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Framework Laws - The Key to Sustainable Development in the Americas: Foreword

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FOREWORD

MICHAEL G. MURPHY*

After over a quarter-century of experience, the United States is reassessing its environmental legal system. That system influences countless aspects of our daily lives and many minute details of business conduct. Despite achieving significant improvement in the overall health of the environment, the system shows signs of needing repair and inspiration. Simply reinforcing the existing scheme, however, may impose significant economic costs on the private sector. The costs currently imposed have caused some to question the validity and effectiveness of this system of environmental regulation and have contributed to the introduction of legislative measures aimed at limiting the applicability of environmental laws.

Internationally, many countries are earnestly trying to establish competent systems for preserving the environment because they realize that environmental protection is a prerequisite to full participation in the expanding global market. Following a growing trend in Latin America toward greater environmental activism, Argentina recently amended its Constitution giving its citizens a right to a healthy environment through sustainable development. Argentine legisla-

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tors must now face the responsibility of implementing this challenging mandate. Argentina, which has a federal system of government similar to that of the United States, has the advantage of studying the development of environmental laws in the United States over the past quarter-century to see what has worked, what has not worked, and at what cost. The United States faces the challenge of rethinking its system to achieve greater efficiency and fairness without compromising the goals of sustainable development.

In 1994, Professor John Nolon started work in Argentina on a Fulbright Scholarship to examine that country's prospects of achieving sustainable development. To assist in that effort, Pace University School of Law collaborated with the *Fundación Ambiente y Recursos Naturales (FARN)* to hold two seminars, one in White Plains, New York, and the other in Buenos Aires, among seasoned experts in the legal systems of the two countries. Both seminars evaluated the current state of environmental protection in each nation and explored additional means of achieving sustainability in the future.

Participants in the U.S. seminar were asked to address the strengths and weaknesses of American environmental protection and conservation laws and, in doing so, provide guidance for Argentina as it attempts to create a cogent system in a complex federal system. The U.S. seminar was videotaped and shown at the seminar in Buenos Aires. The seminars would not have been possible without the support of Pace Law School, FARN, McKinsey and Company, which supported the activities conducted in Argentina, and the Lincoln Center in Buenos Aires, which hosted the seminar held in that city.

Other papers have been commissioned during this process to both inform and help frame this bi-national dialogue. The papers and remarks of the participants in the seminars offer a variety of ideas for creating a legal framework for achieving sustainable development which was the objective of Professor Nolon's work as a Fulbright Scholar. The presentations made at these seminars have been reformatted for publication in this symposium issue. Victoria Mendez, a student at Pace University School of Law, performed the difficult task

of summarizing and translating into English the presentations of the participants in the Argentine seminar.

The summaries of the presentations made at both seminars, the contextual papers and an article synthesizing the results are included in this issue of the *Pace Environmental Law Review*. The editors are pleased to offer them as a brief history and evaluation of the past quarter-century of environmental law in the United States and as a guide to decision-makers in Argentina, other countries in Latin America and the United States as they look toward the future.

Opening the White Plains seminar, Richard Ottinger, Dean of Pace University School of Law, recounts the ongoing cooperation between Pace University and FARN. Noting that Professor Nolon is the fifth representative of the law school to work with FARN in Argentina, he expresses confidence that this type of international cooperation will lead to significant improvement in the practice of environmental law in both countries. Professor Nicholas Robinson discusses the progress of sustainable development internationally. He contends that sustainable development has become a "guiding theme" for the both public and private sectors at the local and national level. Professor Robinson believes that environmental impact analysis, which dates back to 1969 when the National Environmental Policy Act was adopted in the United States, has become an important method of integrating economic and environmental considerations and achieving sustainable development.

Professor Jeffrey Miller recounts twenty-five years of environmental protection experience in the United States. He questions the logic of a system that is made up of laws each focusing on a single aspect of an organically integrated ecosystem and each concentrating its attention almost exclusively on large source polluters, leaving small source polluters and non-point source pollution under-regulated. He believes that decisions relating to small source polluters and non-point source pollution are fundamentally land use decisions and that land use law in the United States is as fragmented and inefficient as the environmental legal system.

Expanding on Professor Miller's theme, Professor Nolon discusses a time in the early 1970s when the U.S. Congress considered, and nearly adopted, the National Land Use Policy Act. Professor Nolon recalls that Senator Henry Jackson, the bill's primary sponsor, envisioned a cooperative effort between federal, state and local governments for protecting the environment and promoting economic development. Professor Nolon believes that this bill, had it been adopted, would have provided a basic framework for the more cost-effective development of an environmental protection system. In hindsight, Professor Nolon contends that current property rights protection measures are a response to the environmental system that developed in the absence of a land use framework law.

Douglas Porter's article, which was presented at an earlier seminar sponsored by the Land Use Law Center at Pace, describes efforts at the state level to harmonize economic development and environmental protection through growth management laws. While each state has a different approach to meet its own needs, each law reflects the basic structure suggested by the National Land Use Policy Act by encouraging "consistency and coordination among state, regional, and local planning and regulatory programs." Mr. Porter concludes that successful state programs provide local governments with needed guidance and incentives to allow them to plan more effectively the land use patterns that they control and which must be influenced to mitigate the negative impacts of small source and non-point source pollution.

Mr. Richard Barth lends a personal and corporate perspective to this country's efforts to promote sustainable development. Based on his experience, he suggests there is a certain tension between the economic and environmental components of sustainable development. Mr. Barth believes that the failure to integrate these components into a "system" has been particularly burdensome on the regulated business community. He also recommends the creation of a centralized scientific institution to act as an independent source of information for stakeholders in the U.S. pollution prevention system.

Dr. Alistair Hanna closes the U.S. seminar by reviewing a recent opinion survey of the performance of New York land use law. The survey reveals that a majority of the individuals involved with that system are not satisfied with its performance and believe it fails to accomplish important public objectives such as protecting the natural environment, providing affordable housing, and supporting economic development. It is interesting to note that New York is not one of the states reviewed, in Douglas Porter's article, as making progress in the area of growth management. Dr. Hanna compares these results to the emerging paradigm in science and business that views integration and communication as essential components of any successful system, including regulatory regimes. He concludes that our failure to create a comprehensive, connected and flexible land use system has contributed to the disorganization and high costs of the environmental protection system; he calls on public and private sector leaders to come together and collaborate in "identify[ing] problems and seek[ing] solutions." This collaboration, he suggests, should be built into the legal system as well.

The environmental problems that Argentina faces are serious indeed. In his article, Sean Nolon provides an overview of the current state of the environment in Argentina today, suggesting the urgent need for effective action. For example, 45% of Argentines have no running water or use water considered to be of poor quality. Many Argentine waters show dangerous concentrations of heavy metals, bacteria, nitrates and hydrocarbons. The underground aquifer beneath Buenos Aires has been heavily exploited, has become severely polluted, and is no longer serving the needs of the populace whose needs are being met, in a manner of speaking, by the massive Rio Plata which is subject to extensive pollution as well. Mr. Nolon relates that Argentina also faces significant problems in other areas such as air pollution and deforestation. For example, if current trends continue, all of Argentina's native forests will be lost by 2024.

Several familiar themes emerge from the seminar held in Buenos Aires. Opening the seminar, Sr. Pedro Tarak, Execu-

tive Director of FARN, presents his thoughts on international progress since the United Nations held its Conference on the Human Environment in Stockholm in 1972. He outlines "important influences" that shaped the response to the environmental challenges of this early period. He believes that, to move forward, we must embrace the complexity inherent in environmental and economic systems. Professor Nolon summarizes the substance of the U.S. seminar including some thoughts about what the United States might have done differently. Perhaps responding to Professor Nolon's thoughts, Sr. Rodolfo Pedro Gassó advocates the creation of a national land use plan where the autonomy of provincial and municipal governments is respected and property rights are protected. He believes that an essential component of the plan is the provision of financial and technical assistance to provincial governments.

Dr. Horacio Payá, Dr. Juan Rodrigo Walsh, and Dr. Daniel Sabsay address the many jurisdictional barriers and the lack of effective coordinating mechanisms that will hamper Argentina's effort at fulfilling its new constitutional mandate. Of particular concern to Dr. Payá is the lack of any legal mechanism to ensure the sustainable use of Argentina's natural resources. Dr. R. Eugenia Bec outlines past and current trends in Argentine environmental law. She believes that earlier environmental laws failed to address the environment as a single system and that the recent constitutional amendments mandate reform in this area. Reflecting that thought, Sr. Carlos Ben, manager of a private facility that supplies water to over seven million people in the Buenos Aires region, believes that the existing environmental regulatory system is replete with confusing and contradictory standards that must be remedied. He calls on legislators to create a comprehensive system with clear, understandable standards.

Echoing the thoughts of Mr. Barth at the U.S. seminar, Sr. Raimondo Florin states his belief that the private sector must take the initiative by establishing a program of self-regulation for dealing with environmental problems. He emphasizes the importance of cost-efficiency, certainty and

predictability to future economic development. Similarly, Sr. Federico Zorraquín and Sr. Horacio Carmona, reflecting the opinions of Dr. Hanna, suggest the establishment of an open and flexible process in Argentina. Sr. Diego Gallegos focuses on the theme of collaboration by stressing the importance of public participation to the success of Argentina's goal of sustainable development. He feels that a successful legal system must encourage and allow public participation. Dr. Julio Barberis discusses the consequences to Argentina at the international level of noncompliance with its current environmental standards. Essentially, he believes that failure to do so will prevent Argentina from enhancing its place in the international market. Finally, Sr. Carlos Vigil expands on the international theme by noting the importance of coordinating the environmental regulations of the member countries of the South American common market, MERCOSUR. He stresses the importance of avoiding needless overlap and conflict in their respective regulations.

In his article, Felipe Páez provides the reader with an overview of four different framework laws adopted by Brazil, Chile, Mexico and Venezuela. Mr Páez suggests that these framework laws reflect the political, economic, environmental and cultural conditions of each country. As these framework laws imply, there is no single prescription for a successful framework law.

Finally, in his article, Professor Nolon provides the results of his research, offers a synthesis of the contributions of the various participants and discusses the essential components of a successful framework law. Recognizing that the details of any framework law must reflect the needs and conditions of each country, Professor Nolon outlines the components of a framework that could serve the needs of Argentina as it reconstructs its legal system to accomplish the sustainable development objectives of its amended constitution. Such a framework law would establish the appropriate roles for each level of government, provide for the involvement of regulated industries and representatives of nongovernmental organizations, and establish a process for the gradual integration of the country's current economic, land use and

environmental laws. The initial emphasis of the law should be on creating a collaborative process, on the collection and distribution of information and data and on the gradual integration of existing programs into the overall framework created.

Today, the collaboration between Pace University School of Law and FARN continues through their cosponsorship of the studies and research of Hernán López, an Argentina environmental attorney selected by FARN to pursue his L.L.M. in environmental law at Pace Law School. Mr. López researched and compiled data for a recent publication on Argentine environmental laws, *Dos Décados de Legislación Ambiental en la Argentina* (Two Decades of Environmental Law in Argentina) and will continue this exploration of how the legal systems in both countries can be improved.

As the United States and Argentina move forward with their efforts to protect the environment, it will become increasingly important that they share their insights and experiences. The cooperation between Pace University and FARN over the years, with support from various private sector participants, demonstrates that this process is already well under way. We are pleased to present the record of that collaboration, to date, in this issue of the *Pace Environmental Law Review*.