Pace Center Holds 2nd Seminar in Brazil: Two More are Scheduled

By Marco Olsen

Brazil contains an acknowledged wealth of biological diversity, with rich varieties of species and ecosystems. The image of the Brazilian Amazon, besides its exuberant ecosystems, is often associated with serious environmental problems.

Pace-Brazil Seminars, Page 2

The Right Thing in the Wrong Place: Nuisance and Zoning in New York

Introduction

A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.1

By Jody Tamar Match, ’01

Trade and Environment: International Dispute Resolution

By Daniel T. McKillop, ’01

I. Introduction

Environmental protection has been consistently trumped by preference for less-restrictive global trade regulation when the two regimes have come into conflict in international courts. This trend is most potently exemplified by a consideration of the Tuna I, Tuna II, Reformulated Gasoline, and Shrimp-Turtle cases, all international judicial decisions of the 1990’s that accorded trade a preeminent position over considerations of global resource protection.1 Current mechanisms and procedures for the adjudication of international trade-environment disputes are therefore unsatisfactory.

Trade-Environment Disputes, Page 4

IKEA Thwarted: Victory for Social Justice and Environmental Law

By Debra S. Cohen

In October of 1999 Jerome Newmark met with Pace Law Professor Randolph Mclaughlin, Director of the law school’s Social Justice Center. Mr. Newmark was seeking help in saving the city of New Rochelle, New York’s City Park neighborhood from being destroyed and replaced by an IKEA furniture superstore under an urban renewal plan. A City Park business owner, Newmark was representing the concerns of a group of business and home owners, and two church con-
$193,000 For Energy Research at Pace Energy Project

Thomas G. Bourgeois, Senior Economist at the Pace Energy Project, has been awarded an 18-month $193,000 grant from the New York State Energy Research & Development Authority to do research with DOE’s Oak Ridge National Laboratory on removing barriers to combined heat and power (cogeneration) installations in New York State. This technology, using the waste heat from power plants for industrial processes and using industrial waste heat to generate electricity, is one of the most advantageous ways of increasing the efficiency of electricity production, increasing efficiency from about 30% for the average electric power plant to as much as 80%.

PACE A STRONG PRESENCE AT IUCN WORLD CONSERVATION CONGRESS

The 2nd World Conservation Congress, in Amman, Jordan was a great success. Richard L. Ottinger, Dean Emeritus of Pace Law School and founder of Pace Energy Project, was successful in securing the adoption by the Congress of a resolution supporting the UNDP World Energy Assessment. Dean Ottinger also hosted a well attended program for the UNDP on the World Energy Assessment, led by Jose Goldemberg, formerly Brazil’s Environment Minister.

The Pace Center for Environmental Legal Studies also co-sponsored a resolution adopted by the Congress on information technology that supports the Biodiversity Conservation Information System (BCIS).

Pace’s Kerlin Distinguished Professor Nicholas A. Robinson, founder of the Pace Center for Environmental Legal Studies, was re-elected to a second term as the chair of the Commission on Environmental Law for IUCN and re-appointed as the Legal Advisor to IUCN.

POWER SCORECARD™

The Pace Energy Project has created a comprehensive Internet based consumer education tool designed to enable consumers to use the power of choice in competitive retail electricity markets to reduce the environmental impacts of their electricity use. This such as the exploitation of natural resources, forest fires, poor management and implementation of existing legislation, among others. Brazil is also a country that still has serious inequalities in its income distribution despite its efforts to control inflation and achieve economic stability.

Brazil is comprised of the Federal District, 26 states, and more than 5,000 municipalities, each is constitutionally entitled to formulate and carry out their own economic, social and environmental policy.

Among the Europeans, the Portuguese were the first to colonize Brazil, and have been the most influential in shaping the cultural patterns of today. The city of São Luís is the capital of Maranhão and was founded by the French in 1612, invaded by the Dutch, and then by the Portuguese in 1644. The historic beauty of São Luís has led to the City’s recognition by UNESCO as a World Heritage Historic Site in 1997.

The gateway to the Amazon Rain Forest is the State of Maranhão, on the northeast coast, where one can find Brazil’s largest mangrove forests. About 15% of the Amazon Rain Forest has now been destroyed, by the opening of highways, mining activities, colonization, and timber export.

Despite extensive legislation aimed toward environmental protection in Brazil, training of enforcement personnel is still below the desirable level. Parallel to the efforts made by the Brazilian Government to meet its commitments to safeguard a sound environment, the Pace Center for Environmental Legal Studies continues to develop capacity-building programs in Brazil.

Similar to the first International Environmental Law Seminar held in September of last year in the State of Rondônia, the second event was held in São Luís on December 11, 12 and 13, co-sponsored by the Brazilian Bar Association in the State of Maranhão, Ecolegis – Center for Environmental Law and Sustainable Development (a Brazilian NGO), the International Union for the Conservation of Nature (IUCN), and the Pace Center for Environ...
The Second International Environmental Law Seminar in Brazil in Pictures

Left Top: The Center for Environmental Legal Studies sent a team to the São Luís Seminar.

Left Middle: Pace Professor John Humbach addresses the audience on a new land ethic, while Pace S.J.D. candidate Marco Olsen translates.

Left Below: Pace history Professor Jordan Young charms the crowd with his history of northeastern Brazil.

Right Above: The Second International Seminar on Environmental Law in Brazil was held in the city of São Luís, in the northeastern state of Maranhão. A city characterized by its historic, colonial architecture, it is also a city bent on protecting its natural environment as it grows.

Right Below: The Ordem Dos Advogados Do Brazil, MA (OAB) was the venue for the two-day seminar on environmental law.

Bottom Left: Among the most jeopardized ecosystems, the mangrove forests of Brazil provide a plethora of benefits to the environment.

Bottom Right: East of São Luís lies the remarkable dunes of the Lençóis National Park. Encompassing an area of some 5000 square miles, the dunes are as white as snow, and the water that accumulates between them during the rainy season is clear and sweet. This is one of the world’s most unique ecosystems.
II. GATT/WTO

A probable reason for the pro-trade decisions that are rendered in situations of international trade-environment disputes is the inadequacy or insufficiency of the fora available for consideration of the matters. A adjudication by the General Agreement on Tariffs and Trade’s World Trade Organization (GATT/WTO) is one method used to resolve such matters. For several reasons, however, the GATT/WTO is incapable of serving as a forum for trade-environment disputes. An alternative to the GATT/WTO as a forum for the adjudication of these disputes may be the International Court of Justice (ICJ). While the ICJ is a more balanced and legitimate forum than the GATT/WTO, significant objections to its consideration of trade-environment disputes may also be made.

The shared and related objections to the assumption of trade-environment dispute resolution duties by both of these bodies have caused several scholars to call for the establishment of a new international environmental court (IEC). Such an institution, it is theorized, may be better able to balance the competing interests of trade and environmental protection in its deliberation and adjudication of these complicated matters. Yet another different and persuasive line of reasoning sets forth the idea that international trade-environment disputes should not be the subject of adjudication at all, and that the creation of a new or use of an existing non-adjudicatory international environmental body (IEB) to which such trade-environment disputes would be referred is the proper course.

This paper will consider the above-mentioned arguments in order and will compare the respective benefits and shortcomings of the GATT/WTO, the ICJ, a new IEC, and a new non-adjudicatory IEB as fora for the resolution of trade-environment disputes between nations, and support the initiative to use an existing international body to address these matters.

II. GATT/WTO

The United States’ 1930 Smoot-Hawley Tariff Act, which markedly increased the import tariffs placed on foreign goods entering the United States, caused economic turmoil in Europe and was one of the factors that combined to start World War II. Post-war planners attempted to create an international economic regime that would discourage governments from pursuing policies that would place the goods of one country at significant disadvantage vis-à-vis domestically produced goods or products of other nations. The GATT was the regime designed to accomplish this goal.

The GATT was not, however, designed to become the international organization that it has become; in fact, it was chiefly meant to simply provide substantive trade rules, which were to be implemented and used by an International Trade Organization (ITO) that was to be created in a separate treaty. This entity never came into being, and the GATT was left to take over the duties of a full-fledged international organization. In 1994, the World Trade Organization was established and today it administers and adjudicates disputes regarding the trading rules established by the GATT pursuant to the Understanding on Settlement of Disputes (DSU), which established a judicial-type dispute settlement system.

Since 1994, the DSU has ensured that virtually all trade-environment disputes are brought within a single dispute resolution process overseen by the GATT/WTO Dispute Resolution Body (DSB), which is empowered to establish GATT/WTO panels, adopt GATT/WTO panel and appellate reports, monitor the implementation of GATT/WTO rulings and recommendations, and authorize retaliatory measures in cases where states do not implement GATT/WTO panel recommendations. Indeed, the monopolistic effect of GATT/WTO over these matters is one reason why it is an improper forum for adjudication of these matters; as such, monopoly often leads to abuse.

The GATT/WTO is an improper forum for trade-environment adjudication for numerous other reasons as well. A brief and non-exhaustive summarization of the factors cutting against the jurisdiction of the GATT/WTO follows.

1) The substantive law of GATT/WTO treats any law pertaining to international environmental law and any law or treaty not embodied in GATT/WTO or its “Covered Agreements” as irrelevant.

2) GATT litigation shows that international environmental protection has been subordinated to the overarching GATT mandate, the liberalization of trade via the elimination of domestic trade-restrictive controls.

3) The GATT/WTO judges who are interpreting substantive trade law are unfamiliar with and are likely biased against law pertaining to international environmental protection.

4) The GATT/WTO’s traditional function is as a forum where governments that are represented by trade ministries attempt to secure trade concessions for the benefit of various industrial constituents; as such, it is very difficult for environmentalists to get to the bargaining table, much less have any appreciable effect upon the proceedings.

5) The GATT/WTO processes are closed and secretive, and exclude environmentalists and NGOs.

Several “cures” have been promoted to address these and other shortcomings of GATT/WTO, including the amendment of the GATT, the utilization of the GATT Article XXV(5) waiver (which allows contracting parties, in “exceptional circumstances” to “waive an obligation imposed upon a Contracting Party by this agreement”), or negotiate a separate “environmental code”. None of these “cures” are likely to foment any real reform or are even likely to come about. First, the GATT may only be amended “upon acceptance by two-thirds of the contracting parties.” As over 100 nations are now GATT members, agreement by two-thirds of them is unlikely at best. Use of the GATT Article XXV(5) waiver would chill the development of permissive trade measures, which is undesirable in light of the speed with which international environmental law is developing, and the negotiation of a separate environmental code to the
GATT would entail a long and difficult negotiation periods followed by years of implementation.¹⁶ The GATT/WTO is therefore an improper forum for the adjudication of trade-environment disputes.

III. The ICJ

The ICJ is a more legitimate forum for adjudication of trade-environment disputes than the GATT/WTO. Created in 1945 as the “principal judicial organ of the United Nations,”¹⁷ the ICJ is the primary judicial forum for the resolution of international legal disputes¹⁸ and is competent to hear and adjudicate international trade-environment disputes.¹⁹ In fact, the ICJ has heard more cases touching on the law of the sea than on any other area of public international law.²⁰ Finally, the ICJ is less likely to suffer from the inherent and entrenched pro-trade bias which expels the GATT/WTO from consideration as the best forum for trade-environment adjudication. However, as with the GATT/WTO, there are a host of impediments to prevent the ICJ from being the best forum for adjudication of trade-environment disputes.²¹

1) Notions of state sovereignty make states reluctant to submit to the ICJ, which may or may not conclude matters deemed by states to be of paramount interest to them in their favor.²²

2) The ICJ, an international body designed to encourage and persuade nations to follow certain paths of international behavior, has been perceived as having little real ability to enforce its judgments.²³

3) The ICJ takes a prolonged amount of time to come to its decisions, as exemplified by the duration of the Barcelona Traction Case (eight years) and the South West Africa Cases (six years).²⁴

4) The ICJ’s highly restrictive standing requirements allow only states that are directly harmed by the environmental wrong to bring a case - thus preventing any state from bringing a case in which harm was done to the global commons - and prohibit NGOs, private individuals, and multinational corporations from bringing cases before the Court.²⁵

A’s fundamental issues of state sovereignty and ICJ standing requirements are not likely to be malleable enough to allow for effective utilization of the ICJ, it is not likely the best forum for adjudication of trade-environment disputes.

IV. Creation of A New International Environmental Court?

The fragmentation of international environmental law institutions to date has prevented the establishment of a “judicial tribunal with mandatory jurisdiction, the right to monitor, or legally-binding enforcement authority [that] has been established to enforce globally the evolving norms of international environmental law.”²⁶ This fact, combined with the problems with GATT/WTO and ICJ jurisdiction over international trade-environment dispute adjudication, have given rise to the concept of the creation of a new IEC designed specifically to adjudicate international trade-environment disputes. Without the jurisdictional competition provided by the existence of such a body, the GATT/WTO has been able to enjoy continued prominence as the chief adjudicatory body in the realm of trade-environment dispute resolution.²⁷ A new IEC may well have the reforming effect upon GATT/WTO that some environmentalists seek, as “[t]he existence of another forum that can challenge the judicial monopoly of GATT/WTO might generate genuine reform within that organization.”²⁸

Chief among the criticisms of such a plan is the fear that the rampant proliferation of international fora will create conflicts in the law as adjudicated by those bodies.²⁹ This is a point that may be debated; the availability of judicial recourse in the international sphere is a principle embodied in customary international law, and the provision of such recourse via the establishment of new judicial bodies is laudable and legitimate.³⁰

Unfortunately, the emergence of such a new IEC is unlikely to occur, or is at best very far off in the future, for a number of reasons. First, such an initiative would have to be sponsored and supported by powerful international actors and states, which are the very entities that would be most constrained by such a body.³¹ This is improbable at best, especially considering that such an initiative was removed from the agenda at the 1992 Earth Summit at Rio de Janeiro “because different states rejected the idea.”³² Second, there is no reason to believe that a new IEC would be able to avoid the problems suffered by the ICJ regarding the unwillingness of states to subsume their ideals of state sovereignty in favor of IEC authority.³³ Third, although individuals serving as judges on the IEC would presumably be credible and worthy jurists, it would be difficult to guarantee that an international environmental court would be able to avoid pro-environment bias - the inverse of the GATT/WTO bias problem.³⁴ A new IEC, then, is not the best forum for such adjudication.

V. The Case Against Adjudication Itself

The insufficiency of the three leading contenders for adjudication of international trade-environment disputes - the GATT/WTO, the ICJ, and a new IEC - leads to the conclusion that trade-environment disputes may not be matters for adjudication at all. In fact, there are several political, doctrinal, procedural, and structural reasons why this is the case.

There are three primary political reasons why adjudication does not serve as the best method of international trade-environment dispute resolution: first, nations are rarely willing to consent to third-party adjudication because of the risk of losing the case, or of being incapable of affording the judgment of the tribunal; second, nations prefer negotiation and compromise to the adjudicatory process of determining a winner and a loser, which leaves no flexibility to devise alternative resolutions (or for governments to opt for compromise rather than embarrassing legal defeat); third, nations may be reluctant to bring cases for redress of international environmental wrongdoing by another state for fear of strain-
Nuisance & Zoning, continued

The purpose of this article is to analyze relevant zoning cases in the State of New York under common law nuisance in order to illustrate the relationship between the two concepts.

Part II of this article will be an overview of the history of nuisance law, including a discussion of a selection of relevant nuisance cases. Part III will provide background information on the history of zoning law in general, and particularly in New York State, as well as a selection of relevant zoning cases. Part IV will be a look at a selection of zoning cases in New York State under common law nuisance. Part V will support the conclusion that elements of nuisance are indeed still prevalent in zoning law.

Nuisance

Background of Nuisance Law

"There is perhaps no more imperceptible jungle in the entire law than that which surrounds the word nuisance." Although courts and legal scholars have differed in their definitions of "nuisance," there still remains two distinct nuisance causes of action in the common law — "private nuisance" and "public nuisance." 6

Private Nuisance

Private nuisance is defined as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." 7 Private nuisance claims occur when a defendant operates in a manner which the plaintiff alleges to be offensive. 8 These claims arise "from an injury to the use and enjoyment of land that is essentially private in character and that affects a limited number of persons." 9 Although private nuisance causes of action date back as far as the twelfth century, it was not until the nineteenth century that economic development began to put stress possession of property as a "natural right," existing independently of legal and social institutions. 11

In order to determine if a nuisance has occurred, it is irrelevant whether the invasion is intentional or negligent. 12 However, to impose liability for a private nuisance, the invasion must be considered "unreasonable." 13 An unreasonable invasion occurs if "the gravity of the harm outweighs the utility of the actor's conduct." 14 Factors considered by courts to determine the "gravity of harm" include "(1) the extent and character of the injury alleged; (2) the social value of the use invaded; and (3) the burden of avoiding harm by the harmed party." 15 Factors involved in determining the "utility of conduct" include "(1) the social value of the conduct; (2) the suitability of the activity to the locality; and (3) the impracticality of avoiding the invasion." 16

Public nuisance

Public nuisance is defined as "an unreasonable interference with a right common to the general public." 17 In order for an individual, as opposed to a public officer such as an attorney general or a district attorney, to bring an action for a public nuisance, the plaintiff must show that he or she "suffer[ed] harm distinctly different from that suffered by the general public." 18 Generally, a court will only grant equitable relief in a successful public nuisance cause of action. 19 In most cases, to be awarded monetary damages, an aggrieved plaintiff must bring the claim under a private nuisance cause of action. 20 There are exceptions to this rule, though, as shown in the Boomer v. Atlantic Cement Co., Inc. case below.

Public nuisance causes of action have often been used to address environmental harms. In fact, as a result of air pollution caused by war-oriented production during World War II, many municipalities enacted nuisance-based air pollution abatement ordinances. 21 Although the post-war era resulted in such ordinances becoming commonplace, nuisance ordinances have been enacted for pollution abatement, and upheld by the courts, since the 1800s, as illustrated below in the People v. Detroit White Lead Works and Kinney v. Koopman. 22

Selected Nuisance Cases

People v. Detroit White Lead Works 23

In People v. Detroit White Lead Works, the Supreme Court of Michigan upheld the validity of an ordinance that was enacted in order to abate nuisances. 24 Neighbors of the Detroit White Lead Works plant complained that they had been "constantly annoyed by odors, smoke, and soot which came from the works and entered their houses, producing... headache[s], nausea, vomiting" and other health ailments. 25 The plant had been in business for approximately twenty years prior to the complaints, but within that time span, the surrounding area had grown from being mainly industrial to being primarily residential. 26 The court held that the City of Detroit, under its police powers, had the authority to enact such an ordinance, and the fact that the plant predated the residential neighborhood was irrelevant. Despite the legality of the factory, the court stated that "[w]henever such a business becomes a nuisance, it must give way to the rights of the public, and the owners thereof must either devise some means to avoid the nuisance or must remove or cease the business." 27

Kinney v. Koopman 28

Kinney v. Koopman involved a statute which prohibited the keeping of more than fifty pounds of gunpowder. 29 The question was raised as to the liability of a person who violated the statute, which had resulted in an explosion causing damages to property. The court first determined whether there was an issue of negligence per se. The court stated that "[u]nless the thing of itself, because of its inherent qualities, without complement, is pro-
ductive of injury, or by reasons of the manner of its use or exposure threatens or is dangerous to life or property, it cannot be said to be nuisance per se at common law.  

The analogy was made between explosives and wild animals. A vicious animal secured in a yard is not itself dangerous, just as gunpowder alone is not per se dangerous. Although the holdings in similar preceding cases differed from case to case, the court held that certain products that are in daily use, such as gunpowder at the time, were "indispensable to the convenience of the public, and for the public defense." Therefore, although the court held the defendant violated the statute, it declined to hold that the storage of gunpowder constituted a nuisance.

Boomer v. Atlantic Cement Co., Inc.  

Boomer v. Atlantic Cement Co., Inc. is "considered the premier nuisance case in American jurisprudence." It is also the first case decided in New York State in which monetary damages, rather than an injunction, were awarded in a public nuisance cause of action. Although the land on which the Atlantic Cement Company constructed its facilities was originally an unzoned area, by the time construction was complete, the parcel was zoned "heavy industrial." The land owners neighboring the plant instituted a suit against Atlantic Cement Company complaining of "injury to property from dust, smoke and vibration emanating from the plant," and requested injunctive relief. The lower court held that the actions of the defendant constituted a nuisance. The Appellate Division and Court of Appeals affirmed. Even though an injunction would typically be the proper remedy in a situation such as this, the court instead awarded permanent damages "imposing a servitude on land, which was the basis of the actions, [thereby precluding] future recovery by plaintiffs of their grantses."

The reason for this holding was that the court recognized the utility of the conduct (i.e. the importance of the cement factory in the area). The result of this holding is that the line between public and private nuisance was blurred; a line which is now often considered "relevant today only in theory."

Carpenter v. Double R Cattle Co., Inc.  

Carpenter v. Double R Cattle Co., Inc. involved a cause of action for nuisance brought by homeowners who lived near the defendant feedlot. The feedlot had been expanded to accommodate 9,000 head of cattle, which the plaintiffs alleged, resulted in a nuisance due to "the spread and accumulation of manure, pollution of river and ground water, odor, insect infestation, increased concentration of birds, dust and noise." Since the plaintiffs was seeking an injunction, based on Idaho Rules of Civil Procedure, the court acted only in an advisory role, and the judge had the responsibility of determining whether there was in fact a nuisance.

The district court judge held there was no nuisance. The Court of Appeals reversed the decision by holding sua sponte that the absence of an instruction based on section 826(b) of the Restatement (Second) of Torts was erroneous. The Supreme Court of Idaho vacated the Court of Appeals decision and affirmed the judgment of the district court. In its opinion, the court stated that Idaho had not adopted the Restatement, nor had the plaintiffs requested such an instruction. Therefore, there was no error. The court held that the utility of the conduct of feedlots was imperative to the economy of the state, and to hold that a feedlot is a nuisance would "place an unreasonable burden upon the industry."

Zoning  

Background of Zoning Law  

Zoning laws are promulgated pursuant to the State’s police powers in order “to promote the public health, safety, moral, and general welfare” of its citizens. Every State, with the exception of Hawaii, has delegated the power to regulate land use to its local municipalities. Zoning was originally intended to protect “private investment in land development in cities from unpredictable nearby land uses and urban populations from the perils of fire, unsanitary conditions, unsafe buildings, and uncontrolled traffic,” and it continues to provide municipalities with protection from landowners who may use their properties in a manner that may harm the community.

Early legislation pertaining to land development was promulgated as an effort to prevent nuisances. However, “local officials came to realize that narrowly focused, nuisance preventing legislation was not sufficient to address the needs of the nation’s increasingly complex urban areas.” In response to these concerns, the Board of Estimate and Apportionment of New York City passed the first comprehensive zoning resolution in the United States in 1916. Six years later, the United States Commerce Department lent substantial support to comprehensive zoning when it enacted the Standard State Zoning Enabling Act (SZEA), which was later revised in 1926. Also in 1926, the Supreme Court validated the legality of zoning in the landmark case of Village of Euclid v. Ambler Realty Co.

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.
SZEA
The power of local legislative bodies to enact zoning ordinances is granted pursuant to state zoning enabling legislation.55 States have used the SZEA as a model act to delegate power to its municipal governments.36 Most state zoning enabling acts are similar to the SZEA, some states, such as Vermont, have extended this power to its municipal governments.56 The purpose for having a zoning commission is to create a body that will "recommend the boundaries of the original zoning districts and the appropriate regulations for those districts."73

Section 1: Grant of Power.
Section 1 of the SZEA granted the legislative bodies of municipalities the authority to "regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of a lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for [any] purpose."58 By delegating the zoning powers "[f]or the purpose of promoting the health, safety, morals or the general welfare of the community,"59 it is apparent that the United States Commerce Department recognized the "interrelationship between zoning and traditional police power goals."60 Although the grant of power in most adopted enabling acts are similar to the SZEA, some states, such as Vermont, have extended this grant of power to permit not only restrictions, prohibitions, and regulations of land development, but development on or near watercourses or other bodies of water as well.61

Section 2: Districts.
The SZEA provides municipalities with the authority to divide the municipality into districts.62 A district is "a portion of a community identified on the locality’s zoning map within which one or more principal land uses are permitted along with their accessory uses and any special land uses permitted by the zoning provisions for the district."63 Although the regulations may differ from district to district, the regulations must be "uniform for each class or kind of building throughout each [individual] district."64

Section 3: Purposes in View.
The purpose of the SZEA is to assure that zoning regulations are promulgated in accordance with a comprehensive plan.65 The regulations must also be designed to provide for: 1) minimizing traffic congestion; 2) security from "fire, panic, and other dangers;" 3) promotion of the health and general welfare of the municipality; 4) adequate light and air; 4) prevention of overcrowding of land; 5) avoidance of undue concentration of population; and 6) facilitation of "the adequate provision of transportation, water, sewerage, schools, parks and other requirements."66 States often expand upon the purposes section of their enabling acts in order to accomplish particular goals, such as conservation of a viable tax base, historic preservation, and viewshed protection.67

Section 4: Method of Procedure.
This Section mandates that procedures for "enacting, enforcing, amending, supplementing, or otherwise changing the regulations" must be created.68 It also states that zoning actions are not effective until "a public hearing... at which parties in interest and citizens shall have an opportunity to be heard."69 Notice of the hearing is required at least fifteen days before it takes place.70

Section 5: Changes.
This Section of SZEA permits municipalities to amend, supplement, change, modify or repeal regulations.71 However, if twenty percent of certain interested citizens protest the changes, in order for the changes to take effect, a three-fourths vote is required in the local legislature.72 Therefore, the citizens are afforded protection from unfavorable regulations, as well as given a chance to be heard.

Section 6: Zoning Commission.
The purpose for having a zoning commission is to create a body that will "recommend the boundaries of the original zoning districts and the appropriate regulations for those districts."73 The commission submits preliminary reports of its findings, conducts public hearings, and then submits final reports to the local legislature.74 A dissent this report, a legislature cannot take an action on a zoning ordinance.75

Section 7: Board of Adjustment.
Section 7 encompasses approximately half of the entire Act. It authorizes the creation of a board of adjustment and outlines the board’s powers and duties. Included in these powers and duties are the original and appellate powers to hear and decide appeals resulting from administrative action, and the power to grant variances and exceptions to the ordinance.76 The Section also sets forth the procedural requirements for appeals to the board and judicial review of the board’s decisions.77

Section 8: Enforcement and Remedies.
Section 8 provides local governments with the power to "enforce the enabling act and any zoning regulations made thereunder."78 It leaves the details of enforcement to the discretion of each municipality.79 The local legislature can enact enforcement provisions providing for criminal and civil damages, as well as injunctive relief.80
Municipalities also have the power to institute proceedings to compel correction of violations of the zoning ordinance.81

Section 9: Conflict with Other Laws
Section 9 requires that if there is a conflict between the SZEA and any other statute or local ordinance, the most restrictive provision is applicable.82

Village of Euclid v. Ambler Realty Co.83

In 1926, the Supreme Court had its first opportunity to grapple with the legitimacy of zoning in the landmark case of Village of Euclid v. Ambler Realty Co.84 This case involved a comprehensive zoning ordinance that was adopted in the Village of Euclid, Ohio by the Village council in November, 1922.85 The ordinance regulated and restricted the uses and bulk requirements permitted in the Village.86 Ambler Realty, Co. owned land that fell within three different districts, thereby placing different restrictions on each portion.87 Ambler Realty, Co. factually challenged the zoning ordinance on the grounds that it was unconstitutional,88 and sought to enjoin the Village from enforcing the ordinance.89

The issue in this case was whether “the ordinance [was] invalid, in that it viola[ed] the constitutional protection ‘to the right of property in [Ambler Realty Co.] by attempted regulations under the guise of the police power, which are unreasonable and confiscatory.’”89 The lower court found for Ambler Realty Co. and granted an injunction, holding that the ordinance was unconstitutional and therefore void. The Supreme Court, however, reversed the lower court decision.90 The Court found that “the exclusionary nature of zoning was appropriate and in the public interest as a means to reduce nuisances, and as such overrides the interests of individual property owners.”91

As a result of this case, “[t]he division of [a] community into districts... with the resulting restrictions on land use,” have become the character traits of what has come to be known as “traditional Euclidean zoning.”93

Brief Background of New York Zoning Laws

Municipal Home Rule
Zoning is not required in New York State, yet as of 1995, seventy-five percent of the 1,600 municipalities in the State had adopted zoning regulations.94 Under the Municipal Home Rule Law, a municipality is permitted to enact land use regulations pursuant to the “powers granted to it in the statute of local governments.”95 Home Rule Authority has been described as “a quasi-constitutional grant of authority for local governments to pass local laws relating to their property, affairs or government, provided such local laws are consistent with the constitution and general statutes of New York State.”96 This authority “has been upheld as a source of zoning and planning power for local governments,”97 and it also “gives municipalities great flexibility in dealing with local regulation of land use.”98

Town, Village and General City Law
Specific authority exists in the Town, Village, and General City Law for local governments to adopt zoning regulations.99 These laws, for all relevant purposes, echo the authority granted by the SZEA. Local governments may adopt regulations for the “purpose of promoting the health, safety, morals or general welfare of the community.”100 They may also divide the municipality into districts, and although the regulations may differ from district to district, they must be uniform within each individual district.101 The laws also require that zoning and land use regulations shall be in conformity with a comprehensive plan.102

Relevant Zoning Cases
Town of Hempstead v. Goldblatt

The issue in Town of Hempstead v. Goldblatt was whether an ordinance regulating a nonconforming use was confiscatory.103 The defendants owned a sand and gravel pit that had been active from 1927 until the ordinance question was passed in 1958, which prohibited mining operations occurring below water level.105 The sand and gravel pit was located in a residential area, surrounded by homes and schools. The Supreme Court, Appellate Division and Court of Appeals all held that the ordinance was a valid exercise of the municipality’s police powers.106 The ordinance intended to protect the surrounding property and children from “cave-ins, falls, drownings and water pollution” by mandating more stringent safety procedures.107

The Court of Appeals found that there was a rational basis for the regulation, and therefore the town prevailed.108

Stringfellow’s of New York, Ltd. v. City of New York

Stringfellow’s was a challenge to the constitutionality of New York City’s Amended Zoning Resolution, which regulated adult use establishments.109 A study conducted by the Department of City Planning (DCP) indicated that: (1) in 1965, there were only nine adult use establishments in New York City, and that number increased to 177 by 1993; (2) adult uses tend to cluster together; and (3) adult use establishments result in negative secondary impacts such as “increased crime rates, depreciated property values and deteriorated community character.”110 In response to the study, the Amended Zoning Resolution included terms limiting the size of adult establishments, as well as anti-clustering provisions, regulating such issues as location and proximity to other adult establishments.

Nuisance & Zoning, continues

---

Conference Announcement:

2001 Animals and the Law Conference: Whistleblowers
Keynote Speaker: Frank Serpico

Saturday, April 7, 2001
8:00 a.m. to 5:30 p.m.
Pace Law School
Nuisance & Zoning, Continued

establishments. The plaintiffs alleged the ordinance deprived their constitutional right to freedom of expression under the New York State Constitution.

The Supreme Court of New York County held that the resolution did not violate the plaintiffs’ rights. The resolution merely addressed a serious neighborhood problem, was no broader than necessary to achieve the intended purpose, and that zoning was the most appropriate method of accomplishing the goals. The Appellate Division affirmed. The Court of Appeals also affirmed stating that “[t]he City’s effort to address the negative secondary effects of adult establishments is not constitutionally objectionable...”

Wal-Mart Stores, Inc. v. Planning Bd. of the Town of North Elba

Wal-Mart Stores, Inc. v. Planning Bd. of the Town of North Elba involved an application for a conditional use permit from the Planning Board of the Town of North Elba to construct and operate a Wal-Mart retail store. In a three to one vote, the Board disapproved the application. Wal-Mart brought an Article 78 proceeding claiming the decision was arbitrary and capricious. The Appellate Division held that the determination of the Planning Board was justified, and therefore affirmed its denial of the conditional use permit. The zoning ordinance stated that a Planning Board would only grant a conditional use permit if the proposed use “will not have a materially adverse impact upon adjoining and nearby properties,” and “will not result in a clearly adverse aesthetic impact.” The Planning Board found these standards were not met. The court, in upholding the Planning Board’s determination, affirmed the right of a municipality to enact zoning ordinances that are protective of its unique assets, such as a viewshed.

Common Law Nuisance Elements in New York Zoning Case Law

Nuisance and nonconforming uses -

Goldblatt

The court here ultimately held that the nonconforming sand and gravel pit constituted a nuisance, which was the rationale for the passage of the ordinance by the town. The court specifically referred to the risk of harm that existed from the continuation of the use. After balancing harm and utility, it found the harm was much greater than the utility of the facility. The ordinance still allowed sand and gravel pit operations, just not in the manner in which it was being conducted. However, the dissent posed an interesting nuisance argument similar to that found in the Kinney case. Justice VanVoorhis stated, “Automobiles are not kept off the highways for the reason that children as well as adults are occasionally injured or killed by them.” This is similar to the gunpowder utility argument in Kinney. The gravel pit, by its mere existence, is not dangerous. Therefore, it should not have been deemed a nuisance per se, yet it seems that exactly how the court held.

Nuisance and First Amendment zoning issues - Stringfellow’s

The court in Stringfellow’s held that utilizing zoning to abate adverse effects on a neighborhood caused by adult establishments was constitutionally permissible. The negative secondary effects were in fact a nuisance to the community. Similar to Detroit White Lead Works, even though the adult uses were legal, issues such as increase in crime, depreciation of property values, and deterioration of community character constituted unreasonable invasions on the use and enjoyment of the neighboring properties.

If a person cannot feel safe walking the streets in front of his or her home, there is an unreasonable invasion.

Nuisance and viewshed protection - Wal-M art Stores, Inc.

This case helped a community avoid a nuisance. The viewshed in North Elba is an integral part of the character of the community. North Elba is the “western gateway” into Lake Placid, a community whose economy is dependant upon its beauty for tourism. Therefore, allowing a Wal-M art to be built, thereby blocking a traditional scenic view, would be an unreasonable interference with the enjoyment of the land.

This case, as analyzed under nuisance law, stands for the proposition that although activities in one situation may not constitute an invasion, in a different situation, the outcome may be different.

Conclusion

Since the basis for zoning law has its roots in common law nuisance, it is not surprising that courts could have possibly reached the same results by analyzing cases under nuisance law. Similar to nuisance law, zoning is based on the specific needs of a municipality. For instance, in Idaho, the utility of a massive feedlot far outweighs the inconvenience to its neighbors. Yet, if that same feedlot was in New York, the case would most likely have been decided differently.

Zoning can be a statutory mechanism for municipalities to regulate against nuisances. However, due to the subjective nature of the analyses, one
may find that sometimes it is acceptable for the pig to be in the parlor.

Footnotes
2 1 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 1.02[2], at 9 & n.5 (1998).
3 See id. at 9.
4 See id. at 10.
6 See Holczer, supra note 5, at 99.
8 Roger Meiners & Bruce Yandle, Common Law and the Concept of Modern Environmental Policy, 7 GEO. MASON L. REV. 923, 928 (1999) [hereinafter Meiners & Yandle].
9 Holczer, supra note 5, at 100.
10 See Holczer, supra note 5, at 100.
12 See Meiners & Yandle, supra note 8, at 928.
13 See Meiners & Yandle, supra note 8, at 929.
14 RESTATEMENT (SECOND) OF TORTS § 826. An invasion is also considered unreasonable if "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible." Id.
15 Meiners & Yandle, supra note 8, at 929. See generally RESTATEMENT (SECOND) OF TORTS § 826 cmt. d.
16 RESTATEMENT (SECOND) OF TORTS § 828.
17 Id. § 821B.
18 Meiners & Yandle, supra note 8, at 927.
19 See Meiners & Yandle, supra note 8, at 928.
20 See Meiners & Yandle, supra note 8, at 928 (1999).
21 See Amold W. Reitze, Jr., The Legislative History of U.S. Air Pollution Control, 36 HOU S. L. REV. 679, 687 (1999) [hereinafter Reitze].
22 See Reitze, supra note 21, at 682.
23 See People v. Detroit White Lead Works, 46 N.W. 735 (Mich. 1890).
24 See generally id. at 736. The ordinance stated:

Sec. 5. No owner or occupant of any... building or place, shall allow any nuisance to remain on his or her premises; nor shall any person, persons, or corporation, operating, owning, occupying, or using any public or private street, alley, way, or any premises whatever, within the limits of the city of Detroit, create or maintain any nuisance thereon.

Id. at 736.
25 Id.
26 See id. at 735.
27 Id. at 737. The court affirmed the rule of law in Robinson v. Baugh, 1875 WL 6381 at *3-4 (Mich. Jan. 29, 1875): However lawful the business may be in itself, and however suitable in the abstract the location may be, they cannot avail to authorize the conductor of the business to continue it in a way which directly, palpably, and substantially damages the property of others, unless the operator is able to plant himself on some peculiar ground of grant, covenant, license, privilege, or prescriptive right.

Id. at *3-4. See also Detroit White Lead Works, 46 N.W. at 737.
29 Id. at 594.
30 Id.
31 Id. at 595.
32 See generally id. at 596-600.
33 Kinney, 22 So. at 599.
35 Holczer, supra note 5, at 99.
36 See Holczer, supra note 5, at 101.
37 Holczer, supra note 5, at 101.
38 Boomer, 257 N.E.2d at 871.
39 Id. at 875.
42 Id. at 224.
43 See id. at 226. See generally IDAHO R. CIV. P. 52(a).
44 See Carpenter, 701 P.2d at 225. See also RESTATEMENT (SECOND) OF TORTS § 826 (1979).
45 See Carpenter, 701 P.2d at 224.
46 Id. at 228. Not all of the justices concurred with this decision. In his dissent, Justice Bristline stated, "If the odoriferous quagmire created by 9,000 head of cattle is not a nuisance, it is difficult for me to imagine what is." Id. (Bristline, J., dissenting).
49 NOLON, supra note 47, at 38.
50 See NOLON, supra note 47, at 38.
52 Id. at 356-57.
53 See 1 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 1.02[2], at 10-11 (1998). The SZEA was originally issued in mimeographed form in 1922, but was not widely published until 1924. See generally David W. Owens, Protest Petitions n.2 (last modified Mar. 8, 1999) <http://www.iog.unc.edu/organizations/planning/protest.htm>. The principles behind the SZEA are that: “1. zoning must be consistent with a comprehensive plan; [and] 2. there must be some systematic study of the provisions that support zoning practices and standards.” League of Women Voters of the Cincinnati Area, Land Use Planning: Learning How and Where to Grow, 13 PACE L. REV. 351, 356-57 (1993) [hereinafter Nolon Comprehensive].
54 See generally Euclid, 272 U.S. 365.
55 See 6 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 35.03[2], at 13.
56 See id. at 13.
57 Id.
prive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.
89 See Euclid, 272 U.S. at 384.
90 Id. at 386.
91 See id. at 397.
93 6 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 35.03[2], at 14.
94 See NOLON, supra note 47, at 39.
97 Id.
98 Id.
99 See NOLON, supra note 47, at 39.
100 N.Y. VILLAGE § 7-700; N.Y. TOWN § 261; N.Y. GEN. CITY § 20(24).
101 N.Y. VILLAGE § 7-702; N.Y. TOWN § 262; N.Y. GEN. CITY § 20(25).
102 N.Y. VILLAGE § 7-704; N.Y. TOWN § 263; N.Y. GEN. CITY §§ 20(24), (25).
104 See id. at 563.
105 See id. at 565 (VanVoorhis, J., dissenting).
106 See id. at 563.
107 Id. at 564.
108 See Goldblatt, 172 N.E.2d at 564.
110 See id. “A dult Use” has been defined as: ‘[T] hose commercial enterprises in which a ‘substantial portion’ of the premises are used as an ‘adult book store,’ an ‘adult eating or drinking establishment,’ an ‘adult theater’ or ‘other adult commercial establishment.” Id. (quoting Amended Zoning Resolution § 12-10).
111 Id. at 410. The study included an evaluation of the effect of adult establishments on nine different cities, as well as a study on the “specific adverse secondary effects caused by adult es-
Trade-Environment Disputes, from Page 5

...ing relations with that state, or because nations fear reprisal suits when they themselves are the environmental wrongdoer.35

Doctrinal impediments to the adjudication of international trade-environment disputes include the uncertainty regarding the scope of responsibility that states bear under international environmental law, the related debate regarding whether the general obligation to protect the environment imposes a strict liability or a fault-based standard on states, what level of damage must be shown in order for one state to charge another with impermissible damage to the environment, and the uncertainty of relief that would be afforded to a successful litigant.36

Procedural impediments to the adjudication of international trade-environment disputes are related to the problem of standing, discussed in reference to the ICJ, supra. In short, the limited ability of states to pursue claims based on damage to global environmental interests and the exclusion of certain international actors (such as NGOs) are the most serious procedural obstacles to adjudication.37

Structural problems with adjudication of international trade-environment disputes are the most unwieldy and difficult problems to be faced. These impediments deal mainly with the fact that international environmental problems do not easily crystallize into bilateral disputes – rather, international environmental disputes most often involve any number of states, entities, and international actors, all of which have specific and distinct motivations and issues regarding an overall situation. In short, “[t]he core structural impediment to adjudication is that most global environmental issues are ‘polycentric’ or ‘many centered.’” 38 This polycentricity, in addition to the ever-changing and evolving scientific knowledge regarding global environmental problems, the virtually unachievable level of environmental enforcement monitoring that must be carried out around the globe, and the insufficiency of settlement between two (or more) parties to a suit vis-à-vis the motivations and issues of other parties all cut against adjudication as the primary method of international trade-environment dispute resolution.39

VI. The Need For Non-Adjudicatory Resolution Of Trade-Environment Disputes

Thus if it may be agreed that adjudication of international trade-environment disputes is an improper method of addressing those problems, the need for utilization of a non-adjudicatory international body becomes most apparent. The question, then, is whether a new IEB should be created to consider these problems or if an existing non-adjudicatory international body would suffice as a forum for resolution of these matters.

A) A New IEB - The Dunoff Criteriа

Professor Jeffrey Dunoff 40 contends that environmentalists “should be attempting to refine the features of bodies that would be able to resolve these issues in a manner that furthers both economic and ecological interests,” 41 and supplies five criteria for the success of such a new IEB.42 First, in order to avoid the types of problems encountered by the GATT/WTO regarding conflicting economic and environmental objectives, the body must possess a mandate that expressly incorporates economic development and environmental protection. Second, the body must be able to gain the benefit of impartial scientific information and expertise, so that its efforts may be based upon knowledge that is state-of-the-art and so that any solutions proposed by the body may have the credibility of a solid scientific foundation. Third, the processes utilized by the body must be participatory and transparent, so that all nations may have a meaningful role in the proceedings and so any appearance of bias may be avoided. As part and parcel of the participatory and transparent nature of the proceedings, NGOs must be allowed to add outside perspective to the proceedings and deliberations must be as open as possible to produce better results and enhance the political acceptability of the resolutions achieved by the body. Fourth, the body must be able to encourage compliance with its decisions, either through the use of economic, technological, or market incentives. Finally, the body must provide decisions and outcomes that foster the growth of trade and environmental policy on a global basis rather than limit their decisions to the terms of disputes between particular nations.

B) Existing International Bodies As Forum Possibilities

Unfortunately, many of the difficulties encountered in the creation of a new IEB, discussed supra, may well plague attempts to create a new IEB. The current international discomfort with the proliferation of international bodies, and the garnering of the necessary but elusive international political will to construct and accede authority to a new IEB, will at least greatly delay if not destroy an attempt to create such a body.

As the formation of a new IEB is unlikely in light of current international sentiment and logistical difficulties, an examination of existing non-adjudicatory bodies to determine their feasibility as fora for the resolution of trade-environment disputes is necessary. Such a determination may be accomplished by superimposing Dunoff’s five criteria for successful resolution of trade-environment disputes by a hypothetical international body upon the working practices of the existing bodies. This will allow a discernment as to which body or bodies already encompass all or most of his criteria. If no existing body fulfills the criteria, insight will be gained as to which body or bodies might most easily be able to amend their processes to fulfill his five criteria.

Three existing international bodies bear particular scrutiny: the United Nations Environment Programme (UNEP), the Permanent Court of Arbitration in the Hague (PCA), and the United Nations Conciliation Commission (UNCC).
To effect its approach to environmental management, UNEP concentrates on the establishment of effective partnerships on the international level. "We combine the values and interests of governments with the strengths of U.N. agencies, IGOs, NGOs, and the private sector. UNEP promotes partnerships by demonstrating what makes sustainable development happen."56

2) The Permanent Court of Arbitration

The First Hague Peace Conference took place in 1899 at the Hague, the Netherlands, at the behest of Tsar Nicolas II of Russia "with the object of seeking the most effective means of ensuring to all the peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments."57 Chief among the accomplishments of the Conference was the adoption of the Convention for the Pacific Settlement of International Disputes, which established the Permanent Court of Arbitration (PCA).58 The PCA was the first global mechanism for the resolution of international disputes, and is currently the oldest international institution for the settlement of such matters.59

According to the provisions of the 1899 Convention, the PCA was established to serve as a "tribunal of arbitration, accessible to all."60 It is housed in the Hague Peace Palace (along with the ICJ), and is not precisely a court but an organization made up of three parts. The International Bureau is the secretariat of the PCA and is headed by its Secretary-General, and it performs administrative tasks involved in dispute resolution. The Administrative Council supervises the International Bureau and is made up of representatives of the states parties to the Convention of 1899. Finally, the Members of The Court, approximately 265 jurists with impeccable credentials in various international and legal fields from the 86 states parties, from among whom the parties to a dispute may choose the person or persons to settle the matter at issue.61

The PCA offers four types of peaceful settlement of disputes: inquiry, mediation, conciliation, and arbitration.

The PCA offers four types of peaceful settlement of disputes: inquiry, mediation, conciliation, and arbitration.
The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait

The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait. The United Nations Compensation Commission (UNCC) was established by a series of UN Security Council Resolutions following the 1990-91 Gulf War. The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait.

The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC ensures that its decisions are complied with by funding the awards to be paid to complaining parties through an “oil-for-food” scheme. Pursuant to UN Security Council Resolution 986, Iraq is permitted to sell its oil in order to buy necessary humanitarian supplies. Thirty percent of the money gained by Iraq in this manner is then used to compensate worthy complainants.

To date, $13 billion in claims have been processed and $12 billion has been paid in compensation. The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait. The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait. The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait. The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait. The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait. The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait. The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait. The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait. The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait. The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait. The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.

The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait. The UNCC’s work is divided among three groups: the fifteen-member Governing Council, panels of Commissioners, and the Secretariat. The Governing Council, composed of the membership of the UN Security Council, provides policy guidance. The three-member panels of Commissioners, nominated by the Secretary-General and appointed by the Governing Council, evaluate and recommend to the Governing Council the appropriate damages for specific claims. Finally, the Secretariat is comprised of an Executive Secretary, who is appointed by the Secretary-General, and a staff of over 200 lawyers and legal support personnel; and it provides legal, technical and administrative support for the Governing Council and the panels of Commissioners.
one hundred countries were in attendance. Delegates to this session established a High-level Committee of Ministers and Officials in Charge of the Environment as a subsidiary organ to the UNEP Governing Council and strengthened the Permanent Representatives Committee.87

UNEP also has great ability to gain scientific and expert assistance in rendering its decisions, whether from individual experts called at the initiative of the Director or from the many scientific and expert groups that UNEP established and maintains. The participatory and transparent nature of the UNEP proceedings are another great strength of the UNEP program, as they encompass the input of U.N. agencies, IGOs, NGOs, and private sector participants in its deliberations.

If there is a weak link in the UNEP armor, it is the fact that UNEP must depend upon individual states to execute its decisions. Enforcement of judgments is critical for any tribunal, and as such, this shortcoming would have to be addressed if UNEP were to be tasked with consideration of trade-environment disputes. Revision of UNEP’s procedural rules, jurisdictional scope, and overall international authority would most likely be needed. These objectives may be achieved by the current “rebuilding” process described supra, but accomplishing the expansion of UNEP power in this manner will be a time-consuming and intricate affair. Finally, UNEP will be able to provide decisions that foster growth of trade and environmental policy on a global scale by its capacity for creating frameworks for multilateral agreements and institutions. “Since its creation, the UNEP has been successful in coordinating substantive scientific and technical support, as well as in drafting, facilitating, and negotiating a number of environmental treaties by administering and funding necessary costs.”88 UNEP’s accomplishments in this regard have been “substantial, even remarkable, considering the inherent limitations in its mandate and powers, the jealously guarded state sovereignty, the bewildering array of international environmental organizations and agencies, and the sheer complexity and enormity of the problems at hand.”89 UNEP has therefore shown its capability to effect the type of growth in trade and environmental policy that is needed to remedy the inadequacies of the current system.

The PCA is slightly less likely than UNEP to be able to serve as a forum for trade-environment disputes. Its mandate is broad enough to encompass such matters, but may be so broad – and unmindful of either trade or the environment as specific topics of arbitration – that it would be more difficult to legitimately assign trade-environment disputes to the PCA. Experts and outside assistance are available to the tribunal and to the parties, but the transparency and participatory elements of PCA proceedings are a significant problem, as they take place in camera or are cloaked in great confidentiality, and no mention is made of the possibility for NGO or private party participation.

Enforcement of decisions, a weak point with UNEP, is a strength of the PCA process. PCA decisions in disputes between two states, between two parties only one of which is a state, involving international organizations and states, and between international organizations and private parties are binding on the parties and must be carried
out without delay. In situations of conciliation and fact-finding inquiries, the parties are bound by the terms of the settlement agreement and are not bound by the findings of the Commission, respectively. Finally, the PCA has established a list of experts and scholars in the international environmental field from whom to draw expertise during any future international trade-environment contests. This scheme may well be effective if put to the test, but the inexperience of the PCA as compared to that of UNEP in the area of public international environmental law, gives the edge to UNEP as a more credible forum for international trade-environment disputes.

The UNCC’s political mandate could quite easily be adjusted to allow for the organization to consider non-Gulf War-related environmental claims brought by individuals, governments, and international organizations, and would already enjoy the legitimacy accorded to it by more than 60 nations at the end of the Iraqi war. Expertise available to the UNCC is found in the persons who serve as Commissioners, who are themselves experts in fields ranging from law to accounting, loss adjustment, assessment of environmental damage, and engineering.

The transparency and participatory rules of the UNCC are problematic, since the Governing Council holds only four formal sessions per year, which are closed to the public, and only opens the plenary sessions between the formal session to the public. There is no mention of the possibility of NGO or private sector participation at these plenary sessions, a critical component of Dunoff’s criteria.

The enforcement of UNCC decisions, currently by the scheme instituted pursuant to U.N. Security Council Resolution 986, will obviously have to be completely overhauled. A system of enforcement by which decisions of the UNCC regarding international trade-environment disputes will be complied with would have to be developed and instituted, a procedure that will require solving problems relating to state sovereignty and UNCC jurisdiction. This is likely to take a great amount of time and international effort and political will, none of which may be readily available for some time to come.

Finally, the UNCC does have a broad experiential base related to the handling of a plethora of claims related to environmental damage, but this experience to date has likely dealt only indirectly with the issues involved in trade-environment disputes. These problems with the UNCC as it is currently structured relegate it to a position of inferiority as compared to both the UNEP and the PCA as a forum for international trade-environment dispute resolution.

VIII. Conclusion

The above discussion sets forth the reasons why current international mechanisms for the adjudication of international trade-environment disputes are inadequate to the task of fostering economic growth and preserving the natural environment, and suggests that UNEP is the best candidate for a forum that may address such matters. UNEP offers the best alternative to the WTO/GATT, the ICJ, or a new IEC because use of UNEP would avoid the proliferation of international institutions, and because its characteristics come quite close to fulfilling Professor Dunoff’s criteria for the type of forum required. The PCA and the UNCC, while credible organizations in their own right, do not fulfill Professor Dunoff’s criteria as completely or cannot be modified as easily as UNEP to accomplish concurrent goals of economic and environmental benefit.

Some revision to UNEP procedures and policy will be needed to fully implement a program by which it considers international trade-environment disputes. UNEP is poised to do so, however, and the international community would be well advised to work to garner the necessary international political will to take advantage of the opportunity at hand.

Footnotes:

The Role of the ICJ in the Development of International Environmental Protection Law, reprinted in 22 Envtl. Pol. & L. 312, 313 (1992). As a judge and the President of the ICJ told the UNCED Conference, “there is no legal question or problem concerning the environment over which the ICJ does not have full jurisdiction and competence ratione materiae.” Id.


See Dunoff, supra note 13, at 1086-1106.

22 See id.

23 See id. at 1090, citing Anglo-Iranian Oil Co. (U.K. v. Iran), 1951 I.C.J. 89 (Interim Protection Order, July 5) (Iran refused to obey the ICJ’s order forbidding the nationalization of a British corporation until the Court’s final judgment:); Fisheries Jurisdiction Case (U.K. & N. Ireland v. Iceland; F.R.G. v. Iceland), 1972 I.C.J. 30 (Aug. 17) (Iceland disregarded the Court’s order not to enforce a fifty mile fishing zone pending the Court’s disposition of actions filed by the U.K. and West Germany); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7 (Interim Order, Dec. 15), 1980 I.C.J. 3 (Final Judgment on the Merits, May 24) (Iran refused to comply with the Court’s Interim Order and Final Judgment to release U.S. citizens taken hostage at the U.S. Embassy in Tehran, Iran).


Trading Institutions

Environment Conflicts – The Case for

shall be provided.”

A/CONF.151/26 (vol. 1), art. 10, 31
See id

national environmental law in general.
be extrapolated to the corpus of inter-
ticular, but it is an argument that may
vention on the Law of the Sea in par-
Charney speaks of such proliferation
ment, U.N. Doc. A/CONF. 48/14 and
Conference on the Human Environ-

See generally Johnathan A. Charney,
The Implications Of Expanding Inter-


Other Earth Summit Issues
Aggressive Action on Climate Change,

40 Assistant Professor, Temple Univer-

58 “Website of the Permanent Court of

69 Murphy, supra note 67 at 349.


71 “The United Nations Compensation
Commission,” <http://www.unog.ch/
uncc/irroduc.htm>, last visited Dec. 5,

72 Robin L. Juni, The United Nations
Compensation Commission as a Model
For An International Environmental
Court, 7 ENVTL L. 53 n.70 (2000).

73 See id.

74 See id.

75 See id.

76 “The United Nations Compensation
Commission,” <http://www.unog.ch/
uncc/governin.htm>, last visited Dec.

77 Id.

78 “The United Nations Compensation
Commission,” <http://www.unog.ch/
uncc/commiss.htm>, last visited Dec.

79 Id.

80 See “The United Nations Compensation
Commission,”” <http://www.unog.ch/
uncc/loc.htm>, last visited Dec. 5,

81 Id.

82 See Juni, supra note 72, at n.701.

83 See “The United Nations Compensation
Commission,”” <http://www.unog.ch/uncc/theclaims.htm>,

84 Id.

85 See Myung Hoon Choo, An Institution-
alist Perspective on Resolving
Trade-Environmental Conflicts, 12 J.
ENVTL. L. & LITIG. 433, 462 (1997),
citing Lakshman Guruswamy, Interna-
tional Environmental Law: Bound-
daries, Landmarks, and Realities, 10
NAT. RESOURCES & ENVTL. 43, 45 (Fall
1995).

86 Choo, supra note 85 at 467, citing
Farhan Haq, Environment: M omentum
Builds for Successor to UNEP, INTER
PRESS SERVICE, Mar. 18, 1997.

87 Choo, supra note 85 at 467, citing
U.N. Nineteenth Session of UNEP, Gov-
ering Council Concludes at Nairobi,
Trade Environment Disputes, page 22
Pace Environmental Litigation Clinic Docket

New Cases

Defendant: Southern Energy, Inc.
Background: Southern Energy has proposed to construct a new gas fired, combined cycle power plant adjacent to its existing Bowline 1 and Bowline 2 plants in Haverstraw. The plant would be known as Bowline 3. Instead of incorporating a dry cooling system for the new plant, which would eliminate impacts on the Hudson River ecosystem, DEC and Southern Energy propose to use a wet closed cycle system with a fabric mesh screen over the intake. The plant would draw 7 million gallons of river water a day during the summer.
Status: Riverkeeper has been granted party status in the Article X proceeding before the Public Service Commission siting board, and will seek party status in the concurrent DEC permitting proceedings. Riverkeeper will argue for incorporation of a dry cooling system in order to eliminate impacts on the river.

Defendant: Various proposed power generators
Background: There are over a dozen barge mounted electric generating plants currently being proposed for various locations in New York Harbor. Soundkeeper, Baykeeper, and Riverkeeper are very concerned about the bad precedent that would be set by allowing a private interest to effectively convert a portion of a water body to a non water-dependent, upland use.
Status: The Pace Environmental Litigation Clinic is monitoring the permitting process for these barges and will participate in opposing issuance of Clean Water Act permits. Clinic intern Danielle Abate appeared at a DEC legislative hearing on December 12, 2000 to present comments in opposition to a DEC air permit for the first of these proposals, a 79.9 megawatt facility proposed for Wallabout Channel in Brooklyn.

Defendant: Chappaqua School District
Background: The Chappaqua School District has proposed constructing a new high school on the edge of a New York City reservoir, rather than building at other available sites further from sensitive drinking water resources. In their resolution approving the site, the School District proposed to construct a galley system for subsurface sewage disposal. Subsequently, a study by a watershed panel demonstrated that galley systems are ineffective at treating sewage, and contaminate groundwater. Galley systems will now be banned in the watershed. This development lead the school board to propose a conventional absorption trench septic system for the school, despite the fact that the proposed absorption trench site exceeds the 15% slope limitation for septic systems in the watershed.
Status: Riverkeeper filed comments on the project’s environmental impact statement in opposition to the proposed site, and particularly in opposition to any kind of subsurface sewage disposal system for the site. Riverkeeper has not filed proceeding pursuant to Article 78 to challenge the failure of the environmental review for the project to take into account the lack of any permissible form of sewage disposal for the site.

Defendant: New York State Bridge Authority
Background: Riverkeeper is investigating reports that paint-chipping operations on Bridge Authority Hudson River bridges allow lead paint chips to fall directly into the Hudson River.
Status: Riverkeeper has filed a notice of intent to sue the New York Bridge Authority and will continue to investigate the case.

Defendant: NYC Department of Environmental Protection, Village of Fleischmann’s
Background: The NYC DEP granted a variance from the watershed regulations to a proposed junkyard in the Village of Fleischmann’s without undergoing any review under the state Environmental Quality Review Act. A community group in Fleischmann’s sought help from Riverkeeper to resist the permitting and encroachment of automobile junkyards in the village’s downtown area as well as areas surrounding New York City reservoirs.
Status: In response to a lawsuit filed by Riverkeeper, the city DEP withdrew its approval of a variance from the watershed regulations. The Village nonetheless amended its zoning to make junkyards a special permit use, and granted a special permit for one such facility right on a tributary to the reservoir. The Pace Environmental Litigation Clinic commenced an Article 78 proceeding in court to challenge both the rezoning and the special permit, based on the Village’s failure to perform any meaningful environmental review of the junkyard proposals.

Defendant: New York State Department of Transportation
Background: Riverkeeper was asked by the Westchester chapter of Trout Unlimited to investigate a Clean Water Act case against unpermitted, contaminated stormwater discharges from New York State highways directly into trout streams in the New York City watershed.
Status: Riverkeeper has been engaged in negotiations with NYS DOT and the state Department of Environmental Conservation to require stormwater mitigation measures at each of the outfalls.

Updated Cases

Defendant: U.S. Environmental Protection Agency
Background: Every day, power plants across the country draw in billions of gallons of cooling water from natural water bodies, including the Hudson. In doing so, the plants kill one trillion fish a year. Under the 1972 Clean Water Act, EPA was required to promulgate regulations requiring utilities to use the best technology available to minimize adverse environmental impacts, but EPA failed to do so. We sued in federal court to force EPA to issue the regulations. Under a 1995 settlement with Riverkeeper, EPA agreed to issue final rules by the year 2001. Having failed to diligently pursue its regulatory duties, however, the agency sought an extension from the court including three years to issue rules for existing facilities.
Status: The judge has decided to allow EPA to issue separate regulations for existing and new facilities and set a July 20, 2000 deadline for the proposed rule for new facilities. EPA issued a proposed rule for new facilities in July but it fails to adequately protect fisheries. Riverkeeper and EPA have now agreed upon a new schedule for the rules, which includes progress reports and benchmarks that the agency must meet.

Defendant: Athens Generating Company, L.P.
Background: Athens Generating has proposed to build a 1,080 megawatt gas-fired, combined cycle, combustion turbine generating plant about three miles west of the Hudson River in Athens, N.Y. As proposed, the plant would have marred the viewshed of historic Olana, and would have damaged the spawning and nursery grounds of American shad due to its 4.2 million-gallon-a-day (average) (7.5 mgd maximum) withdrawal of cooling water from the Hudson. Riverkeeper has been an intervener in the hearing since October 1998. The NYS Board on Electric Generation Siting and the Environment and the state Department of Environmental Conservation have both recently approved the facility.
Status: In a victory for Hudson River fisheries, the agencies mandated that the plant use “dry cooling,” an extremely protective new technology Riverkeeper advocated in the hearings. With dry cooling, the plant will withdraw only 180,000 gallons of water a day, compared to the 4.2 million gallons a day that would have been needed with wet cooling.

Defendant: Central Hudson Gas & Electric, Consolidated Edison, New York Power Authority, Orange and Rockland Utilities
Background: The short-nosed sturgeon is an endangered species fish that inhabits and spawns in the Hudson River. Every year, quantities of short-nosed sturgeon are injured or killed when they are caught in cooling water intake structures at power plants on the Hudson River. None of these utilities has obtained the permit required under the Endangered Species Act for such “incidental takings.” In the spring of 1998, Riverkeeper filed a notice of intent to sue under the Endangered Species Act.
This prompted the utilities to file a preliminary application for an incidental take permit with the National Marine Fisheries Service. In April 1999, after nearly a year of inaction by the utilities and the government, Riverkeeper filed suit in federal district court against Central Hudson Gas & Electric Co. under the Endangered Species Act to enjoin its continued taking of shortnosed sturgeon without a permit.

Status: On the eve of trial, Central Hudson was issued an incidental take permit by the National Marine Fisheries Service, preempting any possible further relief by the District Court. Riverkeeper agreed to a voluntary dismissal of the case as moot, and will seek attorneys fees for its success in bringing Central Hudson into compliance with the law. Riverkeeper is considering the option of challenging the NMFS permit in a separate proceeding. Riverkeeper has also filed a letter with the State Department of Environmental Conservation demanding an immediate review and legal hearings on the cooling water technology requirements of the state Clean Water Act permit for the Danskanmer Plant, which has been operating under an expired permit since 1992. Permit renewal proceedings would require implementation of a cooling water system that is more protective of Hudson River fish, including the shortnosed sturgeon.

Defendant: New York City Department of Environmental Protection

Background: The Shandaken tunnel carries water from the Schoharie Reservoir to the Esopus Creek in the Catskills, which then flows in the Ashokan Reservoir. New York City DEP operates this tunnel as part of its water supply system. Esopus Creek is a renowned trout-fishing stream. Unfortunately, the water that is piped in from the Schoharie Creek is of much lower quality than the natural flow in the Esopus, and contains high amounts of suspended solids, cloudy clear waters of the Esopus and ruining the Esopus trout fishing. DEP has no Clean Water Act permit for this discharge of contaminated water into Esopus Creek. Riverkeeper, the Ashoken-Pepacton Watershed Chapter of Trout Unlimited, the Catskill Mountain Chapter of Trout Unlimited, Catskill-Delaware Natural Water Alliance, Federated Sportsmen Clubs of Ulster County and the Theodore Gordon Fly Fishers Inc., filed a notice of intent to sue DEP for failure to obtain a Clean Water Act permit for the discharge.

Status: The suit seeks to require DEP to obtain a permit for the discharge, which will require DEP to use the best available technology for reducing suspended solids in the Schoharie water discharged into the Esopus and meet water quality standards. We filed a complaint under the Clean Water Act in March 2000. In October, the District Court for the Northern District of New York dismissed the complaint, holding that the Clean Water Act does not prohibit transfer of polluted water from one water body to another. Riverkeeper will appeal this ruling.

Defendant: ARCO and Harbor at Hastings

Background: Anaconda Copper, which was later taken over by ARCO, operated a wire manufacturing company on this site and allegedly deposited hazardous waste there that Riverkeeper believes is seeping into the Hudson. We filed a complaint in U.S. District Court charging ARCO and Harbor at Hastings with violating the Resource Conservation and Recovery Act, and the Clean Water Act. Pursuant to a settlement agreement, most of the 90,000 cubic yards of construction debris has been removed from the site. Further site tests have recorded the presence of PCB contamination on the order of 300,000 parts per million, making this one of the most contaminated PCB sites known.

Status: With the court's permission, Riverkeeper has moved for summary judgment, declaring ARCO to be liable for an imminent and substantial endangerment to the environment. ARCO has sought discovery on Riverkeeper's claims, and has joined the United States Navy as a third party defendant. Summary judgment motions were fully briefed in September 2000. Riverkeeper has also hired Dr. David Carpenter, a national expert on the effects of PCBs, to testify in the case. While awaiting the court's ruling on the summary judgment motions, Riverkeeper and the Pace Clinic have been interviewing former Anaconda employees about PCBs at the site, and have been reviewing remedial investigation documents prepared in connection with the DEC administrative remediation process for the site.

Defendant: New York City Department of Environmental Protection

Background: Nitrogen discharges from sewage treatment plants are a major cause of low oxygen, or hypoxic, conditions in Long Island Sound and New York Harbor estuary. Riverkeeper, Long Island Soundkeeper and New York Harbor Baykeeper, as well as several individuals, sued in federal court to enforce the nitrogen limits in the Clean Water Act permits for eight of New York City's 14 sewage treatment plants.

Status: In December 1998, the court rejected New York City's motion to dismiss and allowed plaintiffs to proceed with their action. Investigation has discovered that in addition to violating the nitrogen limitations set in its permits, New York City has been under reporting the amount of nitrogen discharged. On January 19 and 20, 2000, United States Magistrate Judge Roanne L. Mann conducted a settlement conference. The parties have been meeting to implement the terms of a settlement proposed by Judge Mann. As these negotiations have dragged, plaintiffs had the court establish a final deadline for trial preparation in the Spring of this year.

Defendant: New York City Department of Environmental Protection

Background: New York City DEP has responsibility to regulate permitting for new septic systems within the NYC water supply watershed. Under the Watershed Agreement, NYC was required to apply the most stringent rules applicable under state Department of Health regulations. These regulations prohibit the construction of septic systems on natural slopes exceeding 15 percent. This rule is necessary to prevent septic system failure and contamination of surface waters with sewage. In October 1998, NYC DEP adopted a new policy allowing developers within the watershed to avoid this ban on steep slope septic construction by artificially modifying steep slopes with imported soils. This policy was adopted without any public review or comment, and without any environmental review.

Status: Riverkeeper, the Croton Watershed Clean Water Coalition, Inc., Natural Resources Defense Council, HDFC Coalition, Friends of the Great Swamp, Friends of the Jerome Park Reservoir, Concerned Residents of Southeast, Carmel and Kent and the Croton Watershed Chapter of Trout Unlimited challenged the rule in court as arbitrary and capricious. On May 24, 2000, Judge Justice Dyre granted Riverkeeper's petition and annulled the steep slopes policy as a violation of the state Environmental Quality Review Act and the watershed agreement. A judgment was entered in Riverkeeper's favor in September, 2000, and no party took an appeal.

Standing Cases

Defendant: United States Coast Guard

Background: From 1950 to 1973 (and possibly later), the United States Coast Guard regularly and systemically disposed of batteries from all Aids to Navigation (AtoNs) in waters of the United States by discarding them into the surrounding water. In the early 1990s, the Coast Guard initiated a nationwide cleanup effort that categorically excluded all floating AtoNs and prioritized the cleanup effort on fixed Aids, so that batteries at low priority AtoN sites stand little, if any, chance of being recovered. These low priority sites include salt water sites.

Status: On August 28, 1998, the Alabama BASS Federation, Ray Scott, the founder of BASS, Riverkeeper and other Keeper groups around the country filed a notice of intent to sue. The 90-day notice period ended in December, 1998. Riverkeeper is currently investigating AtoN sites and collecting evidence in preparation of litigation.

Defendant: Millennium Pipeline

Background: Millennium Pipeline, sponsored by Columbia Gas Company, has proposed constructing a natural gas pipeline across New York State, terminating in Westchester County. The proposed pipeline would cross Haverstraw Bay on the
Appendix - COMPARISON OF UNEP, UNCC, AND PCA USING DUNOFF CRITERIA

<table>
<thead>
<tr>
<th>Criteria</th>
<th>UNEP</th>
<th>UNCC</th>
<th>PCA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dunoff Criterion 1:</td>
<td>The body must have a mandate that expressly incorporates economic development and environmental protection.</td>
<td>“To provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations.”</td>
<td></td>
</tr>
<tr>
<td>Dunoff Criterion 2:</td>
<td>The body must have the ability to gain the benefit of impartial scientific information and expertise.</td>
<td>The Council’s authorization of the Executive Director to “initiate legal consultations between experts and participate in developing principles.” Director consults scientific and legal experts to formulate records, reports, planning proposals, and studies.</td>
<td></td>
</tr>
<tr>
<td>UNCC</td>
<td>The UNCC was established to process claims and pay compensation for losses suffered as a result of Iraq’s invasion of Kuwait, and is “a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved.”</td>
<td>The Commissioners, who perform the critical tasks of evaluating and assessing claims in this process, are chosen by the Executive Secretary from a Register of Experts established by the Secretariat-General in 1991, which is regularly updated and maintained by the UNCC Secretariat. Persons selected are chosen for “their integrity, experience, and expertise in such areas as law, accounting, loss adjustment, assessment of environmental damage, and engineering. They are international jurists and other professionals with an established international reputation.”</td>
<td></td>
</tr>
<tr>
<td>PCA</td>
<td>The PCA was established to serve as a “tribunal of arbitration, accessible to all.”</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**OPTIONAL RULES FOR ARBITRATING DISPUTES BETWEEN TWO STATES: BETWEEN TWO PARTIES WHEN ONLY ONE IS A STATE: INVOLVING INTERNATIONAL ORGANIZATIONS AND STATES: BETWEEN INTERNATIONAL ORGANIZATIONS AND PRIVATE PARTIES:**

**Representation and Assistance -- Article 7**

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons shall be communicated in writing to the other party and to the Commission; such communication shall specify whether the appointment is made for purposes of representation or of assistance.

**Experts -- Article 27**

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the experts’ terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

**OPTIONAL CONCILIATION RULES:**

**Representation and Assistance -- Article 6**

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

**OPTIONAL RULES FOR FACT-FINDING COMMISSIONS OF INQUIRY:**

Conduct of the Fact-finding Proceedings -- Article 12

2. The Commission shall give the parties every opportunity to be present at hearings and investigations, and to submit documents, present evidence and have witnesses and experts called. The Commission may also take initiative in asking for documents and calling witnesses and experts.
**Dunoff Criterion 3:**
The processes utilized by the body must be participatory and transparent.

**Dunoff Criterion 4:**
The body must be able to encourage compliance with its decisions.

**Dunoff Criterion 5:**
The body must be able to provide decisions and outcomes that foster the growth of trade and environmental policy on a global basis.

**UNEP** combine[s] the values and interests of governments with the strengths of U.N. agencies, IGOs, NGOs, and the private sector.

**UNEP** can plead for and initiate action, mobilize support for a particular approach, and even issue demands. Ultimately, however, it must look to states for execution.

**UNEP** can provide frameworks for the creation of national and multilateral agreements and institutions.

Principle 22 of the Stockholm Declaration, the assignment of a quasi-legislative role to UNEP by General Assembly Resolution 3129, and the UNEP Council’s authorization of the Executive Director to “initiate legal consultations between experts and participate in developing principles” cut for the recognition of UNEP’s ability and legitimacy as a contributor to the development of international environmental law.

The Governing Council usually holds four formal sessions per a year to consider recommendations by the Commissioners, which are closed to the public. Plenary sessions that take place between the formal sessions are open to the public, however, and even non-member states may address the Council during these meetings.

Pursuant to UN Security Council Resolution 986, Iraq is permitted to sell its oil in order to buy necessary humanitarian supplies. Thirty percent of the money gained by Iraq in this manner is then used to compensate worthy complainants.

Since 1991, the UNCC has dealt with more than 2.5 million claims from individuals and corporations submitted by over 100 governments around the world as well as international organizations and 13 different offices of the United Nations.

**OPTIONAL RULES FOR ARBITRATING DISPUTES BETWEEN TWO STATES; BETWEEN TWO PARTIES WHEN ONLY ONE IS A STATE; INVOLVING INTERNATIONAL ORGANIZATIONS AND STATES; BETWEEN INTERNATIONAL ORGANIZATIONS AND PRIVATE PARTIES:**

**Representation and Assistance** -- Article 7

Evidence and Hearings -- Article 25

4. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

Confidentiality -- Article 10

Unless the parties agree otherwise, or unless disclosure is required by the law applicable to a party, the members of the Commission and the parties shall keep confidential all matters relating to the fact-finding proceedings, including the investigations, hearings, deliberations and findings of the Commission. Unless the parties agree otherwise, the Commission shall meet in camera.

**OPTIONAL RULES FOR ARBITRATING DISPUTES BETWEEN TWO STATES; BETWEEN TWO PARTIES WHEN ONLY ONE IS A STATE; INVOLVING INTERNATIONAL ORGANIZATIONS AND STATES; BETWEEN INTERNATIONAL ORGANIZATIONS AND PRIVATE PARTIES:**

Form and Effect of the Award -- Article 32

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

**OPTIONAL CONCILIATION RULES:**

Settlement Agreement -- Article 13

2. If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement. The conciliator draws up, or assists the parties in drawing up, the settlement agreement.

3. The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

**OPTIONAL RULES FOR FACT-FINDING COMMISSIONS OF INQUIRY:**

Termination of Fact-finding Proceedings -- Article 14

1. Unless agreed otherwise, the fact-finding proceedings shall terminate upon the issuance of a written report by the Commission.

2. Unless the parties have agreed otherwise, the report of the Commission shall not be binding on the parties.

**OPTIONAL RULES FOR FACT-FINDING COMMISSIONS OF INQUIRY:**

The PCA has heretofore not been viewed by the international community as a forum for the resolution of international environmental contests, and to address this fact the task group recommended that the PCA maintain a list of experts and scholars in that field so that it will be able to accommodate such disputes and ably advise parties that submit such contests to the Court. Action on this recommendation was taken, and the PCA now stands ready and available to decide environmental disputes.
Congregations, being threatened with the loss of their property through the exercise of New Rochelle’s eminent domain power if they refused to sell voluntarily to the Swedish furniture giant.

By the time Mr. Newmark arrived at the Social Justice Center, he and the people of City Park were feeling frustrated and hopeless about their chances for success. They had tried without success for over a year to convince local officials that the destruction of their businesses, churches, and homes was not only a violation of their rights but would not prove to be in the best interest of New Rochelle or surrounding communities.

Many of the residents were senior citizens who had lived in their City Park homes most of their lives. Others were small business owners worried about the negative effects the ongoing uncertainty about City Park’s status was having on their ability to plan for their companies’ future. Congregations of City Park’s two churches were also wrestling with whether or not to give in to pressure from IKEA to sell rather than face the threat of eminent domain.

The Social Justice Center agreed to help.

According to Professor McLaughlin, “after hearing how other more traditional approaches had failed, we felt that the Center’s less conventional strategies might be City Park’s last and best hope to battle city hall.” Rather than placing a sole emphasis on litigation, the work of the Social Justice Center follows a three-part model inspired by Dr. Martin Luther King Jr.’s Letter From a Birmingham Jail - investigate, organize, and then, if negotiation fails, litigate.

Over the next 18 months an unprecedented coalition made up of local residents, business owners, and homeowners from surrounding communities worried about the impact of the IKEA store on their quality of life, along with urban planners and attorneys, volunteered their time, energy, and creativity to oppose the project. The staff of the Social Justice Center served as advisors to the people of City Park providing strategies for community organizing efforts, focusing media attention on their concerns, and organizing the efforts of the volunteer attorneys in preparation for public hearings and possible future litigation.

The Center’s staff attorney, Adrienne Orbach, coordinated the efforts of the legal volunteers, sometimes fielding over fifty e-mails and telephone calls a day. The attorneys took a two prong approach. First, they divided into teams to attack the Draft Environmental Impact Study (DEIS) presented by consultants hired by IKEA to the New Rochelle City Council. Acceptance of the DEIS by the council would have been the next step towards ultimately condemning the area, seizing private property through an exercise of the government’s eminent domain power and then moving forward with the IKEA proposal as part of the “urban renewal” of the area. At a series of standing room only public hearings, speaker after speaker attacked the DEIS. Key concerns included the impact of traffic on surrounding areas and the inadequate relocation provisions for displaced residents and businesses.

At the same time, Social Justice Center attorneys and law student interns set to work researching and developing novel federal claims, in the event litigation became necessary to stop the project from moving forward. The unique character of the City Park neighborhood as an integrated, mixed-use community was the starting point. According to McLaughlin, “If it became necessary to go to court, we were developing claims based on the argument that the people of City Park are entitled to live, work and pray in an integrated community. That opportunity would be destroyed along with destruction of the homes, churches and businesses of City Park. We were prepared to argue that under federal law that would be impermissible, especially when the public good to be derived was so tenuous.”

On January 31, 2001, the mayor of New Rochelle and representatives of IKEA held a joint news conference to announce that IKEA was walking away from plans to build the “big box” store in City Park. IKEA’s official reason for the pull out was that requests from the City in response to the concerns expressed at the public hearings to decrease the size of the store, add parking, and build a new exit ramp off the highway would be too costly and time consuming to make the store sufficiently profitable for the company. One local activist credited the overwhelming opposition expressed at public hearings, in the media, and through letters to local officials with killing the project, noting, “It was real grass-roots activism winning out.”

McLaughlin sees the victory to stop IKEA as a text book example of how the Social Justice Center’s community based lawyering approach works best when the “club” of litigation stands as a backdrop to the activism of a focused and empowered community. Following IKEA’s announcement, Professor McLaughlin observed, “the message to New Rochelle and other governments is that if you want to develop your town, you need to enter into a partnership, not with the developer but with the people. This is a case of real people power. The city officials heard the message and realized they had to respond.”

Debra S. Cohen ’98 is associate director of the Pace Social Justice Center.
of wetlands, biodiversity and their legal protection. Kevin Madonna, Executive Director of Waterkeeper’s Alliance and an active attorney at the Pace Environmental Litigation Clinic, addressed the theme “Public Participation Implementing Environmental Laws.”

Professor John Humbach addressed the issue of “a new land ethic,” based on the one first propounded by Aldo Leopold, an ecological morality in which citizens see ourselves not as conquerors of nature, but rather as partners in our share land resources. Pace LL.M. graduate, Eli Medeiros, besides being instrumental in putting the seminar together, described the mechanisms of the Kyoto Protocol and the Brazilian potential to host carbon sequestration projects. Marco Olsen, Pace S.J.D. candidate discussed the importance of biodiversity and mechanisms for its legal protection.

Finally, Jordan Young, Pace University Professor of Brazilian Civilization and History, stressed the importance of historic preservation as part of environmental protection.

The seminar was concluded with an understanding that environmental conservation is not a luxury or a frill, nor an imposition from outside, but rather is a contribution for the growing quality of life for all people as well as for the other species that share our world.

Pace and Ecolegis will continue to share experiences and academic expertise in Brazil. The next Seminars are scheduled to take place at the end of May, 2001 in Manaus and later in the year in Fortaleza. Those Seminars aim at strengthening the environmental control and awareness in Brazil, as well as building closer relationships with the Brazilian academic community.
Pace Land Use Law Center News

Professor John R. Nolon’s book on New York Land Use Law and Practice has been expanded and up-dated as a treatise on Land Use Law entitled Well Grounded: Using Local Land Use Authority to Achieve Smart Growth. He has entered into an agreement with the Environmental Law Institute to publish the second edition of this book and four others in the next two years.

Four additional student papers have been accepted for publication in outside journals. Jody Match’s article on Aesthetic Zoning was published this month in Matthew Bender’s Environmental Law in New York. Her paper on Performance Zoning will become a mental Law in New York. Her paper on Aesthetic Zoning was published this outside journals. Jody Match’s article have been accepted for publication in others in the next two years.

Environmental Law Institute to publish has entered into an agreement with the authority to Achieve Smart Growth. He

ground: Using Local Land Use Authority to Achieve Smart Growth. He has entered into an agreement with the Environmental Law Institute to publish the second edition of this book and four others in the next two years.

The Right Thing in the Wrong Place

CBI is directed by MIT’s Ford Professor John R. Nolon’s book on New York Land Use Law and Practice has been expanded and up-dated as a treatise on Land Use Law entitled Well Grounded: Using Local Land Use Authority to Achieve Smart Growth. He has entered into an agreement with the Environmental Law Institute to publish the second edition of this book and four others in the next two years.

The Right Thing in the Wrong Place

CBI is directed by MIT’s Ford Professor John R. Nolon’s book on New York Land Use Law and Practice has been expanded and up-dated as a treatise on Land Use Law entitled Well Grounded: Using Local Land Use Authority to Achieve Smart Growth. He has entered into an agreement with the Environmental Law Institute to publish the second edition of this book and four others in the next two years.

The Right Thing in the Wrong Place

CBI is directed by MIT’s Ford Professor John R. Nolon’s book on New York Land Use Law and Practice has been expanded and up-dated as a treatise on Land Use Law entitled Well Grounded: Using Local Land Use Authority to Achieve Smart Growth. He has entered into an agreement with the Environmental Law Institute to publish the second edition of this book and four others in the next two years.

The Right Thing in the Wrong Place

CBI is directed by MIT’s Ford Professor John R. Nolon’s book on New York Land Use Law and Practice has been expanded and up-dated as a treatise on Land Use Law entitled Well Grounded: Using Local Land Use Authority to Achieve Smart Growth. He has entered into an agreement with the Environmental Law Institute to publish the second edition of this book and four others in the next two years.

The Right Thing in the Wrong Place

CBI is directed by MIT’s Ford Professor John R. Nolon’s book on New York Land Use Law and Practice has been expanded and up-dated as a treatise on Land Use Law entitled Well Grounded: Using Local Land Use Authority to Achieve Smart Growth. He has entered into an agreement with the Environmental Law Institute to publish the second edition of this book and four others in the next two years.

The Right Thing in the Wrong Place

CBI is directed by MIT’s Ford Professor John R. Nolon’s book on New York Land Use Law and Practice has been expanded and up-dated as a treatise on Land Use Law entitled Well Grounded: Using Local Land Use Authority to Achieve Smart Growth. He has entered into an agreement with the Environmental Law Institute to publish the second edition of this book and four others in the next two years.
Assault on the Environment, from Page 1

about environmental protection. Her espousal of turning public lands over to private use and exploitation flies in the face of her Interior Department mandate. Furthermore, as Colorado attorney general, Ms. Norton was a strong advocate of Colorado’s “self-audit” law, which grants companies amnesty from enforcement of air and water pollution laws if they police themselves. She has been an outspoken opponent of environmental regulation. She should not be confirmed.

At the ultra-conservative, anti-environmental regulation Cato Institute, Jerry Taylor, its director of natural resource policy was reported as saying he and his associates were “popping Champagne” in celebration of her selection by Bush.

Added to this insult to the environment is the Bush appointment of Spencer Abraham as Secretary of Energy. Abraham, another avowedly anti-environmentalist who, with Vice President Richard Cheney received consistent ratings of “zero” from the non-partisan League of Conservation Voters. Abraham was sponsor of legislation to prevent the Administration from tightening automobile mileage standards for SUVs and lightweight trucks.

Even Christine Todd Whitman, Bush’s new administrator of the Environmental Protection Agency is no prize. While she added substantially to New Jersey parklands, she decimated the New Jersey Department of Environmental Protection, cutting 738 employees, reducing its budget by $32 million, which gutted enforcement and decreased fines for air and water pollution permit violations by more than 70%.

These appointments do not bode well for the environment. They fly in the face of Bush’s claim to be a “compassionate conservative” and to be a unifier as President. It is very discouraging to have to contemplate spending the next four years fighting against retreats from the bipartisan environmental gains made in the past decades, many of them under Bush’s father, rather than seeing our environmental heritage and safety advanced. We can only hope that Congress will hold the line.

2001 Pace National Environmental Law Moot Court Results

CONGRATULATIONS TO
UNIVERSITY OF CALIFORNIA - BERKELEY
SCHOOL OF LAW (BOALT HALL)
Winner of the 2001 National Environmental Law Moot Court Competition

TEAM MEMBERS
Ed Balsamo, Jeff Brax, and Patrick Doherty

COMPETITION AWARDS
BEST ORALIST
Craig Welling
University of Colorado at Boulder

DAVID SIVE AWARD FOR BEST BRIEF OVERALL
Yale Law School

BEST BRIEF - APPELLANT
(Friends of the Lustra)
Louisiana State University School of Law

BEST BRIEF - APPELLANT
(State of Rocky Mountain)
University of Michigan School of Law

BEST BRIEF - APPELLEE
(Magma Mining Company)
University of Texas School of Law

Pictured from left to right (front row): Jeff Brax, Ed Balsamo, and Patrick Doherty, winners of the Competition; (back row): Pace student, Daniel McKillop, chair of this year’s Competition, and the presiding justices of the Final Round, the Hon. Renato Martins Mimessi, Chief Justice, Rondônia Court of Appeals, Brazil, the Hon. Scott C. Fulton, United States Environmental Protection Agency, and the Hon. Fortunato Benavides, United States Court of Appeals for the Fifth Circuit.

Read the problem on the web: www.law.pace.edu/pacelaw/environmentalm/
In Print:


Director of Environmental Programs Robert J. Goldstein’s abstract entitled, “Putting Environmental Law on the Map: A Spatial Approach to Environmental Law Using GIS,” has been accepted for the Law and Geography Colloquium at the University College London, July 2-3, 2001.


Professor Robert F. Kennedy Jr.’s article, “A River Reborn,” was published in the September issue of LIFE magazine. The article describes successful efforts of the Pace Environmental Clinic and the Riverkeeper to protect the Hudson River.

Two of Professor M. Stuart Madden’s books were published in their second editions: Understanding Torts and The Law of Environmental and Toxic Torts: Cases, Materials and Problems. Professor Madden co-authored an article entitled, “Proof of Feasible Alternative Design Under the Risk-Utility Test for Design Defectiveness,” which was published at 132 Products Liability Advisory 12 (2000). Two abstracts, “The Role of Epidemiology in Legal Decisionmaking,” and “Effective Reduction of Accidents: Litigation vs. Regulation,” were published in the Proceedings of the Fifth World Conference on Injury Prevention and Control, a World Health Organization Conference held in Delhi, India.


Professor John Noon’s article, “Grassroots Regionalism Through Intermunicipal Land Use Compacts,” was published at 73 St. John’s Law Review 4 (1999).