commitment to sustainable development. The U.S. has a historical legacy, provided by Senator Jackson, that can be revisited and revised as we seek mutually beneficial ways to

---

161. 116, Cong. Rec. 1757, 1759 (1970), Senator Jackson introducing S. 3354, The National Land Use Policy Act of 1970.

162. Jackson, *supra* note 154, at 406.

develop more efficient systems for resource use and conservation.

As Senator Jackson said in 1970:

Meeting the challenge of the land promises to be a difficult task. It will not be resolved by one act in one legislative session. It will require experimentation and the refinement of many programs over a long period of time. It will require hard decisions about what is to be conserved and what is to be lost in the tides of social and technological change which sweep this country. And most important, it will require a national effort based on a high level of State and Federal cooperation.<sup>163</sup>

With the lessons of the past quarter century to sharpen our perception, Senator Jackson's challenge rings more loudly and, hopefully, is more audible today.

## VI. Considerations for Creating a Framework Law in Argentina

### A. Argentine Constitutional Provisions

Under Article 41 of the Constitution,<sup>164</sup> added in 1994, the government in Argentina must respond to at least seven mandates:<sup>165</sup>

1. It shall protect the citizens' right to a healthy, well balanced environment, suitable to human development and to economic development that does not compromise the needs of future generations.
2. It shall provide for the remediation of environmental damage.
3. It shall preserve the nation's historical and cultural heritage and its biological diversity.
4. It shall provide for the environmental education of the nation and for the provision of information on environmental issues.

---

163. 116, Cong. Rec. 1757, 1758 (1970), Senator Jackson introducing S. 3354, The National Land Use Policy Act of 1970.

164. CONST. ARG., art. 41 as amended (1994).

165. See *supra* note 2.

5. The federal government shall establish minimum standards for the protection of the environment without altering the jurisdiction of the provinces.

6. The provinces shall have the authority to establish complimentary standards.

7. It shall prohibit the entry of hazardous and radioactive wastes into the country.

Two conclusions can be derived from reviewing these mandates:

1. First, it is the federal government's obligation to establish a system within which these mandates can be carried out, if the current system is not competent to meet them. By definition, provincial legislatures cannot, acting alone and independently, create a system competent to protect the right to a healthy environment for the citizens of the nation.

2. Second, the organizing principle of the seven mandates is the first of the seven listed above: the obligation of the government to protect its citizens' right to a healthy and balanced environment, "suitable to human development and to economic development that does not compromise the needs of future generations." This latter language expresses the Argentine government's commitment to sustainable development as defined in the Earth Summit in Rio de Janeiro. This requires the federal government to establish a system that fuses environmental protection and economic development: two key components of sustainable development.

There are two other constitutional provisions, also added by the reforms of 1994, that are relevant to the authority and obligations of the federal and provincial governments in Argentina:

1. Jurisdiction over natural resources: The Constitution states that "the provinces have original jurisdiction over natural resources in their territories."<sup>166</sup> This provi-

---

166. CONST. ARG., art. 124 as amended (1994): Corresponde a las provincias el dominio originario de los recursos naturales existentes en su territorio.

sion must be respected by the national congress as it establishes a comprehensive system to protect the constitutional right to a healthy environment of the citizens.<sup>167</sup>

2. Jurisdiction over territorial planning: The Constitution also states that the national congress is authorized "to provide for the harmonious growth of the nation and territorial settlement and to promote policies to balance the relatively unequal development of the provinces and regions."<sup>168</sup> In establishing a comprehensive system to promote sustainable development, this provision clarifies the authority of the federal congress to provide for a competent system of territorial planning.<sup>169</sup>

In environmental terms, these provisions allow the federal congress to establish and carry out two systems: one to prevent and remediate point-source pollution through the establishment and enforcement of minimum standards for environmental quality; the other to prevent non-point source pollution by providing for the harmonious growth of the "nation and territorial settlement."

The failure of the U.S. government to adopt a legislative program in the early 1970s to coordinate its initiatives to prevent both point and non-point source pollution is regarded today as one of the principal failures of its legal system.<sup>170</sup>

---

167. Note, however, section 2340 of the Argentine Civil Code which states that the territorial seas, the inner bays, harbors, rivers, sea and river shores, navigable lakes and their beds and any other water resources capable of satisfying the public interest are under federal jurisdiction. Código Civil [Cód. Civ] § 2340 (Arg.).

168. CONST. ARG., art. 75, section 19 of the Constitution, authorizes the National Congress to "[p]rover al crecimiento armónico de la Nación y al poblamiento de su territorio; promover políticas diferenciadas que tiendan a equilibrar el desigual desarrollo relativo de provincias y regiones." *Id.*

169. Under Article 5 of the Argentine Constitution, the provinces are authorized to create a system of municipal government. From province to province, the degree of autonomy given to municipal governments varies, as it does in the United States. In most provinces, municipalities control land use and development, as do their U.S. counterparts, by adopting building ordinances, issuing permits for residential, commercial and industrial projects, providing for water and sewer services, transportation facilities, and their maintenance. All these functions are intimately bound up in the national system of environmental protection and enhancement. CONST. ARG., art. 5 as amended (1994).

170. See Miller, U.S. Symposium Speech, *supra* this volume, at 513.

Without integrating national programs for the prevention of pollution and for the economic development of its territory, it is difficult, if not impossible, for a nation to achieve sustainable development.

#### B. Four Approaches to Sustainable Development

The experiences in four Latin American countries and the U.S. provide a variety of conceptual models for Argentina to consider in developing a strategy for achieving sustainable development through legislative reform. These models are derived from initiatives in five countries to develop a framework law within which sustainable development strategies can operate.

The Chilean model is a centralized model, focused principally on the prevention of environmental pollution. It is centered on the aggressive use of environmental impact reviews as a prerequisite for the issuance of a permit to develop a project or undertake an activity that might involve environmental pollution. Environmental quality standards are established nationally. Regions are allowed to conduct environmental reviews and issue permits when activities have only regional impacts.

The Brazilian approach is also focused on environmental protection but is more decentralized, with states issuing permits and licenses following national standards and with some national supervision and monitoring. The participation of affected and interested parties is provided for by their representation on the board of a national agency. The board establishes standards for environmental quality and standards for the issuance of licenses and permits. It also hears appeals from enforcement orders. Enforcement of environmental matters of national significance is within the authority of a cabinet level agency. Otherwise, states and municipalities enforce the standards.

The Mexican statute involves both a comprehensive environmental protection regime and a territorial planning scheme as its method of achieving sustainable development. It adopts some of the techniques of the Chilean and Brazilian

models, particularly environmental impact reviews and a decentralized permitting system, but it also concerns itself with urbanization, the location of development and the conservation of the land. In this way, it is cognizant of both point-source and non-point source pollution.

The Venezuelan model concentrates on territorial planning. It adopted an intergovernmental land use planning program as its method of controlling land and natural resource use and the effects of non-point source pollution. The cabinet level agency it creates involves those department of the national government whose activities affect land and natural resource use. Its permitting system is focussed on whether development proposals and other activities meet the criteria established by local, regional and national land use plans.

The National Land Use Policy Act proposed in the U.S. in the early 1970s operated in much the same way as the Venezuelan model. Its principal sponsor believed that a comprehensive approach to territorial planning was a prerequisite for effective pollution prevention strategies. Territorial planning has, as one of its key components, the prevention and containment of non-point pollution emanating from the general development patterns that occur under municipal and state land use permitting practices.

By beginning with territorial planning, a framework is created for decision-making regarding the location and permitting of point-source projects and activities. Such a framework would permit the Argentine government to address several of the mandates of Article 41:

1. Territorial planning provides a legal basis for the federal government to mark off and act to protect critical natural resource areas that it is obliged to protect under the Constitution and international treaties.
2. It is through land use controls that historical and cultural buildings, monuments and sites are protected.
3. Biological diversity occurs in discrete areas that are greatly affected by provincial and municipal land use and planning policies.

4. Economic development can only be sustainable if it is organized on the land in serviceable and cost effective patterns.

### C. Assessing the Argentine Experience to Date

#### 1. Adequacy of the Current System:

Improvements in the current legal system in Argentina are being called for. Practitioners assembled for this study seemed unanimous in their critical assessment of the environmental legal system, both at the national<sup>171</sup> and provincial level. It, like the U.S. system,<sup>172</sup> is characterized as overlapping,<sup>173</sup> confusing,<sup>174</sup> costly and incomplete.<sup>175</sup>

---

171. Prior to the creation of the Secretariat of Natural Resources and Human Environment at the national level, five out of the eight departments had some authority over the environment. This is being consolidated under the new Secretariat. Dr. R. Eugenia Bec, Argentine Symposium Speech, *supra* this volume, at 595.

172. See John Nolon, U.S. Symposium Speech, *supra* this volume, at 519.

173. Decree Nb. 674/89, as amended by Decree Nb. 776/92, regulates discharges into waters subject to federal jurisdiction. Contaminación Hidrica [Water pollution], B.O. Decreto 674/89 (Arg.), amended by Control de Contaminación y Preservación Aguas [Water preservation and Pollution Control], B.O. Decreto 776/92 (Arg.). See *supra* note 167, for the less than clarifying definition of waters which are subject to federal jurisdiction. All Argentine provinces, and some municipalities, have water regulations applicable to the water within their respective territories.

174. The Argentine Hazardous Waste Law regulates the treatment, transport or disposal of hazardous wastes generated in places under federal jurisdiction, wastes generated in a province but transported out of that province, wastes that are capable of affecting the environment outside the province or wastes that are of national economic significance. Ley de Residuos Peligrosos [Hazardous Waste Law], B.O. Ley 24.051 (Arg.). See *supra* note 167, for the imprecise definition of federal waters, which would be a "place subject to federal jurisdiction" under Nb. 24,501.

175. The National Air Pollution Law, which is similar to the U.S. Clean Air Act in many ways, is not self-executing, has not been implemented administratively and, therefore, is not being enforced. Normes par la Preservación de los Recursos del Aire [Regulations for the Preservation of Air Resources], B.O. Ley 22.284 (Arg.).



## 2. Capacities within the Current System:

There is limited experience in Argentina in effective environmental enforcement,<sup>176</sup> joint federal/provincial strategies, use of judicial remedies, and the effective involvement of either industry representatives or citizen groups in the creation of environmental standards or effecting compliance with those standards. Similarly, there is limited experience in Argentina with national or provincial involvement in territorial planning.<sup>177</sup>

## 3. The Urgency of Economic Development and Expansion:

A critical national priority is the expansion of economic activity, domestically and internationally, the attraction of foreign capital to the country and strategies to increase private sector employment. The fiscal integrity of the national and provincial governments depends on continued successful economic strategies.

## 4. The Economic Relevance of Environmental Compliance and Territorial Planning:

Argentine companies cannot compete effectively for international capital and cannot sell competitively in foreign markets unless they can demonstrate that they are in compli-

---

176. There is, for example, no general Argentine law that requires the federal government to perform environmental impact assessments regarding federal projects and activities. A national law was enacted in 1991, Law 24.197, which did create such a requirement but which was vetoed by the President of the Republic. The national government has some experience with environmental assessment. Law 23.879 requires environmental impact assessments to be performed for certain dam construction. *Obras Hidráulicas: Evaluación de las Consecuencias Ambientales que Producen o Podrían Producir en Territorios Argentinos las Represas Construidas, en Construcción y/o Planificadas* [Public Water Works: Analysis of the Environmental Impacts Produced by Dams that are Existing, Under Construction, or Planned in Argentina], B.O. Ley 23.879 (Arg.). Articles 30, 36, and 60 of the national Hazardous Waste Law require assessments for the installation or removal of treatment or storage plants and regarding the management of some hazardous wastes. B.O. Ley 24.051, arts. 30, 36, 60 (Arg.).

177. See Arq. Rodolfo Pedro Gassó, Argentine Symposium Speech, *supra* this volume, at 577.

ance with minimum standards of environmental quality. The constitutional mandate to establish minimum environmental standards is, then, a prerequisite for economic success in the global marketplace.

#### 5. The Importance of Controlling Non-Point Source Pollution

The U.S. experience proves that without effective territorial planning, non-point source pollution cannot be controlled and the cost to the public sector of remediating this pollution and of providing public services in areas which are not developed in cost effective patterns will be very high. The Argentine federal government has clear authority to establish a national system of territorial planning through partnerships with its provinces as a means of controlling non-point source pollution and providing a framework for economic development and point-source pollution as well.

#### D. A Strategic Approach

Given its new constitutional mandate, the national government must act. The limited experience and success of the current federal and provincial systems, however, indicate that the initial objective should be to establish the appropriate roles for each level of government. In addition, the national government should provide for the involvement of regulated industries and representatives of non-governmental organizations and establish a process for the gradual integration of the country's current economic, territorial and environmental laws.

The initial emphasis should be on creating a collaborative process,<sup>178</sup> on the collection and distribution of information and data and on the gradual integration of existing programs into the overall framework created. All of the relevant functions of government, that are to be ultimately inte-

---

178. This process has begun in Argentina. On June 3, 1993 the governors of the provinces of the country and the President of the Republic formed the Federal Environmental Council. Consejo Federal de Medio Ambiente (COFEMA).

grated into a comprehensive system, should be included in some fashion from the beginning.

The tendency of provinces in Argentina to fail to adopt model laws passed by the federal congress in the areas of air pollution, water pollution, hazardous waste regulation and wild animal protection suggests that provinces need to be motivated to join in creating the national system called for by the constitution. This begins by giving them maximum control over the implementation and enforcement of the basic standards that must be set under Article 41 by the national government.

Allowing provinces the authority to conduct environmental impact reviews, issue permits and enforce sanctions affords them that control, without abdicating the duties of the federal government under the constitution.<sup>179</sup> Authorizing federal authorities to enforce established standards by default - where the provinces are unwilling or unable to do so - creates an additional incentive for the provinces to act and, at the same time, honors the constitutional guarantee of a healthy and balanced environment to the citizens. Finally, the national government should provide information, technical resources, tax incentives and financial assistance to the provinces that join the new national system for sustainable development.

#### E. Priorities for National Action

##### 1. Registry and Licensing:

In order to create a competent system of providing certificates of compliance to Argentine manufacturers and exporters, the national government should examine the current system of accrediting firms and entities that are certified to issue compliance certificates under the ISO program in Argentina.<sup>180</sup> ISO is considering creating international stan-

---

179. See Pedro Tarak, Argentine Symposium Speech, *supra* this volume, where a sound reason for this provincial control is articulated: "What is appropriate as a strategy in a city in the northwest region of Argentina is not necessarily the answer to what would be done legally, politically, or administratively in the south." *Id.* at 564.

180. See *supra* note 42.

dards for accrediting compliance examiners; Argentina should be certain that its examiners are properly certified, so that the certificates they issue are recognized and respected internationally. If appropriate, a registry of certified examiners could be created.

This registry could be expanded to include the registration or licensing of the manufacturers and suppliers of environmental clean-up equipment and processes; the generators and handlers of hazardous waste, and principal point source polluters. This central registry of environmentally relevant firms and entities could be a principal method of tracking and supervising those principally responsible for potential pollution and its prevention.

Licenses could be issued to the producers and handlers of pollution and hazardous wastes which could be a prerequisite for doing business in the country. Violations of federal or provincial standards could be grounds for the suspension or revocation of the license. A particularly effective sanction would be to suspend or cancel a company's ISO compliance certificate in the event of severe or repeated violations of established standards.

Registration and licensing can be subject to periodic renewal and reporting. Registrations and licenses could be given for fixed periods, such as two years, subject to renewal upon the filing of a report of activities or compliance. The reporting process could be an excellent method of monitoring, and source of data concerning, environmental compliance.

Fees could be charged for listing on the registry and the issuance and renewal of licenses. These fees could be a revenue source to cover the costs of the maintenance of the registry and the issuance of licenses and monitoring of the activities of the licensees. Where appropriate, provincial offices of the Registry and Licensing agency could be created.

The maintenance of this registry is an appropriate national function and responds to the mandates of Article 41, of establishing minimum standards for the protection of the environment in a way that should not affect, or alter, the authority of the provinces.

## 2. Standard Setting Entity<sup>181</sup>

The national congress should consider establishing an independent and impartial entity to create minimum standards for protecting the environment, thus conforming with the specific mandate of Article 41. This entity should be organized so that the scientific community, regulated industries, and non-governmental organizations have a competent role in standard setting and so that the entity is regarded as both apolitical and impartial. If desired, this entity can be created as an independent corporation, separate and apart from governmental influence.

One of the critical roles of this standard setting agency could be its advisory function to the national congress and legislature regarding the formal adoption of standards, the need for stricter standards in particular areas or provinces, and the mechanisms recommended to meet the standards over time. There is an obvious need for a gradual process of encouraging and enforcing compliance that this entity could meet if properly chartered, organized and supported.<sup>182</sup>

---

181. At the White Plains conference on this subject, Richard Barth, the President of Ciba-Geigy and member of the President's Council on Sustainable Development offered these comments:

If you have a chance in Argentina to build a new system, I would make sure there is a credible, objective, scientifically-based institution . . . which has broad support of the population. Our experience in the President's Council indicates that each constituency brings in its own set of experts, comes up with its own data, and continues to disagree. There is no institute in the United States where we can refer these questions for resolution, one whose decisions will be accepted by the public and the courts. So, the constituents disagree and we end up in the courts in litigation with one group's expert vying against the other's. The existence of a respected centralized institution would help limit for debates which exist between these contentious parties.

See Barth, U.S. Symposium Speech, *supra* this volume, at 529-30.

Note the similarities between Mr. Barth's suggestion and the approach taken in Brazil, under which an independent, interdisciplinary body is given standard setting duties. See *supra* part V., section A.2.

182. The Air Pollution Law currently calls for the establishment of maximum levels of air pollutants to regulate stationery sources of air pollution, however, such levels have not yet been established. B.O. Ley 20.284 (Arg.)

One of the methods of financing the important operations of this entity could be through a schedule of fines imposed on polluters. These fines could be graduated so that, as time passes, it becomes less and less economical for pollution to occur. This should be sequenced with compliance procedures, giving polluting industries time and flexibility to achieve compliance. If the provinces are placed in charge of enforcement, some method of sharing the fines and penalties would have to be created, with the provinces retaining sufficient revenues to pay for the cost of enforcement and the rest paid to this independent agency. Those payments could be supplemented by national appropriations and channeled through a national environmental and territorial promotion fund.<sup>183</sup>

### 3. Negotiated Standards

Among the functions of this entity would be the listing and classification of hazardous materials and substances and the classification of water bodies and water courses and the establishment of air and water quality standards. This system of classification and standards should be a unitary one that recognizes the interconnected nature of water and air resources.

Standards should not be issued by this entity or adopted by the Congress until they have been negotiated with the affected industries involved and expert non-governmental organizations and academies. The involvement of these parties must be significant and effective so that the full costs and benefits of the standards can be assessed in a practical fashion.

This involvement should also be used to identify and articulate market-based methods of achieving compliance.<sup>184</sup> Regulated entities should be given sufficient time and a full range of realistic options to achieve compliance. The amount of time that is realistic and the range of options allowed can

---

183. See *infra* part VI, section E.8.

184. See Zorraquín, Argentine Symposium Speech, *supra* this volume, at 583. "[T]he government first has to provide a simple program with reasonable environmental quality objectives. . . . Private companies should adopt self-regulatory initiatives to meet established standards." *Id.* at 584.

be established by this consultation process. Where public health issues exist, international obligations or other national exigencies requiring more stringent methods of compliance should be developed.

#### 4. Territorial Planning

The national congress should establish a territorial planning system under which geographical areas of national, provincial, and municipal importance can be designated. The congress should adopt a statute providing, within the limits of the constitution, for compacts to be entered into among municipalities, the provinces and the nation for the protection and enhancement of these areas.<sup>185</sup>

---

185. See Gassó, Argentine Symposium Speech, *supra* this volume, at 577. Architect Rudolfo Pedro Gassó, representing the Argentine Professional Council of Architecture and Urban Professionals, (Consejo Profesional de Arquitectura y Urbanismo) notes that:

the federal government should promote the creation of a legal and administrative structure to insure comprehensive and effective land use and environmental planning in Argentina. [Although under Article 124 of the Constitution,] all matters relevant to the use of natural resources and the occupancy of the land are in the hands of the provinces . . . an amendment to Article 75, section 19 of the Constitution, authorizes the National Congress "to provide for the harmonious growth of the nation and territorial settlement and to promote policies to balance the relatively unequal development of the Provinces and Regions."

*Id.* at 577-78.

In Spanish it reads: Proveer al crecimiento armónico de la Nación y al poblamiento de su territorio; promover políticas diferenciadas que tiendan a equilibrar el desigual desarrollo relativo de provincias y regiones. CONST. ARG., art. 75, § 19 as amended (1994).

This provision can be seen as a basis for national legislation regarding settlement, growth and development similar to the Spanish system. In Spain, where 17 provinces enjoy great legal autonomy, the national government retains important planning powers, particularly regarding strategic economic planning, fiscal decisions, property legislation and national infrastructure.

Based on this constitutional language and the Spanish model, it is possible for the National Congress in Argentina to adopt a General Territorial Planning Act setting forth national policies of settlement, growth, land development, resource conservation and environmental protection. This Act could also define critical land areas and jurisdictions at the national and provincial level and set forth procedures for comprehensive planning and administration to ensure their effective development and protection.

Gasso, *supra* this volume, at 578.

The congress should also establish a planning process that links the municipal and provincial territorial planning system and the development permits issued under it with the enforcement of national and provincial environmental standards and the licensing and permitting systems used to achieve compliance with those standards.<sup>186</sup> The system of environmental permitting established by the provinces under the national environmental system should be synchronized with the municipal and provincial permitting system for private development projects and public works projects.

Incentives, including technical assistance, should be provided to municipal and provincial governments to adopt and enforce comprehensive territorial plans that protect national and provincial priority areas and prevent the pollution of protected resources, such as water bodies and courses and threatened air masses. Citizen participation in the preparation of municipal and provincial territorial plans should be guaranteed.

### 5. Geographical Information System

Article 41 requires that the government collect and provide information regarding environmental issues. The development of computer-based, geographical information systems now provides a feasible and cost-effective means of collecting and distributing a wide range of information relevant to environmental pollution, protection and territorial planning. These systems have entered a new phase of development and are now affordable and user-friendly. The advent of a comprehensive system of environmental protection and territorial planning is the ideal time to develop an information program in the context of a computer-based, geographical information system.

This system can become a central data collection and distribution system for all information relevant to the use and conservation of the land and natural resources. It can record

---

186. The Hazardous Waste Law states that no facility that generates hazardous wastes shall be authorized to operate by a local zoning authority unless it has obtained an environmental certificate. B.O. Ley 24.284, art. 7 (Arg.).



and report specific information, such as citizen complaints about pollution,<sup>187</sup> information of hazardous substance releases reported by producers and handlers of such substances,<sup>188</sup> and the information reported in environmental audits and compliance certificates. This system can become a central source of information about the location and capacities of public and private infrastructure such as highways, utility lines, sewer and water systems, treatment facilities and the issuance of development permits.<sup>189</sup>

As a complete and accessible system, these information programs can provide information quickly to local planners,<sup>190</sup> provincial officials, citizens, and national legislators. Geographical information systems provide a method for insuring efficient feed-back within the overall system and can assist greatly in establishing a national system of monitoring of compliance with environmental and territorial planning programs.

## 6. Impact Reviews and Permits

A system of conducting environmental impact reviews, at both the national and the provincial level, should be established by the federal congress. The federal impact review process should be limited to federal projects or activities which carry a significant potential impact on the environment. Beyond this, the provinces should be encouraged to

---

187. Decree 674/89 establishes procedures for citizens and corporations to follow to report violations of federal water pollution regulations. B.O. Decreto 674/89 (Arg.).

188. Article 60(f) of the national Hazardous Waste Law requires the Secretariat of Natural Resources and Human Environment to create an information network available to the public regarding the generation, handling and disposal of hazardous wastes. B.O. Ley 24.051, art. 60(f) (Arg.).

189. The state of Rhode Island has a state land use plan called Land Use 2110 that includes a computer-generated land capability map identifying four categories of land use intensity. This map is used by cities and towns to determine allocations of land for development and conservation. See Porter, *supra* this volume, at 547.

190. See Bec, Argentine Symposium Speech, *supra* this volume, at 595. "[S]ince municipalities enjoy significant autonomy regarding environmental matters, it corresponds to the national legal system to provide for and emphasize the exchange of information and coordination of this highly decentralized system." *Id.* at 595-96.

conduct environmental reviews. Where provinces decide not to conduct environmental reviews, or where a project or activity has clear interprovincial or national impacts, the federal government should complete the required review. In appropriate cases, provinces should be encouraged to delegate environmental review responsibility to the municipal level so that the environmental review can be coordinated with local zoning, building and land use permit issuance.

The Chilean system of requiring an environmental impact study for significant projects and an environmental declaration for less significant projects should be studied for possible adoption. Citizen participation should be included in the process; individual citizens and non-governmental organizations should be allowed to comment on the environmental impacts of projects under review and to suggest mitigation measures, where appropriate. Reviewers should be encouraged to consider and respond to such input.

Compliance with the required level of environmental review should be a prerequisite for qualifying for a permit, either under the environmental protection system or the territorial planning system. All development permits issued by local and provincial governments, as well as permits for point source pollution activities, should be subject to this review system.

## 7. Enforcement

There should be coordination between the administrative mechanisms for issuing permits and enforcing applicable standards. A system of fines and other penalties should be established at the provincial level to insure compliance. Other sanctions should include the revocation or conditioning of existing permits and orders to cease operations where emergency conditions exist. Where willful and intentional violations of standards are found, extraordinary fines should be levied and the proceeds contributed to an environmental and territorial promotion fund. A national system of default enforcement should be created where no effective action is

taken at the provincial or municipal level and serious conditions continue unabated.<sup>191</sup>

The legislature should consider establishing a national system of mediating controversies regarding environmental and territorial planning standards that allows for the resolution of disputes among the parties directly affected by the violation. Non-governmental organizations should be encouraged to become involved in this mediation system to the extent that they are interested and capable.

### 8. Incentives

The national government should establish an Environmental and Territorial Promotion Fund and enable it to provide a wide range of incentives to encourage compliance with this legal system.<sup>192</sup> The Fund should be independently and impartially administered. The first obligation of the Fund, which can be supplemented by national appropriations, should be to provide the financial support needed by the independent standard setting entity. Any net revenues realized by the national registry and licensing functions should be contributed to this fund along with any extraordinary fines levied on willful or intentional violators of established standards.<sup>193</sup>

The directors of this national fund should be authorized to provide a broad range of grants and incentives to encourage activities that advance the purposes of this legal system. These could include educational programs, planning

---

191. This default approach conforms to the intent of Article 41 as interpreted by attorneys Walsh and Sabsay. See Daniel Sabsay & Juan Rodrigo Walsh, Argentine Symposium Speech, *supra* this volume, at 589. It parallels the approach taken under the Brazilian framework law discussed *supra* part V., section A.2.

192. There is precedent for this recommendation. See Law 23.883 which creates the National Fund for the Financing of Productive Activities of Small and Medium Sized Companies, which creates incentives for investments in environmentally sound activities. B.O. Ley 23.883 (Arg.).

193. Decree 674/89 levies fines, or tariffs, on companies that are responsible for untreated, polluted discharges into federal waters. These sanctions are not regarded with great seriousness particularly since it is far cheaper to pay the tariff than it is to invest in the expensive water treatment facilities needed to treat waste water before discharge. B.O. Decreto 674/89 (Arg.).

grants to municipalities or provinces, research and development grants, and similar activities.

## VII. Implementation

On March 23, 1996, an Argentine organization established to resolve environmental conflicts and aid in policy creation, *Consenso Ambiental*, facilitated a day-long meeting attended by ten environmental, economic and land use experts. The purpose of this meeting was to evaluate and comment upon the priorities for national action contained in the previous section of this article. In attendance were representatives of the national petroleum industry, the American Chamber of Commerce, the Argentine Center for International Relations, the National Park System, the Union for the Conservation of Nature, the Foundation on the Environment and Natural Resources, an economist, two facilitators and three recorders.

The group endorsed the idea of a framework law and each of the components contained in the previous section. It focused its attention on the implementation of these recommendations agreeing that the national government's role should facilitate and be subordinate to that of the provinces. The participants gathered by *Consenso Ambiental* recommended that the national government base its role in these matters on the principle of subsidiarity.<sup>194</sup>

The group's principal recommendation was that the national Congress establish a process for forming an interdisciplinary, nonpartisan Coordinating Entity in full partnership with the provinces to implement these actions. This entity could be a reorganized, existing one, such as COFEMA,<sup>195</sup> or the *Parlamento Ecologico Nacional*.<sup>196</sup> Alternatively, this Coordinating Entity could be newly created. In either case, it should be assigned a central role in initiating and directing the priority actions contained in the preceding section.

---

194. El principio de subsidiariedad.

195. Consejo Federal de Medio Ambiente, formed by compact among the national and provincial environmental ministers.

196. Formed by actions of the national and provincial legislatures.

Regarding the creation of an incentive fund, the group felt that the resources should be distributed at the provincial level by this Coordinating Entity based on the degree to which each province has complied with established environmental and land use policies and used primarily to implement land use, or territorial, plans. The group also endorsed or recommended the following:

1. close coordination of land use planning with the completion of environmental impact studies;
2. the participation of non-governmental organizations in the creation of land use plans and in appearing before the Coordinating Entity in administrative proceedings regarding compliance with established plans, procedures and standards;
3. the creation of negotiated environmental compliance standards by an interdisciplinary body created by the Coordinating Entity;
4. the principle of self-regulation among regulated industries;
5. the central importance of creating a Geographical Information System;
6. the principal responsibility of provincial and local agencies for insuring compliance with established standards;
7. judicial standing for non-governmental organizations to appeal enforcement decisions or agency failure to enforce standards; and
8. the responsibility of the Coordinating Entity for the maintenance and administration of the registry and licensing functions and the distribution of any revenues realized from its operations to the provincial and local levels.

### VIII. Conclusion

In Article 41 of the Argentine Constitution, environmental protection and sustainable development are fused.<sup>197</sup> Do-

---

197. All citizens have a right to a healthy, well balanced environment, suitable to human development and to economic development that does not compromise the needs of future generations.

mestic economic reality and the requirements of the international marketplace require environmental policy in Argentina to be integrated with economic policy.<sup>198</sup> Laws adopted in Venezuela and Mexico and a proposal that was seriously considered in the United States<sup>199</sup> provide a model for the Argentine Congress to consider.

These laws provide a framework for integrating economic development, land use and environmental planning, programs and processes. They provide an opportunity for the Congress to adopt a broad set of policy objectives, set forth appropriate institutional arrangements among federal, provincial and municipal governments, establish processes that involve regulated companies and non-governmental organizations in the creation of regulatory standards, provide flexibility in meeting those standards, and coordinate the issuance of environmental and land use permits.

The adoption of a basic law of this type does not require the rescission of existing legislation, but creates instead a framework for coordinating economic, environmental and land use programs and guiding their gradual evolution into a coherent and efficient management system for the country's resources; they provide hope that a national legal system for achieving sustainable development can be created.

---

CONST. ARG., art 41. The Spanish version reads:

Todos los habitantes gozan el derecho a un ambiente sano, equilibrado, apto para el desarrollo humano y para que las actividades productivas satisfagan las necesidades presentes sin comprometer las de las generaciones futuras.

198. *See supra* part IV, section A.

199. *See supra* part V, section B.