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The Law of Sustainable Development

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PROFESSOR NICHOLAS A. ROBINSON

Introduction by Professor Nolon:

Our next speaker is Professor Nicholas Robinson, who has traveled extensively in Argentina. He has lectured there, and he has been in the provinces and knows the country well. Professor Robinson has established our nationally ranked environmental law program here at Pace University Law School. He edited the proceedings of the Earth Summit in Rio, *Agenda 21*.[1] Professor Robinson is widely published, known and respected in the field of environmental law. He is a friend and a colleague to all who advocate responsible environmental protection. I am privileged to introduce Professor Robinson.

Professor Robinson:

I am very happy to be here with you today to participate in this video tape link-up between New York and Buenos Aires. I am even happier to greet my friends from Salta to Puerto Madryne and all of those with whom I have conferred in my travels in Argentina. I am especially happy to be in Buenos Aires, at least vicariously, once again. I would rather be in that beautiful city in person, I might add.

I am going to talk briefly, as dictated by the format of this seminar, about the law of sustainable development and how it has been developing. Sustainable development is, today, the guiding theme for both public and private measures to improve social conditions and strengthen economic conditions around the world. It did not become a guiding theme overnight. The recognition that sustainable development is

1. NICHOLAS A. ROBINSON, AGENDA 21 AND THE UNCED PROCEEDINGS (1992).

fundamental has been growing gradually. The concept recognizes that the sort of development that was popular in the 1960s and 1970s in the United States of America and elsewhere was, by itself, an inadequate base on which to establish a humane, productive society. Each sector of the economic infrastructure in this past model of development considered that its mission was the most important mission of all. Few of these sectors cooperated with each other. They all tried to be primary, competing for and controlling the allocation of financial and natural resources.

Slowly, we learned that this type of control of resources was not adequate for economic development to succeed. As population levels have increased around the world, and as urban populations in our cities have grown, it has become clear that many countries are missing their development targets and that the environment and quality of life are suffering as well.

The United Nations General Assembly looked at many of the deteriorating trends in the economy, environment, and social welfare and concluded that there had to be a better way. So, it constituted a World Commission on Environment and Development to study these problems.[2] It was chaired by the Prime Minister of Norway, Mrs. Gro Harlem Bruntland. She and a team of specialists from around the world, including Latin America, prepared a report that is called *Our Common Future*.[3] It is a very important report which summarizes these deteriorating trends and conditions, world-wide. One quote from this report sums up the problems that all nations face, as part of a global economy, in trying to achieve sustainable development:

> The next few decades are crucial for the future of humanity. Pressures on the planet are unprecedented and are accelerating at rates and scales new to human experience . . . . Each area of change represents a formidable challenge in its own right, but the fundamental challenge

2. U.N. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987).

3. *Id.*

> stems from their systemic character. They lock together environment and development, once thought separate, they lock together 'sectors,' such as industry and agriculture; and they lock countries together, as the effects of national policies and actions spill over national borders. Separate policies and institutions can no longer cope effectively with these interlocked issues, nor can nations acting unilaterally . . . . The real world of inter-locked economic and ecological systems will not change. The policies and institutions concerned must.[4]

How are we going to bring together into a more harmonious relationship these separate sectors and make them work together? The United Nations took up the challenge from the Bruntland Commission and initiated a two-year long preparatory process culminating in the United Nations Conference on Environment and Development (UNCED) that was held in Rio de Janeiro in 1992. At the "Earth Summit Meeting," UNCED prepared a report, *Agenda 21*,[5] which became the action plan emanating from the meeting in Rio. Its length exceeds 600 pages; it contains detailed prescriptions, agreed to by most countries in the world, about how to build a legal, economic, social and educational base for sustainable development. The report echoes what was said in the Bruntland Report. This quote is taken from *Agenda 21*, Chapter 8, which was entitled "The Integration of Environment and Development Decisionmaking:"

> In recent years, some governments have begun to make significant changes in the institutional structures of government in order to enable more systemic consideration of the environment when decisions are made on economic, social, fiscal, energy, agricultural, transportation, trade and other policies . . . . New forms of dialogue are also being developed for achieving better integration among national and local government, industry, science, environmental

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4. *Id.* at 310.

5. In addition to the proceedings of UNCED, cited above, an annotated edition of Agenda 21 has also been published. NICHOLAS A. ROBINSON, AGENDA 21: EARTH'S ACTION PLAN (1993).

> groups and the public in the process of developing effective approaches to environment and development.[6]

That paragraph of *Agenda 21* sets the theme for our discussion of environmental law today. When environmental law works well, it takes the externalities - as economists call them, the pollution and the unaccounted for wastes of resources - and it gives them economic value, thereby bringing them into the decision-making process. This approach makes society account for these externalities so that we do not repeat the mistakes of the past. One proven method of accomplishing this accounting is the use of an Environmental Impact Assessment (EIA).

EIA is a process of analyzing the environmental consequences of a proposed action before it is taken. The procedure looks at the alternatives to that action, what ways could be used to mitigate the adverse environmental effects and adjusts the action to ensure that it will not cause undesired side-effects.

The origins of EIA go back to 1969, when the United States Congress adopted the National Environmental Policy Act (NEPA).[7] Congress adopted this Act so that decision-makers might systematically make use of ecological studies by scientists. Both scientists and decision-makers could study the consequences of human actions on the hydrologic cycle, for instance, and ascertain that indeed there is such a thing as acid rain. Decision-makers could now understand the consequences of filling a wetland or a marsh because, through EIA, they could know there would be no more recharge area to allow the water to be filtered naturally to provide pure and safe drinking water. Through ecological studies, policy makers began to see these natural connections, and through NEPA, officials responsible for governmental actions studied and accommodated them.

The National Environmental Policy Act requires that all federal agencies use the new science of ecology to do an envi-

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6. *Id.* at 115.
7. 42 U.S.C. §§ 4321-4370d (1994).

ronmental impact statement before any major federal action affecting the quality of the human environment is undertaken.[8] Today, over 100 federal and state jurisdictions have adopted this environmental impact assessment process.[9] All these jurisdictions do not use the same process that Congress passed; even our states, like New York[10] and California,[11] have changed what was done in Congress for federal agencies, and have adapted the environmental review system to their own needs.

The popularity of environmental assessment is due to the fact that it is an integrative system. For instance, it brings science together with public decision-makers, economists, land developers, and the public. It is integrative because it brings these different sectors of society together to discuss what really is the best consequence of an economic development decision for all affected interests. Where should this road or power plant go? What effects will it have once it is operational? All relevant questions may be posed and studied.

One of NEPA's strengths is its flexibility; another is its relative simplicity. EIA is an alternative to developing large regulatory systems that require very large bureaucracies to enforce detailed standards and involve time-consuming and expensive government permits. We have found that when our bureaucracies become too large they become inflexible. EIA procedures such as NEPA require only that each existing public agency must itself be a good environmental steward and bring environmental impact analysis into its decisions.

Argentina is in a unique and enviable situation today because it can study the environmental experiences of different nations and decide which parts of those systems to adopt and which to change. There is a role for a university like Pace to

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8. *Id.* § 4332(2)(C).

9. NICHOLAS A. ROBINSON, *EIA: The Computer and Transitional Experience*, *in* ENVIRONMENTAL ANALYSIS, THE NEPA EXPERIENCE 679 (1993).

10. N.Y. ENVTL. CONSERV. LAW § 8 (McKinney 1989 & Supp. 1996). The New York Act is called the State Environment Quality Review Act.

11. CAL. PUB. RES. CODE §§ 21000-21177 (West 1988 & Supp. 1995). The California law is called the California Environmental Quality Act.

provide some assistance in explaining experiences in the United States and elsewhere, but we also want to learn from Argentina. We want to learn what sustainable development laws are going to work well there. Pace has benefitted greatly from its cooperation with the Fundación Ambiente y Recursos Naturales (FARN) and we are grateful to FARN and welcome the opportunity for future collaboration.

Both Pace and FARN are involved in the International Union for the Conservation of Nature and Natural Resources (IUCN). As we work together through IUCN, we can find ways to integrate into the international process our regional knowledge and to transfer it to colleagues in Asia and Africa and other parts of the world. The General Assembly of IUCN was held in January of 1994 in Buenos Aires. Environmental leaders from all over the world came to Buenos Aires and left feeling that the development of laws and programs for sustainable development in Argentina is going to be of fundamental importance. IUCN's General Assembly was the largest gathering of environmental leaders since the Rio Earth Summit. Convening in Buenos Aires was the best evidence that the work to define sustainable development is moving forward in Argentina and that the world wants to study the Argentine experience. I wish you success in all of your deliberations and I look forward to learning from Professor Nolon, Pedro Tarak and others, the outcome of your current deliberations. Thank you indeed.