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Protection of the Global Environment

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**American Bar Association
Tort and Insurance Practice Section
Business Section
International Law and Practice Section
Kansas City Metropolitan Bar
Association
Report to the House of Delegates
Protection of the Global Environment***

RECOMMENDATION

RESOLVED, That the American Bar Association

Urges the United Nations and each nation of the world to adopt and implement appropriate measures to ensure that activities within its jurisdiction or control will be conducted with respect for Nature, and in a manner that accounts for the interests of present and future generations; to develop and foster policies and long-term strategic plans for sustainable development, encouraging the betterment of human life through conservation and efficient use of natural resources; and to cooperate with other nations and with international organizations in developing regional and world-wide arrangements to preserve and protect the environment and to mitigate the effects of environmental damage.

REPORT

I. The World-Wide Environmental Concerns

The side effects of industrialization, aggravated by a swelling human population, are disturbing the web of elements on which life as we know it depends. United Nations experts expect an additional three billion people by 2025, with ninety-five percent of the increase occurring in the already hard-pressed, developing countries. What sort of world will it be? Warnings are being sounded in at least twelve major areas of uncertainty.

*This Recommendation and Report was adopted by the House of Delegates in August 1991. The Recommendation and Report was co-sponsored with other ABA entities. Daniel B. Magraw, chair of the Section's International Environmental Law Committee, played a very important role in the development of this Recommendation and Report.

Fresh Water World-wide, sources of potable and even agricultural grade water, both above-ground in rivers and below-ground in aquifers, are suffering from over-appropriation and pollution. In some nations, much of the water is reportedly too polluted even for industrial use.

Arable Land Farmlands are under pressure, too. Rich topsoil is washing away into rivers or, overgrazed and under-irrigated, blowing away in the wind. Elsewhere, arable land is being lost or degraded. In Africa, along the Sahel's 3000 mile front, more than ten million have been displaced by soil gone barren.

Forests Forests are being stripped, stressed, and burned. In much of the Third World, the reduction in biomass signifies something worse. Almost one half the world's population depends on fuelwood as its principal energy source. Deforestation represents yet another threat. The globe-spanning belt of tropical moist forests, now under increasing pressure, are particularly rich in plant and animal species, and constitute a significant factor in drawing excess carbon dioxide out of the world's atmosphere. These tropical forests are believed to be particularly hard to reestablish, once ravaged.

The Oceans The oceans are being tampered with. Modern technology is making it possible for the intensive fishing nations, having depleted favored stocks along their own coasts, to sweep distant seas with huge nylon driftnets 30 miles long, "the single most destructive fishing technology ever devised by man."

The coastal wetlands, a basic breeding ground for the replenishment of marine life, are under the pressures of oil spills, commercial development and sewage and waste. The deeper reaches of ocean floor are also being affected by coastal runoff and wastes that are dumped into the ocean.

Biodiversity Meanwhile, on land, plant and animal species are being eliminated or placed at risk. Some of the threat, such as to whales, elephants, and "game" animals, arises from killings that are coolly deliberate. More commonly, the loss is the unintended consequence of disruption of habitat by human development, or by the introduction of an exotic species which, unchecked by any native predator, destabilize the local environment.

The consequent reduction in biological diversity is an impoverishment of nature. It also raises concern from humankind's point of view. Today, medicinal advances remain partially dependent upon a supply of newly discovered natural ingredients from plants and animals. The same, yet to be inventoried stock of genetic material is also of value to agriculture. This is because the crops which flourish in any decade are at the risk of weakening or obliteration by disease, pests, or rapid shifts in climate and soil conditions. In modern times the risk has been increased by the spreading reliance, across vast harvest areas, of a single high-yield strain of each of a few crops (called "monoculture"). One insurance against the risks of collapse has been to maintain a broad "portfolio" of crop varieties whose genetic codes are held untapped in the wilds. It is this portfolio that we are now liquidating.

The Ozone Shield In the stratosphere, the fragile layer of ozone that shields life below from some of the sun's potentially most lethal harmful ultraviolet radiation is under assault. There is now substantial evidence that chlorofluorocarbons (CFCs), halons and other gaseous by-products of refrigerators, air conditioners, fire extinguishers, computer chip solvents, and certain other products are implicated in chemical reactions that may be depleting this protective layering. The thinner the ozone layer, the more radiation will pass through to the earth's surface, increasing the incidence of skin cancer and cataracts.

The Atmosphere Below the stratosphere, each year hundreds of thousands of tons of carbon monoxide, nitrogen oxides, sulphur dioxide, hydrocarbons, and various particulates are discharged into the troposphere (the layer of the atmosphere nearest the surface). There, they engage in chemical reactions that may depress crop yields, affect human health, and corrode materials. The effects are not only local: the atmosphere currents can carry them to other regions and continents.

Climate There is the possibility of far-reaching changes in climate parameters, such as cloud cover, temperature, precipitation and storms. One apprehension is that we may be poised at the beginning of the greenhouse effect. The planet is enveloped by layers of water vapor, ozone, carbon dioxide and other gases through which incoming short-wave radiation from the sun can readily pass to heat the earth. But when the earth's surface re-radiates that heat in the form of long-wave (infrared) radiation, these same gases absorb some of the rebounding radiation, trapping heat somewhat in the manner of a greenhouse. Some such trapping is vital: without any "greenhouse" effect, the earth would be perhaps 60°F colder than it is—essentially unlivable for most life-forms. The trouble is that many of the same gases that deplete the ozone shield are allying with increased emissions of methane and carbon dioxide (largely a by-product of humankind's fossil fuel consumption) to thicken the blanket of these "greenhouse gases" in the atmosphere. This thickening may threaten or may presage a shift in the radiation balance, resulting in the planet's capturing more radiation than it presently is reflecting back out into space. Projections as to the likely magnitude of future temperature rise and its consequences vary. However, within the range of possible elevations in global temperature are values that could intensify hurricanes, destabilize glaciers, raise sea levels, and transform patterns of weather which influence agriculture, water, and energy demand. Some regions could benefit, while other regions, richly productive today, could be adversely affected.

The Polar Regions The Arctic and Antarctic are being polluted with far-blown haze and the direct wastes of encroaching human outposts and activities. In both zones, but particularly at the Southern continent, the prospects of oil and mineral exploitation, and of tourism, raise fears of further sacrifice of some of the planet's most unique vistas, flora and fauna.

Aggravated Tensions Between Rich and Poor Nations Unfortunately, human disruption of the environment is not exclusively a result of our highly developed industrialized societies. Many developing countries want to achieve equivalent development. But such nations are not only under pressure to provide the basic needs of burgeoning populations. They are under obligation, at the same time, to pay the interest on growing mountains of international debt. In this context, many developing countries, already resentful of growing wealth disparities, may particularly resent criticisms about their supposed disregard of the environment, and hesitate to divert government funds into global clean-up efforts. Environmental awareness may have to attend upon economic development; and economic development, in turn, may depend upon some dedicated effort, and sacrifice, by the industrialized nations to help our neighbors build. Certainly unchecked population growth cannot be ignored in any concerted effort to help more equalize standards of living among different societies without sacrificing significant environmental values.

Hence, efforts to secure cooperation on environmental issues takes place against an emotionally charged and complex international background.

The Environment in War Recent developments in military technology have added another dimension to the threats the environment faces: as a casualty of war. The specter of earth-as-casualty appears most ominously in connection with the "nuclear fall" many scientists predict would follow an extensive nuclear exchange. But even hostilities on a more limited scale threaten the environment in disturbing new ways. The war in Southeast Asia demonstrated that the arsenals of advanced nations already included, by the 1970s, such environmental modification techniques as defoliation. In the Persian Gulf War, there have been deliberate discharges of oil into the gulf and massive oil well fires thereby initiating at least temporary modifications in local and regional weather patterns.

II. Social Choice in the Face of Uncertainty

The scientific sides of the debate can—and will—go on and on. For every self-concerning (negative feedback) mechanism that is advanced as a possible solution to a particular problem, there seems to be another theory suggesting a positive feedback, that is, a dynamic that threatens further aggravation of the problem. Moreover, any hoped-for technological "cures" may prove worse than the diseases they are aimed at.

As lawyers, we should avoid taking policy standards on controversial technical judgments beyond our competence. But even in the context of considerable controversy at the margins, two considerations stand out.

First, there are many environmental problems that require legal attention right now.

Second, as to the projected but uncertain future problems, it may be granted that the most dire scenarios, such as a melting of the polar ice caps, should be

assigned a low probability, considered independently. But a truly catastrophic event, even adjusted for a low probability of eventuation, and discounted for time, can still retain a "present value" that should command our present attention. Moreover, no one can exclude the possibility that some of the worrisome trends will behave in nonlinear ways. Nor can we exclude as a real possibility that some presently unforeseen combination of moderate trends will produce a reaction with adverse world-wide implications. These problems are so complex, and potentially of such magnitude, that long-lead times and considerable marshalling of resources are required just to analyze, much less to respond to them.

III. What the Law Can Contribute

Across the world, the law and lawyers have become increasingly sensitive to the threats to the environment. The judicial system at all levels has been inventive in recruiting common and civil law doctrines such as nuisance and trespass to check some of the damages from pollution. These efforts have been supplemental in all the industrial nations, but perhaps particularly in the United States, by an array of special legislative enactments, including (for the U.S.) the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Clean Water Act, the Clean Air Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). (Some (e.g., those relying previously on pre ante regulation), have been more effective than others (those relying primarily on post hoc litigation)).

But even as the domestic environmental protection efforts have surged, the pace and scope of global environmental problems have increased. In the main, each nation's laws stop at its territorial boundaries. But environmental degradation is increasingly becoming an affliction on both regional and global scales. In retrospect, the internationalization of the problems appears to have been destined from the start.

The law does not leave persons injured by actions of others outside their country entirely without remedy. Theoretically, persons injured by transboundary pollution can test the waters of the polluter's own fora, under the polluter's own laws. Such ventures have not been without success. See *Michie v. Great Lakes Steel Division*, 495 F.2d 213 (6th Cir. 1974), *cert. denied* 419 U.S. 997 (1974), in which residents of the Windsor area in Canada, in reaction to industrial pollution originating in the Detroit area, chose private remedies in U.S. courts against responsible U.S. corporations, in preference to initiating time-consuming international level remedies.

There are, under customary international law (that is, international law absent some special treaty covering the subject), several fundamental principles that can be brought to bear on such problems, enabling the injured state to achieve diplomatic or even legal relief. See *Trail Smelter Case (U.S. v. Can.)* 3 R.Int'l Arb. Award 1905 (1941) in which the United States won an international arbitral

award in consequence of continuous transboundary air pollution from Canada. But the customary legal principles have a distinctly limited usefulness. They come into play only when there has been a violation of some sovereign's legally protected interests, such as a violation of its territory, or an injury to one of its citizens. Those principles are thus inapplicable to the many "internal" problems such as a nation's extinction of its own, nonmigratory, wildlife, or the destruction of its own ecosystem or forest, where external effects—specifically, some element of "injury" to other sovereigns—are undemonstrable or *de minimis*. Even where some nation's activities, for example, intensive fishing of the high seas, or the massive burning of its forests, do have significant extraterritorial effects (a reduction in fish yields, an adverse impact on the atmosphere and carbon budget), so long as the immediate consequences are limited to the global commons areas (the atmosphere, high seas, and other "unowned"—some think, commonly owned—portions of the earth), it is uncertain that any remedy or even standing can be drawn out of customary legal principles. A protesting nation would be required to show that, albeit the global commons lay beyond its sovereignty, under the law, alteration in the character of the commons provided a legal basis on which it could bring suit. What would be involved include complex questions involving the viability of the *actio popularis* and the status of wrongs *erga omnes* (against the community of nations). Such a claim has yet to be made, and its success, were it pressed to litigation, would appear at present rather problematical.

Even in circumstances where a nation can show a measurable invasion of some interest that probably is legally protected (as, for example, in the case of its suffering blatant transboundary pollution), litigation under customary law principles, while theoretically available, may fail to stem environmental degradation for a number of reasons, including the following:

The Absence of Compulsory Jurisdiction in the World Order Depending upon the conditions of its acceptance, if any, of World Court jurisdiction, the damage-causing state may simply refuse to appear before the World Court.

Problems of Proof The obstacles to proving causal links and dealing with joint causality are typically severe in the relevant situations. The scientific models about such phenomena as acid rain are controversial; damage can be traced to several causal agents operating in association with one another, and originating from widely spread sources; methods for quantifying many "damages" to the environment, e.g., the eradication of commercially valueless species, are highly controversial; and, in any event, judicially cognizable damage may not occur for generations.

Standards of State Accountability It is widely accepted in international law that states are responsible for compliance, by themselves and by persons under their jurisdiction, with norms of international law, including those of environmental conduct. There remain, however, largely unresolved questions regarding the standard of conduct by which a defendant state is to be judged liable. Is Nation A to

be charged for all pollution that wafts into Nation B, however innocently and diligently A behaved (strict or absolute liability)? Or will A be liable only for damages that arose because it did something positively wrongful, such as breaching an internationally recognized rule, for example, failure to give B timely notice of a spreading radiation peril as required by the new (post-Chernobyl) agreement under the auspices of the International Atomic Energy Agency?

The Inadequacy of Relief Even if the defendant appears, and proof is successful, injunctive relief, a principal prop in enforcing domestic environmental law, is rarely available in international legal practice. Damages, when awarded at all, tend to be computed more meagerly than in comparable cases under prevailing U.S. practice. For example, punitive damages are unavailable, and what to U.S. courts would be fairly commonplace elements of damages, such as the reduced value to pollution-blighted businesses and property, may be rejected, as they were in the *Trial Smelter Case*, above, as “too remote and indirect to become the basis . . . for an award” (Decision, 16 April 1938, 3 U.N.R.I.A.A. (1949)). The implication, when one considers that the success rate of pursuing “wrongful” (by some standards) polluters has to be less than unity, and when one considers the transactions costs of suit, is that the realistically calculated damage deterrent a transfrontier polluter faces is likely to fall far short of forcing it to internalize, and therefore efficiently adjust for, the true measure of the damage it is causing the international community.

Enforcement Barriers Indeed, even should courts finally hand down an award, in the absence of an international counterpart to the Full Faith and Credit clause of the U.S. Constitution, there is no guarantee it will be enforced. Recently, after fourteen years of multi-national litigation, a Netherlands court ruled in favor of Dutch plaintiffs against French interests for salt pollution of the Rhine; when the victorious plaintiffs tried to collect on the judgment in France, the French court refused to recognize the Dutch judgment. See 11 *Int'l Env. Rep.* (BNA) No. 12, at 652 (Dec. 14, 1988).

These remarks are not intended to dismiss the value of litigation, either in municipal courts, subject to the forum's own law or customary international law, or in international fora, under principles of customary international law. But, unfortunately, most biosphere degradation occurs too imperceptibly, too “innocently,” too ubiquitously and from too many point sources, to be stanchied by the principles that existing law, domestic or international, makes available to potential plaintiffs.

The principal bulwarks to environmental protection will have to come from

- (1) the voluntary enhancement of environment protection activity at the national level by individual nations; and
- (2) cooperative efforts among nations to reach international accords, i.e., treaty-made law, at the regional and global levels.

In regard to the cooperative strategy, there are several virtues to such bi- and multi-party accords specially tailored to specific problems. First, the treaties can

translate the rather nebulous contours of the customary law (essentially, *sic utere tuo ut alienum non laedas*: "don't use your property (territory) in such a way as to injure that of others") into a more specific, reckonable and realistic set of obligations. Second, treaty-makers can adopt an *ex ante* preventive approach, reducing or eliminating injurious conduct before a situation has reached the stage where some plaintiff nation is able to establish a level of legal harm that by that time may be irremediable. Third, the problem of injuries to, and representative standing for, the commons areas might be overcome by special provision designating an international body or non-governmental organization (NGO) as legal spokesperson for its environmental "ward." Fourth, means can be devised for compensating persons injured by past activities which while lawful when taken are now determined to be socially undesirable. Such means can spread those costs across society as a whole (through unilateral or bilateral governmental appropriations, contributions or allowances) and avoid retroactive punishment of individuals for acts lawful at the time they occurred.

International agreements on conservation of living resources, notably fishing agreements, have a long history. As far back as 1911 the United States, Great Britain, Russia and Japan had reached agreement on the Preservation and Protection of Fur Seals in the North Pacific and Arctic region. There are several accords on marine pollution going back to the 1954 Convention for the Prevention of Pollution of the Seas by Oil.

But the growth of international environmental law, and awareness of the environment's jeopardy, received major new impetus in 1972 with the U.N. sponsored Conference on the Human Environment, held in Stockholm. From that conference emerged the Stockholm Declaration on the Human Environment, an aspirational manifesto, and an Action Plan that called for, among other things, the establishment of the United Nations Environment Program (UNEP).

With the encouragement of that conference, and in the wake of increased environmental consciousness world-wide, international environmental agreements have burgeoned. A suggestion of their range can be gleaned from the titles of just a sampling: the Convention on International Trade in Endangered Species of Wild Flora and Fauna (1976); the Convention on Long-Range Transboundary Air Pollution (1979); the Convention on the Conservation of Antarctic Marine Living Resources (1980); the Vienna Convention for the Protection of the Ozone Layer (1985); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989).

Additionally, there has been an increase in the number of distinctly regional environmental agreements, such as the 1974 Nordic Convention on the Protection of the Environment, and the plans developed under the UNEP Regional Seas Programme, which establishes cooperative frameworks for nations bordering eleven major sea areas.

It is encouraging, too, that there has come into existence an impressive network of diverse governmental and nongovernmental organizations that are engaged in monitoring the planetary environment and coordinating the protective efforts. These include—in addition to UNEP, the Global Environmental Monitoring System (GEMS), the World Meteorological Organization (WMO), the Intergovernmental Panel on Climate Change (IPCC), the International Maritime Organization (IMO), the Group of Experts on Scientific Aspects of Marine Pollution (GESAMP), the International Union for the Conservation of Nature and Natural Resources (IUCN), and the International Council of Scientific Unions (ICSU).

While one must be encouraged by the variety and velocity of this activity, much further legal and diplomatic effort is required. The Stockholm Declaration, above, in its oft-quoted Principle 22 resolved:

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction. U.N. Doc. A/CONF. 48/14/Rev. 1 (U.N. Pub.E 73.II.A.14 (1973).

Then, too, while we need to rely more heavily on treaties, treaties bind only those nations that agree to sign them. Therefore they can be effective only if they can muster the signatures of nations having significant influence over the problem addressed. Such wide-spread consensus is hampered by the lingering scientific uncertainties, compounded by the fact that many nations of the world are too hard-pressed by immediate economic needs to put long-term environmental activities at the top of their agenda. The developing countries may insist upon some form of compensation as a condition of entering into environmental accords. In yet other situations, there are substantive conflicts in values. The powers of the international environmental organizations are restricted to making recommendations, educating, and encouraging interaction. And, of course, even where positive obligations are specified, the enforcement provisions and mechanisms are largely uncertain.

In *Conclusion*, we believe that the issues of global environmental degradation, and of the well-being of future generations, deserve a higher level of public and professional attention. Law in its way, no less than science in its, must contribute what it can to protect us from environmental perils. Accordingly, we recommend that the American Bar Association urge the furtherance of appropriate legal and institutional responses.

Beyond this, the subject area is admittedly too complex to essay endorsement of detailed proposals by a large, diverse corporate body. We have therefore avoided advocacy of any specific action or policy instrument. Instead, we have recommended Resolution that we urge policy makers to consider as the basis for further discussions and appropriate action.

In view of the foregoing, the Tort and Insurance Practice Section, the Business Section, the International Law and Practice Section, and The Kansas City