



National Focal Points' Meeting

Inter-American Forum on Environmental Law (FIDA)

Supreme Court of Justice

Brasilia, May 7, 8 and 9, 2008

DRAFT Background Note

I. Introduction

The Organization of American States (OAS), through its Department of Sustainable Development, (DSD) is responsible for various tasks and initiatives in the area of international and domestic environmental law. These initiatives aim to address mandates of OAS political organs and the Summit of the Americas process, including the 1996 Summit of the Americas on Sustainable Development in Santa Cruz de la Sierra, Bolivia, where member States established the Inter-American Forum on Environmental Law (FIDA). FIDA is a network of experts and officials in environmental law and enforcement that serves as a forum to exchange knowledge and experiences in environmental law and to facilitate training and capacity-building in this area. The OAS-DSD, serves as the Secretariat for this network that initially identified two priority themes: trade, investment and environment; and water law and policy. In order to advance these themes a number of approaches were identified, including education, public participation, access to justice, development of laws, enforcement, and dispute resolution.

In order to support its environmental law program and aiming to strengthen the FIDA network, the DSD established an Environmental Law Advisory Group comprised of 10 esteemed high level experts of the region in the field of environmental law and enforcement.

The OAS-DSD has convened a meeting of FIDA National Focal Points pursuant to a resolution of the Inter-American Commission on Sustainable Development CIDS/CIDI/RES.3 (III-0/02); the mandates issued by OAS member States in the Inter-American Program for Sustainable Development (PIDS 2006-2009), and the Declaration of the First Inter-American Meeting of Ministers and High Level Authorities on Sustainable Development (Santa Cruz 2006).

The Environmental Law Advisory group met twice in 2007 to discuss priorities and a possible agenda for the network's consideration.

The objective of the meeting is to review progress on the FIDA work plan, and identify priorities and a common work program based on the consensus of the national representatives for the next four years.

II. Priorities and Progress of FIDA

The FIDA focal points met in December 1999 to discuss priorities and an initial work plan for the network. While the network has not met since, the Secretariat has been actively working in addressing the priorities established under the initial FIDA work plan as follows:



2.1 Trade, Investment and Environment

In pursuit of economic growth and development, the Western Hemisphere continues to support economic integration and the benefits of globalization, including through increased trade. Trade represents one important development driver, but it can also be a source of environmental pressures. In recognition of this, countries of the Americas have included robust environmental provisions in recently signed bilateral and sub-regional trade agreements, including the Canada-Costa Rica and Canada-Chile Free Trade Agreements, the Dominican Republic- US-Central America Free Trade Agreement (DR-CAFTA) and the EU-CARIFORUM Economic Partnership Agreement (EPA) among others. These environmental provisions focus on commitments related to effective enforcement of environmental laws and on environmental governance; it also highlight the significant challenges faced by the region in addressing the trade and environment legal and policy linkages as well as institutional strengthening.

It is in this context, that the DSD has been supporting member States in building capacity for environmental management in the context of trade liberalization and market integration in the Americas. In particular, the DSD has worked to strengthen environmental laws and enforcement in the context of Regional Trade Agreements, including the DR-CAFTA and the Andean region FTAs. The DSD has also provided technical assistance for developing national capacity-building strategies for free trade, including institutional building. Moreover, the DSD supported twelve countries in conducting "Environmental Assessments of Trade Liberalization in the Americas". Through these assessments, countries of the region have been able to identify sectors that could potentially grow or change with trade, their impacts on the environment, and the regulatory effects of this growth. A key element of this initiative has been the identification of priorities for action in environmental governance. Member States and Focal Points have been significantly engaged in all steps of these initiatives.

2.2 Water Law and Policy

In Latin America and the Caribbean, endowed with 30% of the world's water resources, issues related to water governance have been highlighted for over a century. The first international environmental agreements signed in the region were focused on water resource governance,¹ and laws date back to 1906, when the first Bolivian water law was enacted.² In recent years, the importance of water governance has been reflected in water legislation and management reform processes in most of the countries in the region, as well as in programs and proposals for reforming water-related public services, particularly urban drinking water supply and sanitation utilities.³ However, recent efforts to revise and strengthen national legal and institutional frameworks have been stalled by conflicts among interested stakeholders including related to the multiple uses of the resource. In fact, the most significant reforms regarding water management in region occurred in the eighties, and in the past decade numerous worthwhile attempts have been initiated but stranded in legislative processes. In the meantime, addressing water management in an integrated approach remains a significant challenge for the region, as well as

¹ Organization of American States, Department of Sustainable Development, Policy Series Number 9, March 2006. "Water Management and Climate Change: Lessons from Regional Cooperation".

² Ley de Aguas Vigente, 28 de Noviembre de 1906.

<http://www.oas.org/dsd/EnvironmentLaw/WaterLaw/home.htm>

³ ECLAC, Water governance for development and sustainability, June 2006.



water allocation among riparian states and water quality and scarcity, a growing potential source of conflict.

While it is clear that there are great challenges in this area, the OAS-DSD, has engaged in efforts to support countries in the region in addressing them. Some of the activities include case studies relating to water decentralization trends in three countries of the region and a series of water law and policy round tables with practitioners from the region. These round tables were conducted over a two-year period and covered an array of legal issues related to water management, including public participation and access to information, among others. Additionally, the DSD has developed a water law database, which contains the domestic legal and regulatory frameworks for water management in the region. This database serves as a tool for information exchange among regulators and government officials. Finally, the FIDA Focal Points were recently engaged in a process of analyzing the domestic legal instruments for groundwater management in the region, including transboundary aquifers. This analysis was part of the UNESCO/OAS Internationally Shared Aquifer Resource Management (ISARM) Program.

2.3 Approaches and Procedural issues

In order to advance the selected priority themes in the work plan a series of approaches were recommended by the Focal Points. These approaches are key procedural issues in environmental law and include: environmental enforcement, market based instruments, access to justice, public participation and dispute resolution. To date the DSD has worked on these themes considering them in an integrated manner throughout activities in the substantive priorities above.

In the area of effective enforcement of environmental laws, efforts have been made to work with member States in identifying the necessary elements within laws and regulations for adequate enforcement. One of these elements is public participation, an area in which the DSD has worked actively, including the development of the Inter-American Strategy for Public Participation in Sustainable Development Decision-Making for which the FIDA National Focal Points were consulted. In the case of access to justice, it is important to know that in the international environmental law arena it concerns ‘three different adjudication procedures’: 1) to challenge the refusal of access to information; 2) to seek prevention and/or damages for environmentally harmful activities; and 3) to enforce environmental laws directly.”⁴ The OAS-DSD has been working in access to information and enforcement as noted above. Finally, in the area of market based instruments the DSD has been working on legal institutional frameworks that enable implementation of payment for ecosystem services schemes.

III. Moving forward the environmental law and enforcement agenda in the region: consideration of themes and emerging priorities

Since the inception of the FIDA network and the selection of priority themes, different environmental priorities have emerged and environmental issues have taken a different course. While the initial themes of trade, investment and environment and water law and policy remain important, countries and officials are faced with new challenges relating to core aspects of

⁴ Ved P. Nanda and George Pring, *International Environmental Law & Policy for the 21st Century* (2003), §2.2.1.3 at 52.



resource governance, particularly if they are shared, and to addressing the imminent threat of climate change and its already tangible impacts.

It is in this context that the two new themes, presented below, have been included for consideration by the FIDA focal points in identifying concrete aspects that could be included in an updated work plan for the region.

3.1 Prevention and Management of Conflicts in Shared Natural Resources

Physical coexistence on earth inevitably results in the sharing of natural resources, thus, sharing a border may mean shared forests, ecosystems and water resources. However, sharing is not limited to geographical borders. The commons that is earth invariably dictates that all countries and all peoples collectively take part in sharing certain of its natural resources. In doing so, there is a corresponding responsibility to manage them soundly.

The sound management of natural resources, including shared resources, requires the consideration of key approaches and principles of environmental management and international law. Domestic environmental legislation may be available to address some of the issues, but the transboundary nature of potential damage coupled with the potential for jurisdictional conflict, pose a significant challenge for conflict avoidance by countries of the region. Compliance with domestic environmental laws or a third-party standard is not necessarily the answer, given the serious foreign policy implications that arise in attempting to claim, *inter alia*, extraterritoriality of domestic law. As a result, domestic and local remedies are often insufficient to deal with management of shared resources. Hence, countries seek to resolve this type of dispute in international fora. In fact, the Americas has recently experienced two very high profile disputes involving the management of shared resources in South America and the Andean region.⁵

While transboundary cooperation is a contributing factor to the sound management of shared resources, as proven by various projects implemented by the DSD in the region, countries must have mutual awareness and acknowledgement of principles and guidelines for cooperation, management and conflict resolution related to these resources. These principles and guidelines should build on other efforts such as the 1978 UNEP Draft Principles of Conduct for the Guidance of States in the Conservation and Harmonious Exploitation of Natural Resources Shared by Two or More States (UNEP Draft Principles on Shared Natural Resources);⁶ in addition to other recognized principles of international law, such as prior consultation, access to justice, and the obligation to not cause transboundary environmental harm⁷ as seen in the *Trail*

⁵ *Pulp Mills on the River Uruguay, Argentina v Uruguay* ICJ Rep 2006, 135 and the Ecuador –Colombia Dispute related to the transboundary environmental effects glyphosate fumigation.

⁶ *Draft Principles of Conduct for the Guidance of States in the Conservation and Harmonious Exploitation of Natural Resources Shared by Two or More States*, United Nations Environment Programme Governing Council, XII Plenary Meeting, UNEP/GC/101 and Corr.1 (1978) [hereinafter *UNEP Draft Principles on Shared Natural Resources*].

⁷ See *Rio Declaration on Environment and Development*, The United Nations Conference on Environment and Development (June 14, 1992) Principles 2 and 19; *Stockholm Declaration*, United Nations Conference on the Environment (June 16, 1972), Principle 21; and *UNEP Draft Principles on Shared Natural Resources*, *supra* note 2, Principle 3.



*Smelter Arbitration*⁸ and *Corfu Channel* cases.⁹ Finally dispute resolution should be based on peaceful proceedings as established by the OAS Charter.

Many international and regional agreements, and even domestic laws, provide different fora and procedures for dispute resolution and addressing damages in the context of shared natural resources. The multiplicity of options has proven problematic in that disputes are not necessarily resolved in an expeditious manner. In fact, many cases languish in the dispute resolution process for years while natural resources continue to deteriorate, and transboundary conflicts continue to increase, thereby further injuring the relationship between the disputing parties.

There are multiple international agreements which address specific natural resources of global concern, such as air, water, migratory species, and resources of the seas. These agreements include, among others: the Convention on Long-Range Transboundary Pollution (1979); the United Nations Framework Convention on Climate Change (UNFCCC) & the Kyoto Protocol (1992 & 1997); the Convention on Conservation of Migratory Species of Wild Animals (CMS) (1983); and the United Nations Convention on the Law of the Sea (UNCLOS) (1994). These multilateral agreements reflect the commitment of the international community to sustain specific commonly used natural resources.

Moreover, there are several bilateral and regional agreements among countries which share borders, where migratory species venture, or along which ground and surface waters flow. For instance, the United States and Canada mutually agreed in the Great Lakes Water Quality Agreement (1997) to eliminate persistent toxic substances from the Great Lakes¹⁰ by 2006. Both parties recognized that their “citizens breathe the same air, drink the same water, share the same species and the same environmental problems, and thus it was imperative to work together.”¹¹ In the Rio de la Plata Treaty (1969), Argentina and Uruguay, motivated by the desire to secure equal rights to the Rio de la Plata which runs between them, entered into the treaty delimiting their maritime jurisdiction.¹² Another notable treaty is the Migratory Bird Treaty which the United States, Canada, Mexico, Japan, and the former Soviet Union (now Russia) have signed.¹³

There are also non-binding legal principles for the management of resources. These include, among others: the Rio Principles on Environment and Development,¹⁴ the Authoritative

⁸ *Trail Smelter Arbitral Decision*, 33 AM.J. INT’L L. 182 (1939); 35 AM.J. INT’L L. 684 (1941).

⁹ *Corfu Channel Case* (United Kingdom v Albania), 1949 I.C.J. Rep. 4 (1949). See also *Lake Lanoux Arbitration* (Fr. v Spain), 12 R.I.A.A. 281 (1957) (holding that a state can lawfully utilize the waters of an international river in its territory so long as it takes into account the interests of co-riparian states).

¹⁰ The Great Lakes holds 18% of the world’s fresh surface water resources. Nearly 33 million US and Canadian citizens live by the Lake, from which nearly half get their drinking water.

¹¹ *U.S., Canada Move to Eliminate Toxics in Great Lakes* (quoting a statement by former Canadian Minister of the Environment, Sergio Marchi), U.S. Environmental Protection Agency (1997), available online: <<http://www.epa.gov/history/topics/canada/04.htm>>.

¹² *Treaty between Uruguay and Argentina concerning the Rio de la Plata and the Corresponding Maritime Boundary* (November 19, 1973), available online: <<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/URY-ARG1973MB.PDF>>.

¹³ United States (1916), Great Britain (for Canada) (1916), Mexico (1936), Japan (1972) and the former Soviet Union (now Russia) (1976).

¹⁴ *Rio Declaration*, *supra* note 3. .



Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests,¹⁵ and the recently approved non-binding instrument on all types of forests.¹⁶ These principles, together with the UNEP Draft Principles on Shared Natural Resources, have served as the basis for current work including the Working Group on Shared Natural Resources of the UN International Law Commission on the Draft Articles on the Law of Transboundary Aquifers.¹⁷

Despite this array of binding and non-binding instruments related to natural resource management, countries of the region lack a common set of tools to support their respective national laws and practices related to shared resources.

Previous efforts in this area have not been fully successful due to concerns related to disproportionate focus on the environmental dimension and sovereignty issues. However, the OAS, as the most important political forum in the Americas, and because of its role in the areas of democracy and governance as well as sustainable development, can play a pivotal role in effectively bridging the gaps related to the sound management of shared natural resources. Moreover, the OAS' Secretary General has identified conflict avoidance and facilitation of negotiation among countries and parties of the hemisphere as a key priority in his agenda.

It is in this regard, that the FIDA National Focal Points, could engage in a collective effort to develop a clear road map of alternatives and best practices for countries dealing with challenges related to shared natural resources. Activities within this area should be based on accepted principles to address cooperation, management and conflict resolution related to shared natural resources.

Questions for discussion:

What do you think the needs are in this area?

What steps should the OAS-DSD take to support the FIDA Focal Points in this area?

Which concrete activities should be incorporated into the work plan for the next four years?

Should analysis of MEAs and domestic laws be conducted to assess which common elements to consider?

Would it be helpful to analyze and identify precedent in past conflicts in the region?

15 *Report of United Nations Conference on Environment and Development*, A/CONF.151/26 (Vol. III), Rio de Janeiro, Brazil (1992).

16 See *United Nations Forum on Forests, Report of the Seventh Session* (February 24, 2006 and April 16 to 27, 2007), Economic and Social Council Official Records, 2007, Supplement No.22, E/2007/42, E/CN.18/2007/8.

17 United Nations General Assembly Res.55/152 (December 12, 2000).



3.2 Climate Change and the Domestic Environmental Law Agenda

Most countries of the region have, through binding and non-binding international instruments, expressed not only an awareness of the real phenomenon of climate change; but have committed themselves to addressing it. This is evident in for example, the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and Agenda 21.

The reasons are clear why countries of the region have joined the rest of the international community in confronting climate change challenges. In February 2007, the Intergovernmental Panel on Climate Change (IPCC) established with 90 percent certainty that human activity is responsible for global warming.¹⁸

Climate change threatens the basic elements of life for people around the world- access to water, food, health, and use of land and the environment.¹⁹ Countries of Latin America and the Caribbean are extremely dependent on natural resources and as a result more vulnerable to these threats. Increased greenhouse gas emissions²⁰ have contributed to the raising of the earth's temperature. This rise has caused changes in weather, sea-level, and water access and availability and land use patterns. The impact of these changes has been severe in the region. Hurricanes are more intense and destructive, glaciers are rapidly melting, fish stocks are depleting and landslides are more frequent.²¹

In order for countries of the region to move forward on issues related to climate change, it is important to identify, among other things, the legal mechanisms in place at the national level.

Countries of the region have adopted very different domestic policies to tackle the challenges posed by climate change. Some have utilized or amended existing legislation/regulations to address specifically climate change challenges. In many countries of the region there are Clean Air laws.²² Also, for example, countries like Belize and Guyana have used land-use planning and zoning regulations, along with coastal zone management regulations to address challenges such as landslides, mudflows, and flooding.²³ This also illustrates a general realization that changes in, and improper use of land, along with the improper establishment of settlements on unstable lands by local populations, increase their vulnerability to the severe impacts of climate change;²⁴ hence the reason for applying such regulations. Further, the enforcement of existing laws, such as those relating to forestry, have proven useful in mitigation and adaptation efforts.

¹⁸ *Summary for Policymakers: A Report of Working Group I of the Intergovernmental Panel on Climate Change*, formally approved at the 10th Session of Working Group I of the IPCC (February 2007)

¹⁹ Nicholas Stern, *The Economics of Climate Change: The Stern Review*, Cambridge University Press (2007).

²⁰ According the 2007 assessment of the Inter-governmental Panel on Climate Change, Latin America contributed to 4% of global greenhouse gas emissions.

²¹ See

<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:21575230~menuPK:258569~pagePK:2865106~piPK:2865128~theSitePK:258554,00.html>

²²

²³ See www.sciencedaily.com/releases/2007/04/0704/070410135944.htm

²⁴ Id.



While in some countries, it is through the national legislative framework that climate change challenges are addressed, in others it is at the provincial or state level. For example, in the United States, as in many other countries, there is currently no federal legislation which sets limits on domestic greenhouse gas emissions. However, the state of California, through an Executive Order,²⁵ established its own GHG emission reduction requirements.

Climate change related issues have also been addressed by domestic courts. One very notable case from the region is the *Massachusetts et al v Environmental Protection Agency et al.*²⁶ Supreme Court (SCOTUS) decision. The issues before the SCOTUS were whether the EPA Administrator may decline to issue emission standards for motor vehicles based on policy considerations not enumerated in section 202(a) of the Clean Air Act; and whether the EPA Administrator has authority to regulate carbon dioxide and other air pollutants associated with climate change under section 202(a)(1). Among other things worthy of note from the case was the fact that the SCOTUS acknowledged that ‘the harms associated with climate change are serious’. It acknowledged that the science is strong that “global warming threatens, inter alia, a precipitate rise in sea levels, severe and irreversible changes to natural ecosystems...increases in the spread of diseases and the ferocity of weather events.” No other court in the region has made such acknowledgements about climate change.

The emerging challenges related to climate change in the region are constantly testing domestic legal frameworks in many respects. They also call for translating the basic principles of environmental governance into action.

Although, many domestic laws address climate change challenges in some way, there are several gaps in domestic legal frameworks. One challenge is that many countries in the region have not enacted legislation implementing their commitments and the principles of the binding and non-binding international instruments aforementioned. Also, many of the Clean Air Acts in the region have not been amended to reflect climate change issues such as setting targets or establishing requirements for the reduction of GHG emissions. Further, since there are not any single pieces of legislation addressing climate change exclusively, as most domestic legislation relevant to climate change issues are for example, forestry, land use planning, and water management, the challenge arises of having to identify the synergies and actions that need to be taken within domestic laws to address climate change related issues. This may prove time consuming and onerous on human and financial resources.

Another challenge is related to enforcement. Currently, in many countries environmental legislation is difficult to enforce for reasons including: “archaic legislation, low penalties, insufficient trained investigative personnel, equipment and other facilities, lack of legally trained personnel within the responsible agencies...and overlapping jurisdictions.”²⁷ Even if countries are able to enact and update all their legislation, most of the challenges faced prior to enactment and amendment will still persist.

²⁵ Executive Order # S-3-05. See also, the state of Washington’s SSB 6001.

²⁶ 549 U.S. 1 (2007)

²⁷ Grenade-Nurse, Florabelle, “Decentralized Agencies with Overlapping Jurisdictions – A Problem for Enforcement”, Fifth International Conference on Environmental Compliance and Enforcement



There is also the significant challenge of a lack of education and awareness among the general public about the impacts of climate change, and why it is important to obey laws which seek to protect them from the harsh impacts. Thus, if the citizens are educated on why, for example, there are laws on illegal logging, and are made to understand the consequences of illegal logging, such as deforestation which contributes to landslides and mudflows and thus the loss of life and property, then potential is created for a partnership between government and civil society to work together in mitigating some of the consequences of climate change.

Finally, there are market considerations which raise concerns about enacting mandatory climate change legislation. Some developed countries are concerned that should they enact legislation to cap their GHG emissions “without corresponding action by developing nations that compete in global trade markets, the cost of producing some... products would increase relative to those manufactured in countries without emission limits.”²⁸ This approach raises the question of to what extent or how special and differential treatment will be applied to developing countries. Also, there are concerns about ensuring that any climate change legislation with market considerations is compliant with WTO law.²⁹

The DSD/OAS has done substantial work in the area of climate change and environmental law and enforcement. By merging the knowledge and expertise built in these areas, countries of the region may be assisted through capacity building to strengthen their legal framework and effectively address climate change within the existing domestic environmental law agenda.

Questions for discussion:

What areas of Domestic Environmental Law should be considered in addressing the impacts of climate in the region?

What steps do you think the OAS-DSD should take to support the FIDA Focal Points in this area?

What concrete activities should be incorporated in the work plan for the next four years?

Are there any particular concerns or issues that should be taken into account?

What do you think the approach should be?

²⁸ The Committee on Energy and Commerce in the United States Congress, produced in January 2008 a white paper on “Climate Change Legislation Design White Paper: Competitiveness Concerns/Engaging Developing Countries”. The paper addresses “potential domestic legislative provisions that could encourage developing countries to curb their greenhouse gas emissions”.

²⁹ Id.