Pace Center Awarded $100,000 Grant for Work in Brazil

The Pace Center for Environmental Legal Studies has been awarded a grant by the Tinker Foundation, in the amount of $100,000, to further environmental legal education in Brazil. There is a deep interest in the Brazilian society, and its legal profession, to help better manage waste flow control and the Commerce Clause.

Introduction

The federal government was formed to deal with problems that could not be solved absent central intervention as a government of limited, delegated powers. Able to act only if the Constitution grants the authority to do so, the states retain sovereign authority to govern everything which has not been transferred to the federal government. As the Tenth Amendment makes clear, the federal government – at least theoretically – does not have the power to take an action merely on the basis of public interest. Instead, the Constitution grants the federal government a collection of specific powers, such as the power to regulate interstate commerce; the power to tax and spend; and the right to regulate the use of federally owned public land.

Pace Clinic Wins Steep Slopes Case

By Marc A. Yaggi

On Friday, May 26, 2000, the New York State Supreme Court, Queens County, reported Riverkeeper’s victory in its lawsuit challenging New York City’s 1998 policy of allowing development on steep slopes in the New York City Drinking Water Supply watershed. The Pace Environmental Litigation Clinic represented Riverkeeper and nine other petitioners in this suit. Elizabeth Keane, a 2000 Pace Law graduate, handled the case for the Clinic, including drafting and submitting the winning brief.

New York State Department of Health regulations do not allow septic systems to be sited on slopes greater than percent. In September 1998, DEP changed its septic system siting policy, via email and internal memorandum, to allow septic systems to be sited on slopes up to percent, as long as they were modified to percent. The City’s illegal loophole opened up thousands of acres of previously protected land in Westchester and Putnam Counties and Clinic Victory, Page 17

Waste Flow Control and The Commerce Clause

Student Scholarship Feature

By Sonja Corterier

Introduction

The federal government was formed to deal with problems that could not be solved absent central intervention as a government of limited, delegated powers. Able to act only if the Constitution grants the authority to do so, the states retain sovereign authority to govern everything which has not been transferred to the federal government. As the Tenth Amendment makes clear, the federal government – at least theoretically – does not have the power to take an action merely on the basis of public interest. Instead, the Constitution grants the federal government a collection of specific powers, such as the power to regulate interstate commerce; the power to tax and spend; and the right to regulate the use of federally owned public land.

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Vieques, Continued: The Legal Battle

Relief Sought to Prevent Further Environmental Damage

By Victor M. Tafur

Political turmoil, civil and religious groups protesting and arrests for trespassing have been everyday news in Vieques, Puerto Rico, since the President issued his January 2000 directive, instructing the Navy to conduct training exercises for up to 90 days a year using only inert ordnance until a referendum is held.

The presidential directive marked the end of announced litigation between the Government of Puerto Rico and the U.S. Navy. Now, private plaintiffs have taken over the battle. In May a lawsuit was filed by some of the same attorneys related to the Weinberger litigation. The Puerto Rico Legal Defense Fund is working on a civil rights claim,
Non-Point Sources: Pace Environmental Program Briefs

An E-Mail from Professor Bill Funk, at Lewis & Clark Law School

“The Wildlife Society Bulletin 2000, 28(1) at 276 contains a student article ranking law schools on the basis of their environmental programs. Unlike the USNWR’s ranking of environmental programs, which is based upon reputation in the law school community only, the student’s ranking system involves a combination of factors, each of which receives a numeric weighting. Like all such rankings, it is easy to find fault with, but at least it is entirely transparent. Perhaps most interesting is the author blurb, identifying the author as a person applying to law school for the fall 2000 to study environmental law, but it doesn’t identify where she is choosing to go.

Drum Roll:

Of the 65 law schools claiming to have an environmental or natural resources program, the top 7 (a cut-off the author uses to discuss the programs in more particularity) in order were:

- Lewis & Clark and Pace tied for first
- Golden Gate University of Tulsa
- University of Washington
- University of Nebraska
- Vermont

N.B.: The article’s author, Megan R. Brillault has chosen to attend Pace Law School.

Web Version of Journal Wins Top Honors

The web version of this publication was awarded top honors out of 10 pages selected as Key Resources for the Environmental Legal Journals topic, by Links2Go.com.

Law Professor Surveys Environmental Courses

University of Memphis Law Professor Irma Russell received 33 responses providing information on different environmental offerings. This number is

Judges Needed: National Environmental Law Moot Court Competition at Pace February 22-24, 2001 Call 914-422-4419

Pace Environmental Law Initiatives Around the World

PRAGUE, CZECH REPUBLIC

The Czech Republic conducted a one week conference on the role of nature within the urban and suburban environment. Entitled Prague 2000, “Natura Metropolis,” or the “Nature of the City” the conference from Aug. 28th -Sept. 1st was an interdisciplinary exploration of all aspects of the natural and cultural heritage of human settlements. The premise for the sessions was that landscape is not purely a natural site nor purely a place designed by humans. Rather, everywhere there is a symbiotic interdependence between our cultures and natural systems. The Conference follows the successful completion by the Council of Europe of a new European Landscape Convention. On July 19, 2000, the Committee of Ministers of the Council of Europe announced that the Convention would be open for signatures by the 41 nations that comprise the Council. A ceremony is to be held next October 20, 2000.

The Prague Conference, and the preparation of the Convention, were supported by the International Union for the Conservation of Nature and Natural resources (IUCN). IUCN’s Director General, Dr. Maritta Koch-Weser opened the Conference, and as Chair of the IUCN Commission on Environmental Law, Prof. Nicholas A. Robinson was asked to explore how Environmental Law unites the various themes of the Conference in an closing address on “Towns, Environment, Law: Maintaining Nature and Culture In Landscapes.”

With the coming into force of the European Convention on Landscapes,
The Strange Case of Victor Tafur

Defending a Colombian Environmental Activist

By Robert J. Goldstein

On Sunday, March 5, a car carrying bonsai plants to the Philadelphia Flower Show was stopped by several carloads of federal agents, and one of its occupants arrested. Shortly thereafter, 100 miles away in White Plains, New York, FBI and DEA agents executed a search warrant on the defendant’s law school dormitory room.

The local paper reported the arrest as the result of a large overseas cocaine deal, outing that this defendant would be the first person extradited under a treaty with Colombia, a treaty intended to bring Colombian drug-lords to justice in the United States. There is only one problem with this case -- the defendant in federal custody was a crusader against the drug trade, whose father, a former Colombian legislator, was shot and killed by the drug cartel when he was involved in passing an extradition law eight years ago. Now, with a twist of irony, the same law was being used to impress the American people that Colombia is actively fighting the drug war.

Victor Tafur is as unassuming a person as one could imagine. As a law student, he has proven as capable as any in earning his advanced degree. In classes with U.S.-educated law students, it is his hand that is raised first to answer questions regarding U.S. constitutional law. He formed a bond with his classmates and with the professors who taught him, and he has committed himself to public service. Victor did much of the same in Colombia, with startling results. Part of a program sponsored by the Colombian government to teach poor subsistence farmers in rural Colombia to plant crops other than coca, he was critically injured when his plane crashed under mysterious circumstances. Left for dead for three agonizing days, Victor was discovered by searchers looking for corpses, barely alive.

Educated as a lawyer in Colombia, Victor came to recuperate in the U.S. with his mother, who had fled the vengeful drug-lords after the murder of Victor’s father. While overcoming serious injuries, Victor enrolled as a graduate student in environmental law, a program that is arduous even for U.S.-trained lawyers, whose first language is English. Victor excelled in his courses as he perfected his English. He became a visible participant in every aspect of life and activism at the law school.

While the facts surrounding Victor’s March 5th arrest were some-what clouded, several facts, and several of Victor’s claims, are telling. Notably, the government has made no claim of drugs, paraphernalia or evidence thereof, having been discovered in the possession of Victor, in his dormitory, or in his mother’s home. No claim was made that he participated in any crime while in the U.S. The arrest warrant, issued by telephone, claimed that he had been a fugitive since before the date of his plane crash. But that claim is belied by the fact that his remarkable story of survival and subsequent recovery were the subject of numerous newspaper articles in Colombia.

Subsequent to that time, he was issued a visa and entered the U.S. openly and freely. He maintained a high profile at law school, and was due to participate in a high-level international meeting at the United Nations on the day after he was arrested — hardly the behavior of a fugitive.

Victor even returned to Colombia to secure the renewal of his visa, which was granted — again, inconsistent with the charge that he was a fugitive.

In addition to these facts, there were also Victor’s claims that must be considered. Primarily, he noted that the only piece of evidence against him was a series of checks that he endorsed, which ended up involved in a drug deal. While this is troubling, it is easily accounted for. While still in Colombia, Victor was negotiating the release of his mother’s government pension. The checks were used to exchange Pesos to Dollars. As in the U.S., they were negotiable instruments that could be endorsed repeatedly and end up in the hands of persons that have no connection whatsoever with Victor. You might ask, how coincidental that it landed in the hands of drug-lords? But when you recognize that the economy of Colombia is driven by the drug trade, it isn’t a stretch of logic to realize that a large check could wend its way there.

The reason behind Victor’s arrest, and the use of this treaty to extradite him, is clear when one understands that Colombia recently won certification as a “fully cooperating partner,” in the fight against drugs. Certification means that Colombia is eligible for a huge foreign aid package, $1.6 billion, that was sent by President Clinton to Congress. Premised on battling the Colombian drug trade, supporters of this legislation are anxious to demonstrate that Colombia is sincere in its war with the drug lords. The Colombian government, intimidated by the real drug cartel, has to show some progress, and do it without having their cars blown up. Enter Victor.

The difficulty was this: If Victor had been returned to Colombia, he would not have survived long enough to defend himself. The sad truth is that in Colombia, where judges and legislators are gunned down for the slightest defiance of the drug-lords, a criminal defendant doesn’t stand a chance at survival. For this reason, at the initial hearing the U.S. Magistrate who
presided over the case wisely held Victor for 30 days to allow the U.S. government to prove both the probable cause necessary for extradition and that he would be safe if returned to Colombia.

This case presented not only a test of the U.S. system of justice, but a warning that partnering with Colombia in the drug war by pouring in huge sums of money and military advisors, is a path we might want to think about twice. It is a path that leads to quagmire. Meanwhile, Victor languished in jail.

**When is a Treaty Not a Treaty?**

If it looks like a treaty, and reads like a treaty, it must be a treaty. But the Extradition Treaty Between Colombia and the United States, the treaty that was the basis for the arrest of Victor Tafur, an anti-drug crusading lawyer, is not a valid treaty, and may not be worth the paper it was written on. Colombia was engaged in a no-holds-barred campaign to wrest $1.6 billion in foreign aid, then held up in the U.S. Senate, from the United States taxpayers, ostensibly to support Colombia in battling rebels claimed to be backed by the drug cartel. To support this massive lobbying effort, Colombia has rolled out heavy public relations artillery — claiming that human rights violations in Colombia have magically disappeared, and asserting full cooperation with the United States in the war on drugs. To demonstrate that cooperation, they had petitioned the State Department under the 1979 Treaty for the arrest and extradition of Tafur.

The Colombians forgot one thing -- they never ratified the treaty. According to an article by Professor Igor I. Kavass, the treaty was signed by Colombia and the United States on September 14, 1979, to permit the extradition of drug dealers for their criminal activities. As you might have guessed, this treaty did not sit well with those who held the strings of the politicians in Bogotá. According to Kavass, the Colombian constitution required that the Colombian Congress pass a law in order to ratify a treaty. This bill had to pass in both houses of Congress, and then be sent to the President of Colombia, who is obligated to approve the bill.

As it happened, after Congress passed this controversial bill, it was sent to then President Turvey. At the time Turvey was conveniently on a state visit to the Dominican Republic, and his responsibilities were being carried out by the Senior Minister of Government. According to Kavass, the Minister approved the bill, which was published as Law 27 of 1980. The U.S. Senate ratified the treaty, and it was “entered into force” on March 4, 1982.

**Ordinarily, this procedural irregularity – the failure of the President to approve the bill – might arouse the interest of only the most hypertechnical lawyer or law professor, but subsequent events in Colombia magnified the error and solidified the position of Colombia regarding extradition for years to come. In 1984, when the Quito Declaration Against the Traffic in Narcotics was signed, it signaled a new effort by Colombia to fight the drug trade. Rather than submit the drug traffickers to stand trial in Colombian courts, the extradition of these criminals to the United States seemed a safer and more expedient way of battling the drug cartel. According to Kavass, this is when the treaty and the law ratifying it were challenged in the Colombian courts.**

A decision was rendered on December 12, 1986, a little more than a year after an attack on the court by guerrillas, which took the lives of eleven of the justices. Kavass notes that “in a carefully reasoned opinion, [the court] unanimously held the law to be unenforceable ‘inasmuch as it was not constitutionally approved by the President.’” In an effort to preserve the treaty, the new President of Colombia then unilaterally approved the bill as Law 68 of 1986. But that bill was also challenged for failing to comply with the constitutional requirements, and struck down by the Supreme Court of Colombia.

Notwithstanding the treaty, in 1991 Colombia amended its Constitution to prohibit the extradition of its citizens, which was only repealed in December of 1997, and even then was not made retroactive, severely hampering (if not preventing altogether) extradition from Colombia.

The treaty itself states that it only enters into effect upon ratification. If a similar procedural error existed on the United States’ side, it would surely invalidate the treaty. The decision of the Supreme Court of Colombia has the same effect.

If there is no ratification, there is no treaty, and if there is no treaty, Victor Tafur should have been free to walk out of the Pennsylvania prison where he had been held since his arrest on March 5.

Regardless of this loophole, there should be an extradition treaty with Colombia, but the treaty must be reciprocal, not a one-way street. It must also function fairly, not merely as a public relations tool of the Colombian government, used only when large sums of foreign aid are at stake. Because of its international implications, this case concerned all of us who are being asked to invest huge sums of tax dollars in Colombia. It put into question whether the government in Colombia was committed to preserving justice while battling its foes.

**American Charade**

As Americans, we rely on the government to follow the letter of the law. While we are by no means naive enough to believe that they do this in every instance, our Constitution has a system of checks and balances that exists to ensure compliance with the legal procedures. Victor Tafur, still facing extradition to Colombia on drug trafficking charges, was bolstered in his efforts to rely on the U.S. system of law.
The Constitution and Environmental Protection

The Constitution of the United States does not contain a specific “Environmental Protection Clause” granting authority to the federal government to regulate this area of law. Nevertheless, federal environmental protection laws have been passed, applied, challenged as unconstitutional and upheld. The system of environmental protection in the United States as we know it today is the product of federal legislation, even though the states manage and administer a large part of the federal program. The jurisdictional power to regulate these areas of law has been derived from the existing authorities for federal legislation granted by the Constitution: the Property Clause,4 and the Commerce Clause.5

The Constitution affirmatively grants the power to regulate interstate commerce to the Congress of the United States. This constitutional grant of power is the “active” side of the Commerce Clause. However, under the “dormant” Commerce Clause doctrine another effect of this clause is the limitation of state action that burdens interstate commerce.

Active Commerce Clause

The constitutional grant of power makes it clear that Congress has preemptive power to regulate interstate commerce. This aspect of Article I, Section 8, Clause 3 is frequently called the active part of the Commerce Clause, the domain of which has traditionally been interpreted very generously in favor of federal legislation.6 Most of the federal environmental protection legislation has been passed under this authority.

Nearly everything from coal to milk to piloting can be an article of interstate commerce.7 In City of Philadelphia v. New Jersey,8 the Supreme Court found that even garbage and its disposal fell into the domain of the Commerce Clause.9 While it remains to be seen how the recent, more restrictive decision of the Supreme Court10 will affect future environmental protection efforts of Congress, the legislation in place cannot be undone easily.

The purpose of granting this power to the federal government stems from a deep running (and probably well founded) suspicion that the states, if left to their own devices, would engage in protectionism that would soon destroy the newly founded Federation.11 The plain language of the Constitution does not explicitly limit state interference with interstate commerce. Thus, the construction with regard to what powers remain with the States has been somewhat difficult.12 Under the Tenth Amendment “the powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people.”13 The so-called dormant Commerce Clause, however, does limit state authority in the domain of interstate commerce.

Dormant Commerce Clause

In Willson v. Black Bird Creek Marsh Co.14 the Court recognized the negative – or dormant – implications of the Commerce Clause. State legislation might fail to be upheld if “repugnant to the power to regulate commerce in its dormant state.”15 This outcome is inferred from the “great silence”16 of the Constitution, neither specifying what the States may do if Congress has not acted, nor specifying what qualifies as commerce among the states. It is inferred that the states do have a “residuum of power” to regulate local affairs even if this regulation affects interstate commerce.17 However, upon excessive state action in the regulation of these aspects of commerce, a state “trespases upon national interests.”18 The Commerce Clause requires that some aspects of trade remain free from State interference.19 The “dormant” Commerce Clause jurisprudence has not been particularly easy to handle. Even Justice Scalia described this part of the law as “confused.”20 The modern dormant commerce clause doctrine embodies a two-prong test.21 First, the court determines whether a state law discriminates against interstate commerce. If a law is discriminatory on its face, it is subject to a “virtual” per se rule of invalidity. State laws, which are not discriminatory but merely place an incidental burden on interstate commerce face the balancing test set forth in Pike v. Bruce Church,22

“Per Se” Invalidity

One of the principles of the dormant Commerce Clause analysis is that the states have, as a general matter, no right to discriminate against interstate commerce. Statutes which discriminate against interstate commerce are subject to the rule of “virtual per se invalidity.” “Virtuality” translates into a separate test, where the state has to show, under strict scrutiny, that its measure is the only way to advance a legitimate local purpose.

“Pike” Balancing Test

The “Pike” test is a balancing test, evaluating the relation between legitimate local purposes and the degree of the burden placed on interstate commerce.23 In Pike v. Bruce Church, Arizona required that all cantaloupes grown in the State be packed in standard crates identifying them as “Arizona grown.” The State tried to enhance and protect the reputation of local melon farmers. The Court held that the statute was not discriminatory on its face and effectuated a legitimate local interest.

However, the burden it imposed on interstate commerce was held to be excessive in relation to the putative local benefits, because the cantaloupe producer would have had to build an entirely new canning factory to comply with the statute. The “Pike” balancing test is only applicable where “a statute regulates evenhandedly” and burdens interstate commerce only incidentally. The statute will be upheld if it effectuates a legitimate local purpose unless the burden on interstate commerce is clearly excessive. If a legitimate local purpose is found, the question therefore becomes one of degree. The extent of the burden that will be tolerated will depend on the nature of the local interest.24

How Has the Issue of Waste Disposal Outside of the Generating Area Been
Waste & Commerce, continued

Addressed so Far?

Since the Supreme Court’s 1978 landmark decision in *City of Philadelphia v. New Jersey*, the issue of the constitutionality of regulatory approaches to waste flow control has been heavily litigated. State legislatures have tried various approaches to comply with constitutional requirements as they addressed the issue of waste flow control.

Import Ban or Restrictions

Total Ban

The most obvious possibility to restrict waste flow into a given area is to simply ban the import of waste generated outside. This way, existing landfill capacities remain preserved for local generators, and the life spans of these facilities are extended. The motive for this preservation may be financial in nature, to secure the disposal fees at a current rate, or they might be environmental concerns about building new facilities and using too much land for disposal purposes. Such a regulation, discriminatory on its face, was struck down by the Supreme Court in *City of Philadelphia v. New Jersey*.

The Supreme Court had to review the constitutionality of a New Jersey statute prohibiting the import of solid and liquid waste which was generated or collected outside the territorial limits of New Jersey. The New Jersey Legislature had passed a statute closing its borders to most waste from other states.

The trial court granted summary judgment holding the statute to be unconstitutional. The New Jersey Supreme Court, however, upheld the statute as permissible under the Commerce Clause, deeming waste not to fall under the Commerce Clause, since substances injurious to public health supposedly were not articles of commerce, and the overall balancing of the issues involved would justify the state’s action. The Supreme Court of the United States granted certiorari and rendered its judgment, holding that waste and the service of transporting and disposing of it are well within the domain of Commerce Clause protection. Thus, whatever New Jersey’s ultimate purpose was in promulgating the Waste Control Act, it could not be accomplished by discriminating against articles of commerce coming from outside the state unless there was some reason, apart from their origin, to treat them differently. The statute based the discrimination not on the danger of hazardous and other wastes, since New Jersey did not claim foreign waste to be more dangerous than New Jersey waste, but solely on origin. Thus, the only reason for discrimination under this statute was the fact that the waste was coming from outside of New Jersey. Even if New Jersey’s main motivation was to preserve its resources, the Court reaffirmed *West v. Kansas Natural Gas Co.*, under which the states have no right to grant their inhabitants privileged access to the natural resources of the state. The Court held that “the evil of protectionism could reside in legislative means as well as legislative ends.”

Other attempts have been made to ban the disposal of foreign-generated wastes within a specified facility, but no total import ban has been instituted.

Partial Ban

Various other partial disposal bans have been implemented. Flow restrictions into publicly owned and funded landfills have been upheld, while attempts to control the waste flow into privately owned facilities have regularly been struck down.

*Philadelphia* bars the regulatory import ban as a means of controlling the waste flow under Commerce Clause considerations.

Additional Monetary Burden

Legislatures have also tried to address the problem by using monetary disincentives. Waste disposal is largely governed by financial considerations. Transporters tend to dispose of their cargo as cheaply as possible. Therefore, some legislatures have tried to discourage disposal at their local site using special surcharges for out-of-state waste generators.

In *Chemical Waste Management, Inc. v. Hunt*, the Supreme Court struck down a statute imposing an additional fee on all hazardous waste generated outside Alabama. Emelle, Alabama, is the site of one of the biggest commercial hazardous waste disposal facilities. The additional fee was supposed to curtail the overall waste flow into the Emelle facility. Alabama argued that the regulation of the transport and disposal of hazardous waste, as a noxious substance, should be seen under the basic principles of quarantine laws, rather than as an article of commerce. The Supreme Court rejected this approach pointing out that, while hazardous waste was undoubtedly a “noxious” article, there was no difference as to the danger posed between locally generated waste and other waste. Thus, the quarantine reasoning did not persuade the Court. It reaffirmed Philadelphia’s statement that discriminating against articles of commerce coming from outside the State was per se illegal unless there was some reason, apart from their origin, to treat them differently. It refused to allow Alabama “to saddle those outside the State with most of the burden of slowing the flow of waste into the ... facility.”

In *Oregon Waste Systems, Inc. v. Department of Environmental Protection of the State of Oregon*, the Supreme Court affirmed that monetary discrimination against out-of-state waste was impermissible unless there was a compelling reason convincing the Court under the strict scrutiny test. In this case, Oregon had imposed a $2.25/ton surcharge on instate disposal of solid waste generated in other states. The respective fee for locally generated waste was $0.85/ton. Operators of the waste disposal facilities were required to pay the surcharge, which was intended to offset the cost of disposing of out-of-state waste. The Court held that the surcharge was a violation of the Commerce Clause, reasoning that it discriminate against interstate commerce.

The Supreme Court has held that discriminatory taxes on interstate commerce are unconstitutional if they are not justified by a compelling state interest. In this case, Oregon could not justify the surcharge as a necessary measure to protect public health and safety. The Court noted that Oregon could use other methods, such as requiring out-of-state generators to pay the disposal fees for the waste they generate, to achieve its environmental goals.

The Court also considered whether the surcharge was a permissible exercise of the state’s police power. The Court held that the surcharge was not a legitimate exercise of the police power because it was not reasonably related to a legitimate state interest. The Court noted that the surcharge was not calculated to achieve any legitimate state interest, and that the surcharge was simply used as a revenue-raising device.

In conclusion, the Supreme Court held that the surcharge was a violation of the Commerce Clause and struck it down. The Court’s decision was based on the principle that discriminatory taxes on interstate commerce are unconstitutional unless they are justified by a compelling state interest. The surcharge was not justified by a compelling state interest, and was simply used as a revenue-raising device.

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solid waste disposal facilities challenged this fee as unconstitutional under the Commerce Clause.

The Court of Appeals and the Oregon Supreme Court found the surcharge valid. The Supreme Court reversed and remanded as it held the surcharge facially invalid under the dormant (or negative) Commerce Clause strict scrutiny test. The regulation was held to be subject to the rule of per se invalidity and the Agency failed to show, under strict scrutiny, that the regulation advanced a legitimate local purpose that could not be adequately served by reasonable nondiscriminatory alternatives. Oregon had claimed that it did nothing more than ask a fair contribution from the out-of-state generators. However, the Supreme Court pointed out “for the surcharge to be justified as a “compensatory tax” necessary to make shippers of out-of-state waste pay their fair share of disposal costs, it must be the rough equivalent of an identifiable and substantially similar surcharge on intrastate commerce.”

Not all attempts to place additional monetary burdens on out-of-state-waste have been held unconstitutional per se. In NSWMA v. Voinovich, a summary judgment was reversed, due to the Court of Appeal’s finding that genuine issues of material fact could exist which would provide compelling justification for a statute establishing higher disposal fees for out-of-state generated garbage. Ohio, in this case, argued that it had a reason beside the mere origin to establish a higher disposal fee. The state alleged that there was an especially high amount of hazardous substances in those wastes and the additional costs of inspection would justify the higher fees. The Court held that this line of argument in conjunction with the affidavits submitted justified at least an evidentiary hearing, since it was convinced by the argument that the question whether inspection costs and the costs of prosecution of environmental crime could be regarded as justification under the Commerce Clause were factual matters which could not be decided by summary judgment. Thus, the Court held that there might be a justification to discriminate against interstate commerce in this context.

This holding, of course, needs to be taken with a grain of salt, since the standard of review was the one for summary judgments. On the other hand, it also affirms the result of Chemical Waste: that additional monetary burdens cannot be used to curtail the waste flow into a facility. Then again, it seems to be permissible to charge in and out-of-state generators differently, if there is a legitimate reason other than waste flow control.

Permit

Disposal facilities need various permits to operate legally. States have tried to regulate the flow of waste into their states by means of permit requirements, by creating new permit requirements or by placing conditions on existing ones. Michigan, for example, had enacted a law prohibiting the disposal of waste, which was generated outside of the county unless explicitly authorized in the receiving county’s management plan. Thus, to receive out-of-state or even out-of-county waste, a facility had to apply for a special permit. In Fort Gratiot Sanitary Landfill v. Michigan Department of Resources, this law was challenged and struck down. The Court held that even though the legislation did not discriminate against out-of-state vis à vis in-state, it still was invading the sphere of Commerce Clause protection. The transport restrictions imposed were deemed a restriction on interstate commerce and Michigan failed to show that there were no other, non-discriminatory ways to achieve its goal.

Another case, the United States Court of Appeals enjoined the Arkansas Department of Pollution Control and Ecology from revoking a permit on the grounds of an Arkansas law limiting the amount of out-of-state generated solid waste to be accepted by a local landfill.

The states have not been allowed to use their authority to grant and revoke permits as a means to effectuate waste flow control at all.

Export restrictions

Another waste flow control approach was to restrict the flow of garbage out of the regulated area, be it to ensure sound disposal or to guarantee revenues to a given facility. For some communities, this seemed to be the only way to generate enough money to comply with their responsibilities.

In C&A Carbone, Inc. v. Clarkstown, a local ordinance which required all solid waste to be processed at a designated transfer station before leaving the municipality was struck down. The town of Clarkstown and a private contractor had built a waste transfer station to replace an old landfill. The agreement was that the private contractor was to build the station and operate it for five years after which the town would purchase the station for $1.

For the duration of the aforementioned five years, Clarkstown guaranteed a minimal waste flow of 120,000 tons per year. To amortize the costs of construction, the private contractor was to charge a so called tipping fee of $81/ton. If the transfer station was to receive less than the 120,000 tons, the town was obliged to make up the tipping fee deficit. To ensure the minimal waste flow, the town passed the flow control ordinance which required all non-hazardous solid waste within the town to be deposited at the transfer station.

The petitioners operated a recy-

Manuscripts are solicited for publication in Environmentally Friendly. Short, law review quality articles and essays may be submitted by e-mail to the Editor, rgoldstein@law.pace.edu.
The cases show a variety of state or local approaches to the problem of waste flow control. Only a small number have been successful. Using the conventional tools of constitutional law, such as the strict scrutiny test, the Supreme Court examined the motivation of the legislatures upholding regulation only where the guiding motivation and the legislative tools employed were permissible under the U.S. Constitution.

What is the General Motivation of the States to Regulate the Waste Disposal Within Their Boundaries?

The validity of state regulations limiting the access to state markets has depended heavily upon the reasons for which the regulations were imposed. This, therefore, calls for a more detailed analysis of the allegedly driving motivations for regulating the waste flow.

Public Health

States and municipalities were always quick to claim public health concerns as their primary motivation. Old landfills threatened the groundwater supply of the area, due to the fact that little or no precautions had been taken and due to the toxic mixture of the waste that was disposed of.

The administrator has addressed these and other already known health concerns, and new landfills have to be built in accordance with strict building requirements to protect groundwater and soil.

However, while new landfills meet these requirements and old landfills are not allowed to receive hazardous waste anymore, the local concerns are still not laid at rest: Firstly, the old landfills of course retain the hazardous contents already disposed of and the possibility of chemical reaction with other substances remains an incalculable risk since nobody knows exactly what substances were disposed of in those landfills. Secondly, the hazardous substances contained in municipal waste are not banned from disposal in landfills and, thirdly, there is still the fear of “new” unknown threats to public health from currently unsuspicous substances.

Increased numbers of certain health problems are an indicator for potential danger. However, there has been little concerted effort to evaluate and monitor such alleged “hotspots.” The far easier and less frightening way to address such health issues is to find a cause in the disposal of waste and a scapegoat in those areas which do not take care of their waste themselves and to stop the delivery and disposal of such waste. Thus, at least politically, the problem has been addressed, action has been taken and the decision-maker has “solved” the problem. However, since the dangers posed by locally generated waste are not in any way lesser than the dangers posed by waste generated outside of the area, the problem of public health is not “addressed” by a discrimination against out-of-state generated waste at all.

If the main motivation was one of public health, the focus would be on how to reduce the waste generation in (and possibly outside of) the area, or on better and stricter building requirements for, and on monitoring public health around, landfills and disposal facilities. These considerations lead to the conclusion that the motivation of regulators imposing discriminatory requirements for the disposal of waste generated outside of their responsibility cannot be a concern for public health, as long as the only difference between the wastes is their origin.

Monetary Concerns

The Supreme Court has always tied the issue to monetary concerns. In
its opinion, one of the main concerns has always been the wish to keep disposal fees low and to ensure landfill space, so that citizens do not have to pay higher disposal fees for having to dispose of their waste somewhere else in the country. Monetary concerns seem indeed to play a major role in regulatory attempts to restrict waste flow into a given area.

However, it has to be kept in mind that being the site for a landfill or hazardous waste facility might have its (monetary) costs. There might be increased need for healthcare programs, and there will possibly be higher maintenance costs for roads and other necessary infrastructure. The additional waste flow into any facility will reduce the space for local people, too, and increase the costs of waste disposal for those who already bear the shadow-costs of the facility, thus, laying a double burden on the citizens of such an area. This monetary motivation seems a profound driving force for discriminatory regulative attempts.

Protectionism

Another motivation might be protectionism, the very motivation that the Commerce Clause is supposed to be a safeguard against. Next to economic protectionism (in cases where waste disposal for an area is given to local corporations per se), the regulators introduced the idea of resource protectionism. While they were admittedly attempting to protect something local from outside interference, it was the nature, open space and beauty of the place rather than any local business. It was considered “unfair” that their citizens would have to live “in” the waste of another area and suffer the consequences, while those people who actually generated the waste enjoyed a clean, pristine environment.

Long-term Waste Management as Required under CERCLA Section 104

Some regulators have used reciprocity requirements, denying access to hazardous waste disposal facilities within their area to residents of areas who do not comply with the requirements under CERCLA Section 104 in an attempt to force other areas to comply with federal requirements, ensuring the proper treatment of hazardous waste.53

Taking responsibility

Another motivation to restrict the waste flow, particularly out of any given area, might be to ensure the environmentally sound disposal of the waste generated by the regulated population. A community might decide to have stricter collection requirements and want to ensure correct disposal of hazardous substances in municipal waste or wish to impose stricter recycling requirements. To ensure this, there might be a need for waste flow control for wastes generated within such an area.

Morality

The last motivation is a general feeling of unfairness that is always present when somebody seems to get a “free ride.” It seems morally questionable not to take care of one’s own mess, to evade the secondary costs of treatment facilities and impose the garbage generated on someone else. This possibility also does not increase any motivation to deal with the problem of waste generation itself.

Are These Motivations Permissible Under the Constitution?

George Washington cited the regulation of commerce as one of the key purposes of the Constitution, on par with national security.54 Thus, he viewed the Commerce Clause as one major tool to ensure the unity of the union, treasured so clearly by the first President.55 Under the Articles of Confederation, the conflicting economic interests of the new states led to economic chaos56: States such as New York which controlled major foreign ports imposed taxes on incoming foreign commerce destined for the other states in retaliation for which these states would tax goods brought in from other states so high as to foreclose access to their markets.57

This economic warfare posed a threat to the newly founded nation. “The Constitution was framed... upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union not in division.”58 The idea was to achieve unity through anti-protectionism.59 Thus, the Supreme Court has consistently found the restriction of access to a market to be, as a general matter, a violation of the Commerce Clause, with few exceptions.60 Anti-protectionism under the Constitution does not only apply towards the protection of local businesses, but also prevents the states from giving their citizens privileged access to natural resources.61 The common market and equal treatment have been considered the pillars of the Union.62 Thus, the purpose of the Commerce Clause is to protect the union of the states for the sake of furthering the prosperity of their citizens in a common market as consumers and market participants.

The Commerce Clause remains the only authority to regulate interstate commerce. Its purpose, to benefit all citizens by ensuring the Union through a common market, allows only for little exception based on motivations.63 The general police power empowers the states to regulate the collection and disposal of garbage as long as it does not infringe on this federal authority. However, the specific problem of waste flow control always incorporates an aspect of transport. Transport in turn relates rather strongly to the non-interference purpose of the Commerce Clause, thus, leaving only a small margin of possibilities available to the regulator.

Possible Approaches for a Solution

The Market Participant Doctrine

The market participant doctrine as announced in Hughes v. Alexandria Scrap64 has been found to restrict the limitations posed on the states by the Commerce Clause in cases where they did not act as a sovereign state but as a participant in the market. Alexandria Scrap involved a challenge to a Maryland statute which enabled the state to purchase crushed au-
tomobile hulks from in-state scrap processors at a premium price to rid the state of derelict cars. However, Maryland did not buy scrap from out-of-state scrap processors. This scheme was challenged by scrap-processors from Virginia asserting a violation of the Commerce Clause.

The Court held that the statute was not subject to Commerce Clause scrutiny at all because Maryland was not interfering with the natural functioning of an interstate market but merely participating. The state was free to be a purchaser which was as free to chose his partners as anyone else and had chosen to give its business only to in-state sellers. The reasoning was that since the Commerce Clause was directed at regulatory and taxing actions taken by states in their sovereign capacity, it did not apply as a source of negative implication to state decisions in general never to favor their own citizens. This was especially true for a market that had been created by the states’ actions and would not have existed without the interference. The Court confirmed its holding in Reeves v. Stake, relying on the absence of any indication of a constitutional plan to limit the ability of states to operate freely in the market. The state’s role as “guardian and trustee for its people” was stressed: A state “may fairly claim some measure of a sovereign interest in retaining the freedom to decide how, with whom and for whose benefit to deal.” However, since the states have no right to give their citizens preferred access to the states’ natural resources, the Court drew a line between government actions limiting access to “the end product of a complex process whereby a costly physical plant and human labor act on raw materials” and efforts to control access to the raw materials themselves. Thus, the restrictions of the Commerce Clause are not falling upon a state (a) when it acts as a market participant rather than as a market regulator. This means, however, that a statutory scheme which will meet the exception will have to forego any indication of additional regulations such as criminal or administrative sanctions. Furthermore, (b) the state has no right to limit the access to the natural resources, even as a market participant.

The Courts have accepted the Market Participant doctrine as a possible “out” for the municipalities. In County Commissioners of Charles County v. Stevens, the Court of Appeals of Maryland upheld a county regulation banning the disposal of waste originating from outside the county. The Court determined that the county was acting as a market participant rather than as market regulator. Similarly, in Shayne Bros., Inc. v. District of Columbia, the District Court accepted the distinction between Philadelphia and the “market participant” cases. In 1987 the Ninth Circuit, too, followed the reasoning of the Market Participant doctrine in Evergreen Waste Systems, Inc. v. Metropolitan Service District.

**CERCLA Section 104 (c) (9)**

Under CERCLA Section 104 (c) (9) (A) a state is ineligible for removal or remedial actions unless they assure the availability of hazardous waste treatment or disposal facilities, which have adequate capacity to suffice for twenty years of waste generation within the state. Such facilities are to be sited within the respective states. Facilities outside of the state are acceptable only with an interstate agreement or regional agreement or authority. These adequate capacity plans were intended to stimulate greater self-sufficiency among the states. However, CERCLA does not oblige states to set up facilities, it merely exerts slight pressure.

Some states used “black lists,” refusing to accept waste originating from an area not in compliance with the requirements of the section. While the Supreme Court has generally struck down reciprocity requirements as impermissible burdens on interstate commerce, the Court has recognized that, even when Congress has explicitly legislated a particular area, states are not foreclosed from enacting laws promoting that federal purpose. However, Environmental Technology Council v. Sierra Club v. State of South Carolina suggests that, in cases where state action would fall under the dormant Commerce Clause, such an approach would only work in cases where Congress has intended to invite state action with sufficient clarity.

**Additional Fees for Out-of-State Waste**

The courts have also not stripped the states and municipalities of all possibilities to place different monetary obligations on the disposal of waste originating from other areas. In Oregon Waste Systems, Inc. v., Department of Environmental Quality of the State of Oregon, the Supreme Court held that excessive taxing of out-of-state waste was unconstitutional under the Commerce Clause. It, however, did not prohibit the imposition of additional monetary burdens as such, stating that “for the surcharge to be justified as a ‘compensatory tax’ necessary to make shippers of out-of-state waste pay their ‘fair share’ of disposal costs, it must be the rough equivalent of an identifiable and substantially similar surcharge on intrastate commerce.”

**Conclusion**

As long as the importing states continue to focus only on how to preserve landfills and other disposal capacities for their citizens, the chances of solving the real waste problem are minimal. Thus, the Commerce Clause will (hopefully), in the end, bring the states to see that they have to address the actual problem rather than merely reduce their intake. However, if the importing states are to increase the requirements for waste separation and for waste to be disposed of in their territory, this burdens the in-state voters as well. On the other hand, another part of the waste disposal problem is the actual amount of generated waste, even if properly and most diligently separated. As the example of the City of Philadelphia shows quite vividly, the “out of sight - out of mind” approach is still prevailing in cities without waste disposal sites in the immediate vicinity. For hazardous waste, the problem might be solved under CERCLA by qualifying the reciprocity-requirements.
of some regulations as additional stimulation of the intended process of self-sufficiency. This, however, does not address municipal waste at all, since it is exempt under CERCLA, disregarding the hazardous substances easily found in every household. The idea of recycling – initially introduced under the idea of scarcity of raw materials - is now viewed as a way to preserve capacity of waste disposal. While it would be sensible to introduce laws which require more aggressive recycling, the chance that such laws will be passed voluntarily is slim in areas where waste is simply exported.

Is a New (Federal) Law Necessary to Address This Issue in the Future?

In terms of political reality, it seems unlikely that cities and States will start to address the real problem, which is the generation of waste in the first place, as well as the hazardous waste exception for municipal waste. According to statistics, the United States creates 180 million tons of municipal waste per year, most of which ends up in landfills unseparated, occupying valuable space, burying valuable resources and containing a considerable amount of hazardous substances. Starting with nail varnish, various other lacquers, mercury from discarded thermometers as well as the more aggressive cleaning substances, not to mention the paint coating present on nearly every single item to make it appeal to the eye - everything is contained in the mixture of municipal waste. Taking New Jersey and Philadelphia as examples, the problem – so it seems – needs to be in one’s own backyard to give enough political incentive for regulators to start addressing it properly. New Jersey now has strict separation and recycling laws and was not afraid to impose quite uncomfortable obligations on its citizens. Philadelphia’s stream of waste did not grow smaller until a court put an end to its reckless export policy. The municipalities and state legislatures are barred from the possibility of isolation. Since the control of waste generation and its flow into appropriate facilities, as well as stricter requirements, is a nationwide problem, it seems to make sense to wait for Congress to address the issue, if only by opening the way for waste flow control ordinances and laws. However, absent such action the local authorities do have an – admittedly small – arsenal of possible actions at hand:

1) Municipalities can enter the market of waste disposal and, under the Market Participant doctrine, would be free to discriminate against out-of-state waste within that facility. They have, however, to withstand the temptation to regulate the market.

2) Municipalities also seem to have the ability to impose an additional “fair burden” on out-of-state waste, thus making the disposal at their facility less attractive for foreign generators.

3) Municipalities have the power to regulate the disposal of waste as long as they do not differentiate between in and out-of-state waste. It must also be kept in mind that waste-flow control out of any given area is illegal under the Commerce Clause. However, other financial measures (such as shifting the funding for prosecution of environmental crimes from general taxes, which could be lowered, to the income of waste disposal, fees for which could be raised) might be a way for inventive municipalities to increase the price for the disposal of waste in general, while not increasing the general monetary burden placed on their citizens.

Thus, while a federal law would be desirable, making the administration of waste in municipalities easier, the local authorities are – even under the precedents discussed in this essay – not without recourse to address the issue. They are barred only from discriminating against interstate commerce, which means that they cannot place the main burden of solving the waste problem on generators outside of their jurisdiction.

Footnotes
3 See Nowak, supra note 1, at 131.
4 See U.S. Const. art. IV, § 3, cl 2 (“The Congress shall have Power…[t]o regulate Commerce…among the several States, and with Indian Tribes.”). This power was used by the government to protect wildlife and wilderness by passing the Wild Free-Roaming Horses and Burros Act, which regulated in part not only the use of public land itself, but also the behavior of people on neighboring grounds. See generally Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92-195 (codified at 16 U.S.C. §§ 1331 to 1338, 1338a, 1339, 1340 (1985)).
5 See U.S. Const. art. I, § 8, cl. 3.
8 See 437 U.S. 617 (1978).
9 See generally id.
11 See Nowack, supra note 1, at 138.
12 Compare Tribe, supra note 2, at § 6-2.
13 U.S. Const. amend. X.
14 See 27 U.S. 245 (1829).
15 Id. at 252.
17 Spence, supra note 6, at 1125. See also Lisa J. Petricone, The Dormant Commerce Clause: A Sensible Standard of Review, 27 Santa Clara L. Rev. 443 (1987);
19 See Petricone, supra note 16, at 443.
See id. See also Hackensack Meadowlands Dev. Comm’n v. Municipal Sanitary Landfill Auth., 348 A.2d 505 (N.J. 1975).
See id. See id. See 221 U.S. 229 (1911).
See id. See also Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist., 643 F. Supp. 127 (D. Or. 1993); GSW, Inc. v. Long County, Ga., 999 F.2d 1508 (11th Cir. 1993).
See GSW, Inc., 999 F.2d 1508.
Id. at 339.
See GSW, Inc., 999 F.2d 1508.
Id. at 339.
See Oregon Waste Sys., Inc., 511 U.S. at 104 (complementary or compensatory tax doctrine).
See id. at 105.
See 959 F.2d 590 (6th Cir. 1992).
See Waste Sys. Corp. v. County of Martin, Minn., 985 F.2d 1381 (8th Cir. 1993).
See 966 F.2d 148 (4th Cir. 1992).
The Court also found that Medical Waste Associates’ claim to be invalid under the doctrine of constitutional estoppel, since during the whole pre-test procedures it never claimed the unconstitutionality of the zoning provision containing the source restriction. See generally Medical Waste Assocs. Ltd. Partnership, 966 F.2d 148.
See TRIBE, supra note 2, at § 6-6.
See also Farber, supra note 69, at 10383.

Environmental Law will open a new chapter in its evolution. The debate focuses not on “environment versus development,” rather upon how to conserve and enhance the natural and cultural dimensions of our environment in the course of development. This is a refinement to the concept of “sustainable development” announced at the United Nations Earth Summit in 1992 in Rio de Janeiro. Many of the scientific papers from Prague 2000 will provide valuable guidance to those in east and west Europe alike who will now work to implement the European Landscape Convention. The published proceedings of the Conference will be a valuable multidisciplinary reference.

Nicholas A. Robinson

BANGALORE, INDIA

Professor N.L. Mitra, Director of the National Law School of India University, met with the environmental law faculty during his visit to the United States. Professor Nicholas Robinson visited the law school in July to establish joint programs with Pace, including exchanges of faculty and distance learning programs between the two schools.
To "leap-frog" Brazilian law experience and expertise will allow undertaking sustained strategic alliances in Brazil and are prepared to participate from other University departments, have long standing experience in Brazil and are prepared to undertake sustained strategic alliances with law schools in Brazil. This experience and expertise will allow Pace to "leap-frog" Brazilian law schools into an essential role in helping to manage Brazil’s ecological basis. We can design alliances that ultimately can be financially supported within Brazil through normal Brazilian academic and professional channels.

The ultimate objective of this proposed project is to develop the foundation upon which Brazilian law schools can better prepare the next generation of environmental law practitioners to implement and enforce Brazil’s environmental laws. Because there is no continuing legal education mandate for Brazil’s practicing attorneys, the country’s only hope is with young law students. Until they are prepared to get engaged, Brazil’s basically effective federal environmental laws, its increasingly good state environmental laws and its leadership in international environmental law treaties, will remain a weak, or even "dead" letter. Given Brazil’s importance to the Earth, in terms of biodiversity and magnitude of its markets and development patterns, it is crucial to respond to the Brazilian interest in attaining an effective system for environmental protection.

The Tinker Foundation was created in 1959 by Dr. Edward Larocque Tinker. His lifelong interest in the Iberian tradition in the Old and New Worlds directed the Foundation’s overall focus on Latin America, Spain, and Portugal. More recently the Foundation has included in its mandate the support of projects concerning Antarctica, a region of significant interest on an international scale.

The Tinker Grant, from Page 1

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In his May 26, 2000, decision, State Supreme Court Justice Luther Dye held that DEP violated SEQRA by failing to perform environmental review of the rule allowing septic systems on modified slopes. The judge also held that the rule was contrary to the Watershed Regulations and the state health law.

Partially as a result of the DEP loophole, Putnam County is the fastest growing county in the state. The Putnam County Planning Department estimates that 25 percent of all housing starts in Putnam County were taking advantage of the City’s unlawful rule.

The May 26, 2000 victory in the Steep Slopes case is already returning dividends by slowing sprawl development in Northern Westchester and Putnam County. Citing the decision, the New York City Department of Environmental Protection recently withdrew approval for 17 lots in the Deer Hill subdivision in Putnam County because the lots are on slopes greater than 15 percent.

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to prevent his extradition on trumped-up charges, and almost certain death, in Colombia. Then came one more bizarre twist. At a press conference regarding Victor’s extradition proceeding, Colombia’s Prosecutor General Gomez Mendez bemoaned the U.S. court’s scrutiny of the charges issued from Colombia, noting that “[t]he fact that the basic validity of the evidence provided by Colombian authorities is being questioned in the United States could affect the principle of reciprocity that defines and characterizes extradition.” Sources indicated that he asked for a meeting with Janet Reno, his U.S. counterpart, to protest the fact that U.S. courts are empowered to protect individuals’ constitutional rights, despite his country’s insistence that the evidence of Victor’s complicity is not to be judicially scrutinized.

The message here is that we should apply only the due process afforded in Colombia: shut ‘em up and ship ‘em out.

At the scheduled extradition hearing on April 13, the Justice Department lawyers admitted in open court that the papers they received from Colombia failed to make out the “probable cause” needed to extradite Victor. Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused’s guilt -- a very low threshold of evidence.

The U.S. Attorney also admitted that twelve people involved in this very drug deal had been killed thus far in Colombia. This rather shocking revelation bolstered Victor’s claim that a return to Colombia would be tantamount to a death sentence. U.S. Magistrate Charles B. Smith, while required under the dubious extradition treaty to afford the government a full 60 days to present their case, was iron-willed, granting Victor bail, and extracting promises from the government not to deport Victor while on bail. Ironically, the money that was agreed to be posted for Victor’s bail was the same money that he allegedly used to “finance” the drug deal. That very money was de-

posited with the court. You might think that this is “proof” of Victor’s innocence, and indeed you would be right. It is axiomatic that to finance a drug deal, or anything, you must part with the money. It must go to buy something. If it is accounted for, it has not been used in any transaction - save for transfers between banks. But in accordance with the procedures used in extradition, Victor was not given the opportunity to prove his innocence. He could only try and explain away the evidence presented against him.

The government had given an indication of what that evidence would include, although when backed up against the wall, it is conceivable that the Colombian prosecutor would do anything to secure Victor’s extradition. Based on the U.S. Attorney’s offer of proof, the Colombians would present affidavits from the payees of the checks that Victor wrote, presumably claiming that they never knew Victor. Therefore, the Colombian government and the U.S. Justice Department would rely wholly on the statements of alleged co-conspirators (individuals that Colombia has alleged are one-degree-of-separation closer to the drug deal) to establish probable cause. However, even this “evidence” created a non sequitur argument that fails to connect Victor with the alleged crime in question. The fact that two Colombian-described criminals, who may or may not be in custody in a Colombian prison, claim that they had nothing to do with a drug trade that they would otherwise be implicated in, was ludicrous proof of Victor’s involvement, at best. Still no probable cause.

**Colombian Politics**

The government in Colombia is hewn into at least two factions, supporters of the President and supporters of the Prosecutor General. Unlike the U.S., the Prosecutor General of Colombia is not appointed by the President, but is a somewhat independent appointment of the Congress. Their terms are not concurrent. Victor worked for the President at the anti-drug agency Plante. His involvement in a drug deal would be a great embarrassment to the President.

What remained was the U.S. government’s responsibility to uphold the law and ignore the threat of the Colombian Prosecutor General to abrogate the already questionable extradition treaty. It was ironic that a Colombian official was questioning the reciprocity of a treaty that they had not observed for years. In fact Colombia had a longstanding constitutional provision that prevented extradition from Colombia. That is now changed. Our Constitution, on the other hand is not as malleable. We have never twisted its provisions to accommodate threats, and hopefully, never will.

**The Final Chapter?**

By the time Joseph Tate, the attorney for Victor Tafur, received the accusatory papers from the Justice Department, it was 6:30 p.m. the day before Victor’s extradition hearing. This afforded him little time to read the papers, save to answer them. This tactic by the government, sadly, was consistent with all their actions in this case, which saw Victor spend over a month in jail on, what the Justice Department has admitted, was less than probable cause. The late service of these papers left even less time for the cadre of friends and professors at Pace Law School who have been supporting Victor, to prepare legal arguments to counter Colombia’s latest salvo against him.

Nevertheless, the government’s papers held no surprises and no rev-
elations about illegal activity. Only the same strained logic. If Victor had this money, he must be a drug dealer. Since the moneys that were transferred to a Swiss bank were cleared through New York, there must be something criminal afoot. There was nothing that even hinted at probable cause.

Despite the relief at seeing that the charges were groundless, it was painfully disappointing that the Justice Department had not retracted its position despite several occasions to do so. Ironically, Eric Holder, Deputy Attorney General (the number two person at Justice) was at Pace Law School on the date of the hearing. He had no comment when Professor Nicholas Robinson presented him with a package of papers aimed at alerting him to Victor’s plight. Before the hearing, Professor Ann Powers led a Pace delegation to meet with Bruce Swartz, Deputy Assistant Attorney General in the criminal division, who listened politely, but refused to budge.

The Prosecutor General of Colombia was not going to be happy; a U.S. court was going to scrutinize the evidence that he proffered. Judge Charles B. Smith saw clearly through all the innuendo, and denied the extradition from the bench. Victor was free, but must now face the Immigration and Naturalization Service, who have ordered him to leave the country because he stood accused of a drug-related offense. This whole experience has changed Victor. Where I once described him as demure, he is now loudly outspoken about his experience. Where he was once on the path to recovery from his harrowing plane crash, he is now pained by wounds literally cerated without regard to the Constitution. The playing field must be leveled. And there must be some measure of finality.

Changes of this type will not unduly tie up the system. There are simply not very many extradition requests received by the U.S. State Department, and many of those are for individuals already convicted abroad. A change in this system, however, will close a loophole as big as the Black Hole of Calcutta, a loophole that allows persons accused by foreign nations to be incarcerated without regard to the Constitution.

The system worked in spite of itself. But what of an accused who does not have the luxury of a top Philadelphia lawyer’s defense, or a team of law professors, or a family’s unwavering support? One cannot take any comfort based on the outcome of this case. The system worked for Victor this time, and it is up to us to make sure it was no mere charade.

**Victor is currently completing his LL.M. degree studies at Pace, and participated last summer in the Pace Environmental Litigation Clinic.**

Non-Point Sources, from Page 2

The responses indicated a total of 251 environmental courses offered with 162 being entry or mid-level courses and 27 being law clinics or seminar level (some of the responses did not specify course type).

The average course offering was 7.6 per school with Pace Law School offering the most at 36 (26 of which were entry or mid level). George Washington University followed close behind offering twenty-five different environmental courses, most of which are geared towards their LL.M program but are open to J.D. students.

Some of the responses were vague and did not indicate whether there were other environmental courses in addition to the ones noted in the reply. Some of those responding counted courses not traditionally considered to be environmental courses, such as Tribal Law.

**Some Dates to Save**

The Kerlin Lecture in Environmental Law will feature Yale Law School Professor Carol M. Rose, and will take place on September 21, 2000 at 4:00 p.m. Call the Center for Environmental Legal Studies at 914-422-4122 for details.

Pace Center for Environmental Studies will present a year-long series of workshops on Ecology and Law. Dr. Gene Likens of the Institute for Ecosystem Studies in Millbrook, NY will hold the first workshop on September 27, 2000. Dr. Paul Epstein of Harvard Medical School will hold the second workshop on December 12. Please call the Center for details.

The 7th Annual Garrison Lecture will feature Professor Gerald Torres, and will be held in March 2001. Past Lecturers include: David Sive, Bill Rodgers, Joseph Sax, Oliver Houck, Richard Lazarus, and Dan Tarlock.
FOCUS ON LEADERSHIP

Director’s Introduction

Was 1999 the year that land use law came of age? “Suburban sprawl” and “smart growth” have been talked about by countless politicians, journalists, local officials, and citizen leaders throughout the last year. Behind the idea of smart growth is the recognition that land use law can solve the problem of sprawl. Our work with this body of law provides the prescriptions for smart growth, prevents damage to precious natural landscapes, encourages development in appropriate locations, and promises a sustainable future.

Recently, there has been great interest in the strategic tools that the Land Use Law Center discusses in its books, research papers, website, conferences, and workshops. While sales of 500 copies make most legal texts bestsellers, our Well Grounded books have sold nearly 2000 copies in just the last year. Our Moot Court Room and new classrooms were filled during our November conference on Land Use Leadership: A New Generation. Our website, known as LUCAS, has been updated and hosts a much-used 5,000 page electronic library covering over fifty current land use topics. We have been asked to create model ordinances that encourage mixed-use development in growth districts and that preserve large landscapes where natural resources, habitat, wildlife, and wetlands abound. In states like New York, New Jersey, and Connecticut, where local governments dictate land uses, “smart growth” means very little until it is memorialized in local ordinances such as these.

Our students have produced over forty in-depth research papers – fifteen of which have been published in law reviews and journals – and are working on fifteen new projects in response to requests for research from attorneys, other land use professionals, and our growing group of graduates from the Community Leadership Alliance Training Program. We attend community meetings organized by some of the 200 graduates of our training program to develop new land use plans, zoning ordinances, and “smart” land use initiatives capable of winning broad support. Our students have completed detailed digests and evaluations of the provisions of local land use plans and regulations of nearly fifty communities and are preparing thirty more this semester. Eventually, our website users will be able to obtain and compare the land use provisions of municipal codes of most of the communities in the lower Hudson River region. In the past year, we prepared an interactive ten-part training program for local zoning and planning board members and participated as a member of the statewide smart growth coalition that is urging legislative and gubernatorial initiatives on the subject.

We are fortunate that the growth of the Land Use Law Center has coincided with a sharp increase in public awareness of the importance of land use law. Our objective during the year ahead is to provide as much accessible and usable information as we can, to reindeer our students’ emerging leadership within the Law School, and to assist the impressive leadership that is developing at the local level. To learn more about this powerful growth of leadership and how the Land Use Law Center hopes to help in the year ahead, please read on.

Professor John R. Nolon

STUDENT DIRECTOR REPORTS

Kate Ryan, Managing Director

The research associates of the Center are involved in a number of groundbreaking research projects. Daniele Abate is preparing a paper that will illustrate how the local environmental review process can be used to protect open space. Daniele has just completed case digests of all important cases on the topic of environmental impact review in New York. Deborah Goldberger completed her research on zoning ordinance enforcement, found that virtually no scholarship on the subject has been published, and is now at work on a paper on the subject. Despite all the talk about smart growth, Mark Rielly discovered that there are very few examples in New York of communities that have adopted traditional neighborhood zoning districts where mixed-use development is accommodated in appropriate locations. Mark has completed a draft of such an ordinance and is now completing a research paper explaining its workings and contrasting it to conventional zoning provisions. Similarly, Patricia Black has found little evidence of local adoption of ordinances competent to protect all important environmental features in critical ecological landscapes. She has completed a draft of a model ordinance on this subject. Patricia is now writing a paper that explains the model ordinance and contrasts it to the typical approach of adopting discrete natural resource protection ordinances that limit their concern to one feature such as wetlands or floodplains. Peter Casper supervised the completion of digests and evaluations of the five communities that exercise land use authority over the Great Swamp, New York’s second largest wetland resource, and is now completing a paper on the intersection between transportation planning and local land use regulation.

Thirty new first-year interns are now at work with the Land Use Law Center. Over 20 of them will begin by preparing digests and evaluations of the land use plans and regulations of ten communities in the lower Hudson Valley region. This work was managed by Jody Match and supervised exclusively by students who are working with the Land Use Law Center, have produced their own digests, and have taken land use law courses. Three interns with undergraduate degrees in environmental and natural science will be assigned to our sample land use regulation.

That virtually no scholarship on the subject has been published, and is now at work on a paper on the subject. Despite all the talk about smart growth, Mark Rielly discovered that there are very few examples in New York of communities that have adopted traditional neighborhood zoning districts where mixed-use development is accommodated in appropriate locations. Mark has completed a draft of such an ordinance and is now completing a research paper explaining its workings and contrasting it to conventional zoning provisions. Similarly, Patricia Black has found little evidence of local adoption of ordinances competent to protect all important environmental features in critical ecological landscapes. She has completed a draft of a model ordinance on this subject. Patricia is now writing a paper that explains the model ordinance and contrasts it to the typical approach of adopting discrete natural resource protection ordinances that limit their concern to one feature such as wetlands or floodplains. Peter Casper supervised the completion of digests and evaluations of the five communities that exercise land use authority over the Great Swamp, New York’s second largest wetland resource, and is now completing a paper on the intersection between transportation planning and local land use regulation.

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Other interns worked with Jen Jackovitz, who developed and maintained a land use case and statutory update system. They learned to operate this update system and began research on several new issues that may develop later into complete research papers. Other interns worked on alternative dispute resolution methods for resolving land use disputes, writing research papers on smart growth, zoning enforcement, and green development. Kate Ryan ’00 also served as Executive Editor of the Pace Law Review. She has accepted a position in the litigation department of Coudert Brothers, a New York City firm.

Research Projects

Alison Arcuri, Research Director

In addition to the forty research papers that have been prepared by students at the Land Use Law Center, fifteen more are in production this year. They include papers on zoning for assisted living facilities, an overview of planning and zoning law in New York City, property tax abatements for open space and farmland preservation, obstacles and opportunities in zoning code enforcement, the relevance of land use law to real estate transactions, traditional neighborhood district zoning, using environmental review authority to preserve open space, federal and state funding sources for open space and farmland preservation, ordinances that protect critical environmental areas, regulatory takings law and open space protection, a comparative analysis of New York, New Jersey, and Connecticut land use law, and preventing and spotting legislative mistakes in the land use field.

If the past is a guide to the future, several of these papers will be published in law journals and reviews—a rather unusual happening in law school education. Pace Law School is pioneering in this respect, showing that properly supervised and carefully prepared student manuscripts can add to scholarship in law as they do routinely in scientific fields. Our goal is to see that at least half of the current list of research papers are published in this way.

Alison Arcuri ’00 prepared an extensive glossary of land use terms for the Center’s principal book, Well Grounded, Local Land Use Law and Practice. She has accepted a position with PricewaterhouseCoopers.

Land Use Library and Research Guide

Jen Jackovitz, Executive Assistant

We have recently added a number of new research tools to help our growing group of interns and research associates learn about land use law and conduct research in the field. Students in Professor Nolon’s current Land Use Law class are trying out the Center’s new Casebook and Materials on Land Use Law, which is being developed for publication by the Law School for its use and for other academics who teach the subject. The book may also find a market among land use lawyers, professionals, and other students of the field for their personal use.

Students in the Land Use class and the Center’s research associates and interns are trying out a 6,000 page compact disk that contains the casebook along with research papers and articles produced by the Center. The CD also contains a variety of other research materials, including sample local land use ordinances, a research guide, a citation guide, and instructions regarding the preparation of a digest and evaluation of local land use plans and regulations. All of these materials are being test-marketed with our students while we examine how they can be made accessible and usable by a broader group of those interested in understanding and researching land use law.

Jen Jackovitz received a B.A. in Pre-Law and an M.A. in Criminology with a focus on Environmental Crime from Indiana University of Pennsylvania. Ms. Jacovitz also studied Environmental Politics at the University of Nancy, in France.

Training and Clinical Notes

Sean F. Nolon, Esq., Director of Clinical and Training Programs

Mediators Get High Marks for Resolution of Land Use Disputes

Preliminary results of a recent study reveal a high degree of satisfaction with the work of mediators in land use controversies. The study, which was conducted by researchers at the Consensus Building Institute (CBI) and the University of Colorado, found that most individuals involved in land use mediations felt that the mediator was “crucial” to the parties’ eventual agreement.

The researchers selected 100 land use cases where professional mediators were involved and interviewed more than 400 participants in the mediations. Results show that nearly two thirds of the mediated disputes reached a settlement, and that three out of four respondents commented favorably on the mediation process regardless of whether settlement was reached.

This report also confirmed one of the main lessons taught in the Community Leadership Alliance Training Program: the importance of a proper deliberative process in preventing and resolving controversies. In almost three quarters of the disputes studied, those surveyed stated that the major obstacle to settlement was tension between the parties caused by procedural complications. For a copy of the article please contact Ann Marie McCoy at (914) 422-4262.

Land Use Law Center’s Local Clinic and Workshop Program

One of the promises that the Land Use Law Center makes to the graduates of the training program is that it will assist them in developing and gaining public support for needed land use plans, strategies, and ordinances. In the past several months, one or more clinics have been held in Bedford, Beekman, Clinton, Dobbs Ferry, Dover, New Castle, Ossining Town, the Town of Patterson, the Town of Pawling, the Village of Pawling, Philipstown, Pine Plains, Pleasant Valley, Rye, Sleepy Hollow, Stanford, Tarrytown, White Plains, and Yorktown. This year, we are conducting a course for our students in alternative dispute resolution of land use
disputes to prepare them to provide further assistance to the training program graduates.

Sean F. Nolon ’95 was the Executive Editor of the Pace Law Review and published articles on farmland preservation and sustainable development. After litigating with the New York City firm of Melito and Adolfsen, he joined the staff of the Center to develop its clinical and training programs. One of his tasks is to determine whether mediation can be helpful in resolving land use controversies and how the Center can be helpful in developing mediation capabilities in the region.

Community Leadership Alliance Program Training Notes

Great Swamp Training Program

In collaboration with the Metropolitan Conservation Alliance, a program of the Wildlife Conservation Society headed by Dr. Michael Klemens, we conducted the sixth round of training for twenty leaders from the Great Swamp Watershed communities. These include the Town of Southeast, the Village of Pawling, the Town of Pawling, Patterson, and Dover Plains. This program, which took place at the Glynwood Center, was completed on October 27, 1999. Some of the graduates from this round of training are meeting to discuss the formation of an intermunicipal council to develop collaborative approaches to protecting and enhancing the Route 22 transportation corridor and the Great Swamp watershed and biotic corridor which the municipalities share. The Land Use Law Center is helping the graduates develop a proposal to their municipal boards on this matter.

Long Island Sound Training Program – Round II

The second round of leadership training for the Westchester communities located in the Long Island Sound Watershed began in March 2000. The Land Use Law Center trained the first round of Long Island Sound leaders in the spring of 1998. Twelve of the communities represented by the participants formed an intermunicipal council and entered into an agreement to work together to reduce the pollution of Long Island Sound. Based on the success of that group’s efforts, George Sisco, Area Conservationist for the Natural Resource Conservation Service, has arranged funding for a second round of training for these communities through the offices of Congresswoman Nita Lowey. The program will be held at Pace University School of Law.

Greenway Training Program

The Hudson Valley Greenway Communities Council announced that it is providing scholarships to Greenway communities to select a local leader to participate in a special round of training dedicated to Greenway issues. This training program will take place during the first half of this year at the Glynwood Center.

Croton Watershed Program

Westchester County is sponsoring a round of training for local leaders selected by the ten communities in the Westchester portion of the Croton Watershed. This program will be conducted at Glynwood and will emphasize watershed protection issues in the New York City watershed.

Local and County Governments Provide Legislative and Financial Support to Alliance Training Program

In the past several months, eleven new municipalities have joined the list of official co-sponsors of the Community Leadership Alliance Training Program, bringing to twenty-seven the number of municipal supporters. Three of these co-sponsors – Putnam County, Dutchess County, and the Town of Fishkill – have also appropriated funds to support the program. The full list of co-sponsors is: Bedford, Clinton, Dover, Dutchess County, East Fishkill, Fishkill, Harrison, Hyde Park, Larchmont, Town of Mamaroneck, Village of Mamaroneck, New Rochelle, Village of Pawling, Phillipstown, Pleasant Valley, Putnam County, Rhinebeck, Rye City, Scarsdale, Stamford, Tarrytown, Tivoli, Wappinger’s Falls, Washington, Westchester County, the Westchester Municipal Officials’ Association, and Yorktown.

The Community Leadership Alliance Training Program

The Community Leadership Alliance Training Program is an intensive four-day training experience offered to local elected and appointed leaders and citizen leaders representing development, civic, and environmental interests. It was originated and developed with funding secured by Congresswoman Nita M. Lowey and administered by the Natural Resource Conservation Service of the United States Department of Agriculture.

This program is conducted in partnership with the Glynwood Center, and most of the training programs are conducted at Glynwood’s magnificent headquarters in the Hudson Highlands near Cold Spring, in Putnam County. Judith LaBelle is Glynwood’s President. Jayne Daly, Glynwood’s Director of Programs, is one of the principal trainers in the program. She is a magna cum laude graduate of Pace University School of Law and the former Co-Director of the Land Use Law Center.

Participants in the program learn about land use strategies that may be employed by local government. They also learn how to create a collaborative – as opposed to an adversarial – decision-making process leading to the adoption of comprehensive plans, land use ordinances, or action on proposed projects.

The program aspires to help each participant leave the training sessions with a personal leadership plan. The Land Use Law Center’s programs are designed, in part, to support the graduates of this program in the field as they carry out those plans.

Requests for information regarding any activity of the Center may be directed to Ann Marie McCoy at (914) 422-4262 or amccoy@law.pace.edu.
IN DEFENSE OF THE KYOTO PROTOCOL

By Joy Hyvarinen
Institute for European Environmental Policy (IEEP)

Introduction
The Sixth Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC) is expected to make several decisions in November 2000 that will be critical to shaping the Kyoto Protocol. The purpose of this note is to contribute to the debate in the lead-up to the Sixth Conference of the Parties (COP 6). The title refers both to the Kyoto Protocol as a valuable agreement, which is worth defending, and to the need for the European Union (EU) to take a strong stand in defense of the Protocol. The paper provides a brief background section. It then considers opposition and doubts concerning the Protocol. The paper suggests that some dangers may lie in doubts about the Protocol, even well justified ones. The paper concludes with some observations concerning the EU.

Background
In 1997, adoption of the Kyoto Protocol marked a watershed in international environmental policy-making, with the introduction of the legally binding quantified emissions reduction targets that form the core of the Protocol. After years of mounting scientific evidence on climate change, the world seemed poised to begin the serious business of reducing greenhouse gas emissions. However, central questions concerning the Protocol were left open at Kyoto.

In November 2000, the COP 6 is expected to conclude work on the main parts of the Buenos Aires Plan of Action, adopted at the Fourth Conference of the Parties in 1998. This includes answering decisive questions, such as what the role of the ‘Kyoto mechanisms’ will be, how compliance issues will be resolved and what role carbon sequestration activities (land use, land-use change and forestry) will have in the Protocol.

The decisions likely to be taken at COP 6, or subsequent meetings, will define the substance of the Kyoto Protocol. There are widespread concerns that extensive use of the Kyoto mechanisms, a weak compliance system and excessive reliance on carbon sequestration may compromise the Protocol, perhaps even fatally. Critics have pointed out many potential “loopholes” in the Protocol, which could allow governments to avoid action to reduce emissions.

Agreement at COP 6 on the issues that were left open when the Kyoto Protocol was adopted is seen as necessary by most countries before they can consider ratifying the Protocol. While Parties to the UNFCCC see a need to be clear about the implications of ratification before proceeding, the year 2002, which marks the tenth anniversary of the Rio Conference on Environment and Development, has already emerged as a widely supported target date for entry into force of the Kyoto Protocol. The UN Secretary-General has recently called on the UN Millennium Summit to promote the adoption and implementation of the Protocol, specifically urging those states whose ratifications are required for entry into force to take action in time for the Protocol to come into effect by 2002.

Although the EU, pivotal to entry into force, has so far failed to confirm it willingness to lead rather than to follow, on the issue of ratification, increasing interest in exploring the practical options for achieving entry into force of the Protocol without U.S. participation in the first commitment period may signal a welcome new determination by the global community to address climate change.

Opposition and Doubts
However, with less than six months to go before COP 6, doubts about the viability of the Kyoto Protocol in Kyoto, Continues
col seem to be increasing. The Protocol seems to be facing problems on two main fronts:

On one hand, the Kyoto Protocol is opposed by fossil fuel interests, which would prefer not to see it enter into force at all, and which are arguing against ratification in the U.S. and other countries. Some countries are seeking to expand the “loopholes” of the Protocol to an extent which critics say risks making a mockery of the reduction targets agreed to at Kyoto. This applies to excessive use of carbon sequestration activities and the Kyoto mechanisms. Worst case scenarios could include major greenhouse gas emitters exporting a large part of their reduction commitment to developing countries through official aid and the Clean Development Mechanism (CDM). Outcomes such as this would subvert the foundations of the climate regime laid down in the UNFCCC and subsequently reaffirmed in the Kyoto Protocol. It should be noted that the Kyoto Protocol confirms that implementation should result in an overall reduction in Annex I country emissions of “...at least 5 percent below 1990 levels...” (Article 3.1).

On the other hand, the slow progress and the repeated attempts to weaken the Protocol in the negotiations on the Buenos Aires Plan of Action have discouraged many supporters, leading them to question the value of a seriously weakened Kyoto Protocol. As the risk of this seems to increase, doubts are growing. Many are reserving judgement on the Kyoto Protocol until the outcome of COP 6 is clear.

The concerns are well founded. Expressing doubts helps ensure that governments insist on an outcome at COP 6 that closes as many of the Kyoto Protocol “loopholes” as possible. It is necessary to point out the pitfalls and weaknesses in the Protocol and to urge decision makers to act to address them.

Dangerous Doubts?

However, it may be that some aspects of the emerging “confidence gap” could have the effect of weakening the Protocol further, rather than helping to strengthen it.

Opponents of the Kyoto Protocol would be extremely pleased to see former supporters turning away from the Protocol, whatever the reasons for that might be. For all its weaknesses, and all the question marks that surround it, the Kyoto Protocol has the potential to begin driving enormous, modernizing change in the outdated energy use patterns that steer development in most parts of the world. Adoption of the Protocol confirmed that a paradigm has begun to shift.

In the wrong circumstances, justified doubts about the future of the Protocol risk having the perverse effect of weakening the Protocol further. They may even constitute an invitation to encourage further doubts for less than straightforward reasons. Criticisms about the lack of progress in negotiations on the Buenos Aires Plan of Action are sometimes accompanied by suggestions that the process is not worthwhile. Disillusionment has led to suggestions that other approaches, such as focusing on national action or business-led voluntary initiatives, could be the way forward. One could argue that citing disillusionment with the international negotiating process and walking away from the Kyoto Protocol is the “easy option.”

The solution to climate change is in national and local action. Without ground-level implementation action, the Kyoto Protocol would have no meaning. However, climate change, perhaps more than any other problem, demands international cooperation.

Without the Kyoto Protocol

The Kyoto Protocol would be meaningless without local and national implementation, but so would attempts to address climate change without a global framework. (It does, however, not follow from this that all Annex I countries must necessarily be part of the Protocol in the first commitment period.) The UNFCCC and the Kyoto Protocol form one of the most important international regimes ever established. In committing industrialized countries to discharging a historical responsibility for climate change by taking the lead in implementing action to address it, the UNFCCC and Protocol have laid the foundations for a fair solution to a global problem.

If the Kyoto Protocol turned out to be unacceptably weak, what then?

Without the Kyoto Protocol, the global framework for addressing climate change would be likely to shift towards existing global frameworks and institutions, such as the World Trade Organization (WTO) and the World Bank, and to an increasing emphasis on market-based approaches. The track records of these institutions, and of unrestrained market-based approaches, in a world of imperfect markets, do not inspire confidence. Voluntary approaches would not provide the predictability necessary for the kind of long-term decision making that climate change requires.

Some might argue that integrating climate change considerations into the activities of international financial and other institutions is the most effective way of addressing climate change. While, for example, international lending programs need to be adjusted so that they do not undermine, but instead support efforts to address climate change, the mandates of these institutions are inappropriate and inadequate when it comes to dealing with climate change. The Kyoto Protocol is needed to set the international standards. Some critics would argue that it is precisely the model of economic development promoted by international institutions such as the WTO and World Bank that has been a driving force behind climate change.

Abandoning the Kyoto Protocol would leave a vacuum that is unlikely to be filled by a stronger agreement, at least not without very considerable effort. Permitting a reopening of debate on the key principles that underpin the Kyoto Protocol risks a much weaker replacement or modification. Some countries would welcome any opening that might allow them to attempt to extract themselves from the commitments they made a Kyoto. This is pre-
cisely what some are trying to do in negotiations on the Buenos Aires Plan of Action. However, with the Kyoto Protocol, there is a critical “bridgehead” that can be “held.”

The choice of walking away from the Kyoto Protocol, weak or strong, may not really exist. Perhaps it seems that it could because of the “haze and noise” that can make it difficult to get a clear perspective in the international climate policy arena.

A badly weakened Kyoto Protocol would have the same effect as a non-existent one. However, the outcomes of COP 6 and subsequent negotiations are far from clear yet. It seems much too early to consider abandoning a possibly sinking Protocol. An unsatisfactory outcome at COP 6 would not necessarily be the final word either, as both the UNFCCC and the Protocol contain review provisions.

The European Union

The top priority in the coming months must be to secure a strong, fair and credible agreement to conclude the Buenos Aires Plan of Action. Part of this can and should be scope for some flexibility. It is clear that market-based approaches have a place in the Protocol. However, the scope for choice among various mechanisms and approaches to implementation must not be permitted to result in a de facto renegotiation of the reduction targets agreed at Kyoto.

The EU is now the focus of high expectations. So far, it has failed to display the actions of a leadership group in the climate negotiations (The EU in the International Climate Negotiations - Lost and Defeated? IEEP, January 2000, considered some of these issues). COP 6 is an opportunity for the EU to claim the agenda-setting role. It may not be completely fair, but if the decisions at COP 6 result in a serious weakening of the Kyoto Protocol, the EU is likely to take much of the blame. There are some suggestions that the EU may be ready to make decisive moves. Whatever the case, the EU countries will be watched closely at COP 6.

Want to do litigation, regulatory compliance, or policy work. I was determined to put myself in a position that would expose me to all the above. I decided to participate in the Pace DC Externship Program, and work for the Environmental Natural Resource Division in the General Litigation Section, of the Department of Justice (DOJ).

My rational was that the DOJ was the best government agency out there. (No offense to my “compadres” who worked in other agencies.) I would have the opportunity to observe some of the best attorneys working on a huge variety of cases. I thought that the DOJ attorneys would have both the drive and spirit of attorneys at NGOs and the structure and guidance of the big law firms. I am happy to report that I was not disappointed.

The DOJ offered an abundance of summer learning opportunities. Once a week, interns would gather for brown bag lunches and discuss hot issues with attorneys from different sections. I met with Judges from the Court of Claims and tested my knowledge of takings. The DOJ also had the “occasional” social event, attending baseball games, playing in softball tournaments, happy hours, canoe trips, etc.

I can say with confidence that the DC Externship has helped me set my course in the legal profession. My fellow Externs and I jokingly compared class, led by by Professor Steve Solow, to therapy. We would sit around a table and talk about the law, DC, agencies, as well as our ambitions. We learned how to make the most of our work experiences. I personally learned how to focus on a given task, and use this focus to improve my skills.

The Externs also met with Pace’s growing body of DC alumni throughout the summer. They gave helpful advice and offered their help in the great game of Beltway networking. Pace’s DC Externship has definitely been a positive experience and I am convinced it was the perfect choice for my second summer of law school.
NRDC and the Pace Environmental Litigation Clinic are representing local environmental groups and residents on the Island, and have notified the Navy of their intent to file a suit based on environmental statutes.

The Executive Order initiated an era of new compliance by the Navy of their environmental obligations resulting from their bombing, shelling, and naval exercises in Vieques and surrounding waters (the “Inner Range”). The Navy has tried to speed up compliance with the interagency consultations requirements under §7 of the Endangered Species Act, their permitting process for hazardous waste (open dumping/open detonation), under the Resource Conservation and Recovery Act (RCRA), and to consent with EPA on their many acknowledged violations of their 1984 Clean Water Act permit. Prior to each exercise, the Navy has prepared an Environmental Assessment (EA) and published a finding of no significant impact (FONSI). Aerial surveys, reports, studies and consultations packages began to be part of the Navy’s compliance initiative. However, the Government of Puerto Rico through the Junta de Calidad Ambiental (JCA) has not yet issued the Water Quality Certification required under section 401 of the Clean Water Act (CWA) for the renewal of the 1984 CWA permit.

The Navy resumed bombing Vieques’ Inner Range in spring 2000, a year after the April 1999, incident in which a civilian security guard was killed by two 500-pound bombs. The first exercise using inert ordnance consisted of fifty five-inch rounds fired from one ship. Aircraft stationed at Roosevelt Roads base in Puerto Rico dropped fifty bombs. For this exercise the Navy notified only Vieques habitants of the training activities, and issued a FONSI. Despite the opposition of the population, the Navy completed its first war game of the new millennium.

The US Fish and Wildlife Service (USFWS) imposed a few train-
hundreds stood in line for a visa.

The offices of Sistema de la Integración Centroamericana (SICA), an organization of Central American countries, is not far from the Embassy, and was the site of a three-day meeting, designed to develop substantial projects to further the Cooperative Agreement signed last December. The Pace Environmental Program is to play a major role in these projects, based on its depth of experience in environmental law.

Coordinator of Environmental Legislation for SICA is Dr. Marco González. Like Araujo, González believes that the richness of Central America’s environment is the key to its social and economic success. González is pragmatic and efficient. In conversation he switches from his native Spanish to English to French, to introduce the Haitian Environmental Minister, flawlessly. He is a firm believer in the need for transboundary cooperation in dealing with the environmental problems that plague developing countries. In this regard he views the Cooperative Agreement as mutually beneficial. All the parties can learn from each other, all have knowledge and experience to contribute.

One area where this two-way flow of knowledge is evident is in the proposed projects. In one, faculty from Pace has advised the University Popular of Nicaragua (UPONIC) on establishing an environmental litigation clinic, modeled on the Pace Environmental Litigation Clinic; another will bring experts to confer on the management of transboundary watersheds, highlighting the efforts of the Central American countries to safeguard their watersheds.

Green has made a difference in Costa Rica, where ecotourism has flourished. Whether similar policies can have as significant an impact in post-civil war El Salvador, or in Honduras and Guatemala, which were devastated by hurricane Mitch, remains to be seen. The richness of its biodiversity, and the natural beauty of Central America, however, make it a worthwhile cause.

Vieques Suit, from Page 26

ing restrictions on the spring 2000 exercise to prevent adverse effects on threatened and endangered species and to prevent the taking of marine mammals. The Navy had no incidental take permit in case any endangered species were harmed. The formal biological opinion from USFWS regarding the effects of the Navy’s activities on the West Indian manatee, hawksbill and leatherback sea turtles, and brown pelican dated back to May 16, 1980. National Marine Fisheries Service (NMFS) issued a biological opinion on the same species in December of 1981. The NMFS biological opinion stated that the Navy was required to reinitiate §7 consultation if any sea turtle was “killed or injured” as a result of Navy activities or if “studies or new information revealed impacts of the identified activities that may affect the listed species.” In August 1985, USFWS requested reinitiation of consultations based on increased activities in Vieques. Again in May 1995 and June 1999 USFWS insisted on reinitiating consultations.

A lawsuit was filed May 10, 2000 by the Vieques Conservation and Historical Fund, Union de Viequenses para la Proteccion del Medio Ambiente, and several individuals, based on lack of factual basis for using the Inner Range, violation of environmental statutes, violation of human and constitutional rights by the presidential order, Coast Guard regulations, violation of the Memorandum of Agreement signed by the Navy and the Governor of Puerto Rico in 1983 and Public Nuisance violations.

In response to the Navy’s announcement of June 2000 exercises the plaintiffs moved for a temporary restraining order (TRO) to prevent the Navy from concluding training operation on Vieques. Federal District Court Judge Juan M. Perez-Gimenez denied the TRO because plaintiffs failed to establish irreparable injury and to convince the Court that they were likely to succeed on the merits or that the balance of the equities and effect on public interest weighed in their favor. The decision pointed out that plaintiffs failed to meet their prefiling notice requirements under each environmental statute. The general notice failed sufficiently to inform of the violation on which the citizens intended to bring suit and was not mailed to the required persons as mandated by the statutes and EPA regulations. This suit is still ongoing.

Exercises in June 2000 consisted of five ships firing 600 five-inch rounds into the Live Impact Area (LIA) located on the eastern tip of Vieques. In addition, air-to-ground shelling was conducted during the same time-frame. Five-hundred-and-fifty to 830 25-lb. rounds, thirty 50-lb. laser guided training rounds and 120 rounds of “heavy inert ordnance” (500 or 1000 lb.) were dropped during the aerial bombardment.

The new lawsuit will be key in determining whether the Navy is currently in compliance with environmental statutes prior to any final determination on the land transfer and the standard cleanup.

Footnotes

2 This permit was issued by EPA following the Weinberger case in the Supreme Court.
4 Endangered species in Vieques include the hawksbill sea turtle (Eretmochelys imbricata), the leatherback sea turtle (Dermochelys coriacea), the green turtle (Chelonia mydas), the West Indian manatee (Trichechus manatus), the brown pelican (Pelecanus occidentalis) and the Cobana negra (Stahila monosperma). See 50 CFR 224.101, enumeration of endangered marine species.
5 This lawsuit was brought by Pedro Varela, Salvador Tio Fernandez, Jose Nazario de la Rosa and Fermin Arraiza Navas, some of whom had been involved in the Weinberger litigation.
7 CZMA § 304 (1), 16 U.S.C. § 1453 (c).
In Print:


Dean Emeritus Richard L. Ottinger’s article *Global Climate Change — Kyoto Protocol Implementation: Legal Frameworks for Implementing Clean Energy Solutions* will be published by the *Pace Envt’l L. Rev.* and jointly by IUCN and UNEP.

On the Net:


In his article entitled *Innovations in Environmental Policy: The Most Creative Moments in the History of Environmental Law: The Whats*, 2000 U. Ill. L. Rev. 1 (2000), Professor William H. Rodgers, Jr. identifies the Pace Virtual Environmental Law Library, by Robert J. Goldstein, as one of the developments that marked the “[o]pening of new domains and redirecting traditional ones [that] have occurred repeatedly in the practice of environmental law.”