CAUTIONARY NOTE

Only the RESOLUTION(S) presented herein, when approved by the House of Delegates, become official policy of the American Bar Association. These are listed under the heading RECOMMENDATION(S). Comments and supporting data listed under the sub-heading REPORT are not approved by the House in its voting and represent only the views of the Section or Committee submitting them. Reports containing NO recommendations (resolutions) for specific action by the House are merely informative and likewise represent only the views of the Section or Committee.

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW AND PRACTICE

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports fundamental reform of the U.S. foreign assistance program; and

BE IT FURTHER RESOLVED, that the American Bar Association supports a program which has among its central components the following types of foreign assistance, delivered through both bilateral and multilateral agencies, as appropriate:

(a) foreign assistance to promote democratization, human rights, and the rule of law;

(b) foreign assistance to promote the establishment of the legal infrastructure necessary for economic development and international commerce; and

(c) foreign assistance to promote sustainable development that is environmentally sound.
REPORT

Summary

This Report provides the views of the Section of International Law and Practice (the "Section") on reform of U.S. foreign assistance programs. The Working Group that drafted the report was formed in early 1993 for the purpose of analyzing the new Administration's intended reform of such programs and providing input to the Administration on the direction and content of that reform.

In general, the Working Group viewed its focus as being related to Goal VIII of the Association, "Promoting the Rule of Law Throughout the World". The Working Group's mission was not to serve as an advocate for, or an opponent of, continued funding by the Agency for International Development ("AID") or other development agency funding of American Bar Association activities. Nor did the Working Group feel it was appropriate for it to take any position regarding AID's continued existence or internal organization. It also declined to address the subject of foreign military assistance.

Based on the conclusions and recommendations of the Working Group, the Section supports fundamental reform of the U.S. foreign assistance program. The United States must become more focused in the articulation and implementation of its foreign assistance objectives. Among other things, the "patchwork quilt" process by which foreign assistance policy has been made in the United States in recent years, reflected in the current Foreign Assistance Act and other statutes, needs fundamental reform. The new regime must be devised and implemented in such a way as to permit simultaneous activity on several fronts, long-term efforts, experimentation, and rapid responses to changing circumstances and needs. It must be de-politicized to the maximum extent possible.

Fostering democratization, respect for human rights and the rule of law should be key objectives of the U.S. foreign assistance program. The Report clarifies these concepts, and identifies the elements of a program for political development. The Section notes, however, that it is not sufficient to focus simply on political development. Countries should also be assisted in establishing the infrastructure for economic development which in turn gives nations the means to support themselves and grow, and provides security for the political rights of all the people. The Report describes the elements of an economic development program, and the process by which it should be formulated. As a third objective, the Report focuses
on environmentally sound development and legal-based structures that will support principled environmental decisionmaking.

The Report concludes that the foregoing objectives should be achieved by a combination of bilateral and multilateral means. The pros and cons of bilateral and multilateral programs are examined in detail. In the Section's view, a bilateral approach is the best vehicle for pursuing unique foreign policy and other interests of the United States. However, where there are shared interests, a multilateral approach is appropriate, and may even be preferable in an era of scarcer dollars.

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In view of the desirable goals outlined in the Report, the Section of International Law and Practice supports the recommendations outlined above.
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BACKGROUND

The Working Group on U.S. Foreign Assistance Programs (the "Working Group") was formed in early 1993 for the purpose of analyzing the new Administration's intended reform of U.S. foreign assistance programs and providing input to the new Administration on the direction and content of that reform.

A. Membership of the Working Group

Members of the Working Group (listed in Attachment A) were recruited from a variety of committees within the Section of International Law and Practice, including the International Investment and Development Committee, the International Environmental Law Committee, the International Banking and Finance Committee, the International Legal Exchange Committee, and others. In addition, Section members and others known in the international development community were specifically recruited. The membership of the Working Group includes former general counsels of the Agency for International Development ("AID"), the Overseas Private Investment Corporation ("OPIC"), and the Inter-American Development Bank, and individuals with experience at other government agencies and multilateral development institutions, as well as private-sector-based experience in the area. The group is bipartisan in composition.

In addition to the membership of the Working Group, several individuals served in a resource capacity. These included several employees of different government agencies who preferred not to be identified by name, but who actively participated in the deliberations of the Working Group and contributed their time and expertise.

The membership of the Working Group does not include any member of the Board of Directors of the Central and Eastern European Law Institute (CEELI) or any other ABA project funded by AID or any other development agency. It does include individuals who are familiar with existing U.S. government-funded ABA activities in the areas discussed in this Report.

B. Mission of the Working Group

The mission of the Working Group was debated extensively by the group at its initial meetings. There wasanimity among the membership about what the group's mission was not: It was not to serve as an advocate for, or an opponent of, continued AID or other development agency funding of ABA activities. Nor did the group feel it was appropriate for it to take any position regarding AID's continued existence or internal organization. The Working Group also declined to address the subject of foreign military assistance.
In general, the group viewed its focus as being related to Goal VIII of the Association, "Promoting the Rule of Law Throughout the World". There was lively debate within the Working Group about how broad a mission it should have within this context; specifically, whether it should limit its focus to the so-called "legal component" of U.S. assistance programs, or whether it should feel free to address broader questions. In the end, the group concluded that we should focus on those areas where we had the greatest expertise and/or an ability to contribute to the dialogue.  

C. Focus of this Report

Taking a rule-of-law emphasis, the Working Group decided to focus on three possible substantive objectives of a U.S. development-assistance program:

1. foreign assistance to promote democratization, human rights, and the rule of law;

2. foreign assistance to promote the legal infrastructure necessary for economic development (herein referred to as "law for development"); and

3. foreign assistance to promote sustainable development that is environmentally sound.

We chose these three areas, not because we believe they should be the sole focus of a development-assistance program—obviously, some portion of U.S. assistance will be dedicated to meeting basic human needs of an immediate nature, and some will likely also be dedicated to refugee and disaster assistance. Rather, we addressed these areas in part because they fit within our areas of greatest expertise, as noted above. Moreover, we chose them because we believe they are an appropriate focus for a long-term approach to sustainable development in the fullest sense, and therefore for the U.S. development assistance program. Furthermore, we chose them because the U.S. has a unique interest or expertise to offer in each of these areas, and may itself expect to benefit from the fruits of its assistance in these

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The Working Group recognized the plethora of existing studies regarding the future of AID and the direction of the U.S. foreign assistance program. It decided that it would not be useful to replicate those studies, or to try to tackle the issue of rewriting of U.S. foreign assistance laws in detail. In preparing this report, the group has of necessity reviewed some of the studies, and relevant provisions of the Foreign Assistance Act. This Report, however, is intended more as a "white paper" on selected issues than another study. It reflects the collective insights, research and experiences of the group's members with respect to the issues addressed.
areas. As such, they are perhaps easier for a U.S. population generally unsupportive of foreign assistance to embrace.

In addition, the group decided to address a fourth issue -- the pros and cons of multilateral versus bilateral assistance -- because of the apparent dearth of analysis on that issue, and a belief that such an analysis could contribute to a better understanding of the policy choices with respect to that issue.

**SUMMARY OF ASSUMPTIONS, CONCLUSIONS AND RECOMMENDATIONS**

The Working Group Report includes the following assumptions, conclusions and recommendations:

1. Foreign assistance goals are and should be an outgrowth of U.S. foreign and domestic policies. Just as the end of the Cold War has led to a rethinking of U.S. foreign policy, so should it lead naturally to a reevaluation and revamping of U.S. foreign assistance programs.

2. The United States must become more focused in the articulation and implementation of its foreign assistance objectives. Among other things, the "patchwork quilt" process by which foreign assistance policy has been made in the United States in recent years, reflected in the current Foreign Assistance Act ("FAA") and other statutes, needs fundamental reform. The new regime must be devised and implemented in such a way as to permit simultaneous activity on several fronts, long-term efforts, experimentation, and rapid responses to changing circumstances and needs. It must be de-politicized to the maximum extent possible.

3. Projects and programs should generally be designed not as handouts, but as transferring the skills, tools, and structures that will enable a country to progress in its political and economic development. Programs should be designed so that input from the recipient country is provided throughout their design and implementation.

4. Other important and legitimate considerations of the U.S. development program should be collateral economic benefits to the United States and environmental soundness (given the spillover into the "global commons" of environmental effects).

5. Fostering democratization, respect for human rights and the rule of law should be key objectives of the U.S. foreign assistance program. As pointed out in Part I of this Report, democratic societies are more pacific (internally as well as externally), more stable, and better able to provide for their people. They are less likely to create situations which will lead to population upheaval. Except in rare cases of clearly overriding U.S. security interests, monetary and certain forms of in-kind assistance should not be provided to governments when...
their acts and policies are antithetical to democratization, human rights, or the rule of law. Technical assistance to such governments for political development, on the other hand, may help advance the cause of reform in those countries.

6. It is not sufficient to focus simply on political development, however. As discussed in Part II of this Report, countries should also be assisted in establishing the infrastructure for economic development. As the experience of Eastern Europe and the former Soviet Union shows, political development without concomitant economic development is a risky and unstable proposition. Economic development gives nations the means to support themselves and to grow, and provides security for the political rights of all the people.

7. Both political and economic development have a significant legal component. Promotion of democratization and human rights requires the development of legal and regulatory systems and institutions that will defend and nurture the rights of individuals, channeling conflict to pacific means of resolution, allowing for individual participation in the system, etc. Promotion of economic development requires a legal infrastructure that establishes the framework for economic activity, and controls improper conduct, whether that conduct be corrupt, or simply violative of the norms defined by the society.

8. As discussed in Part III of this Report, protection of the environment also has a significant legal dimension, from the development of norms and standards for business or other activity, and the assembly of information regarding environmental effects, to the enforcement of the rules of conduct.

9. The foregoing goals -- of promoting political and economic development in sustainable ways that are not harmful to the environment -- should be achieved by a combination of bilateral and multilateral means. Traditionally, the United States has pursued its development assistance goals predominately through a bilateral approach. As identified in Part IV of this Report, there are pros and cons associated with each approach. A bilateral approach is the best vehicle for pursuing unique foreign policy and other interests of the United States. Where there are shared interests, however, a multilateral approach is appropriate, and may even be preferable in an era of scarcer dollars. A multilateral approach may also permit greater depoliticization, and may promote experimentation and diversity of models.²

² There are those in the Working Group who would argue precisely the contrary position with respect to the issues of ability to experiment and diversity of models.
INTRODUCTION

A. A New Era for Foreign Assistance

Any analysis of U.S. foreign assistance policy necessarily reflects elements of the larger American debate over the virtues of foreign aid. We begin, however, from the premise that the question of whether or not the United States should provide foreign assistance has been -- and should be -- decided in the affirmative. While pressures to adopt a policy to the contrary may exist, the reality of America's global role is such that complete extrication from the development assistance arena is highly unlikely, as well as inadvisable. Thus, our discussion focuses on how, in view of this reality, this country's foreign assistance goals should be defined in the new world order and how those goals, once defined, can best be achieved.

The roots of America's foreign aid policy go back some fifty years, to European and Japanese reconstruction efforts after World War II. The United States was, of course, a major supporter of those efforts. Significantly, U.S. involvement in multilateral institutions such as the United Nations, the World Bank, and the International Monetary Fund dates from that same era. As one source notes, "[f]oreign aid as we know it today grew out of the post-World War II experience with the Marshall Plan and other reconstruction programs and coincided with the end of colonialism." During the Cold War years that followed, the United States' choices as to how its limited foreign aid dollars would most optimally be spent, more often than not, were influenced by a recipient country's allegiances -- or strategic significance -- in a bipolar world.  

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3 As noted in a recent report, "[f]oreign aid has been an integral part of the conduct of U.S. foreign policy for most of the postwar period." East Asia: Regional Economic Integration and Implications for the United States, United States International Trade Commission Publication 2621, May 1993, at 90.

4 See, e.g., "Beware of the International Monetary Fund," by Robert W. Lee, in The Review of the News, May 25, 1983, at 51 (stating that "[f]oreign aid is perhaps the most unpopular and expensive program ever foisted on American taxpayers by their representatives in Congress.")


6 Id. (noting that "[t]he U.S. aid program was shaped by Cold War political and security concerns with instability in the Middle East and the spread of communism in the Third World.")
The post-Cold War years mark the beginning of a different era, and there is much speculation about the role America should play in this new world. A re-focusing of our foreign assistance policy is necessary as well as timely. With the increasing acceptance of free-market economies and democratic systems of governance around the world, the United States faces the choice of whether to rest on the perceived success of the 40-year struggle against communism, or to recognize that the incipient democratic transformation now underway may well fail if left to evolve without much needed support. As Senator Leahy has stated, "[t]he fundamental question that this Nation must face now is whether we will win the cold war but then lose the peace."7

B. A Program for the 1990s and Beyond

"Winning the peace" means in our view encouraging the development of stable and, optimally, democratic governments. It means promoting the development of productive economies. It means creating a world that is more, not less, habitable. In a global economy, it means creating structures and circumstances that are conducive to increased U.S. trade and investment. Each of these has a significant -- indeed, perhaps a critical -- legal component.

I. U.S. Foreign Assistance to Promote Democratization, the Rule of Law and Human Rights

A. The Justification for Foreign Assistance in This Area

U.S. foreign assistance activities should be guided to a significant extent by U.S. foreign-policy objectives. They should also reflect the democratic and humanitarian instincts of the American people. The principal justification for foreign assistance over the long term, however, lies in its role in furthering U.S. foreign policy and U.S. interests.8

Three important and longstanding U.S. foreign policy objectives are to promote the process of democratization, to establish a society governed by the rule of law, and to advance the protection of human rights in the world. Democratic institutions form the foundation within a country for enduring political freedom and broad-based participation in civic and economic affairs. Democratic countries have historically


8 At the same time, it must be recognized that most effective foreign assistance efforts are long-term in character. To ensure the necessary stability, the programs selected by the U.S. should be the outgrowth of widely-shared U.S. values and interests.
conducted their external affairs peacefully, contribute to the stability of the international system, and enable economic progress to occur while also respecting human rights.

The historical experience of the United States provides it with a comparative advantage relative to most other countries in providing foreign assistance to promote democratic institutions and values. Other countries look to the U.S. experience as instructive. The United States was the first country to rebel against colonialism and has remained democratic for over 200 years. This gives the United States a unique leadership obligation, which it should exercise in developing bilateral and multinational programs tailored to the particular needs of individual countries, as well as to regional and global conditions. At the same time, the United States needs to recognize that the U.S. model will not and should not be the only relevant model for a developing country. Other donor countries may provide civil law models, parliamentary systems, and perhaps others, for consideration. Ultimately, the recipient country must choose which model suits it best.

B. The Meaning of "Democratization"

While there is no generally-agreed definition of "democracy," several recent international instruments enumerate the factors that characterize a democratic system of government. They include factors such as:

a. free elections are held at reasonable intervals by secret ballot (or by equivalent free voting procedure), under conditions that ensure in practice the free expression of the opinion of the electorate in the choice of their representatives;

b. the executive is accountable to the elected legislature or the electorate;

c. the government, the public authorities and the legislature have the duty to comply with the constitution and to act in a manner consistent with laws enacted thereunder;

d. everyone has an effective means of redress against government or administrative decisions;

e. a national legislature should be so organized that a majority will not be able to abuse its power to limit the participation of the minority in decision-making, and the minority will not be able to obstruct unduly the legislative process;

f. human rights and fundamental freedoms are guaranteed by law, which in turn must be consistent with a state's international obligations;
g. all persons are equal before the law and are entitled, without discrimination, to the equal protection of the law;

h. the legal system prohibits any discrimination, and guarantees to all persons equal and effective protection against discrimination on any grounds;

i. the independence of judges and impartial operation of the public judicial service is effectively ensured;

j. the independence of legal practitioners is protected, and the autonomy of the lawyers' associations is guaranteed; and

k. all the media are guaranteed freedom of expression and of dissemination of information.

Any one of these factors has a variety of important components that may also be spelled out. For instance, free elections should provide for:

-- more than one party to participate in the elections;

-- all seats in at least one chamber of the legislature to be freely contested in a popular vote;

-- all adult citizens, without any discrimination, to vote;

-- the voting procedure must be properly supervised (including, if necessary, international monitors), votes must be honestly counted and reported, and the official results must be promptly published;

-- political campaigning must be conducted in a fair and free atmosphere, free from intimidation by administrative action or violence; and

-- no legal or administrative obstacles may be allowed to impede the access of candidates and parties to the media during the campaign.⁹

⁹ These factors and components were excerpted, with slight modifications, from such diverse documents as the 1990 Concluding Document of the Copenhagen Conference on Human Dimension of the Conference on Security and Cooperation in Europe (CSCE); the 1991 Paris Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, concluded by a group of Asian states and the five permanent members of the Security Council (Annex 5, paras. 4 and 5, 31 I.L.M. 200 (1992); and the statement of fundamental principles prescribed by a special session of the General Assembly of the United (continued...)
C. The Programmatic Focus

U.S. foreign assistance programs to promote democracy, human rights, and the rule of law should focus on specific goals in light of limited available financial resources, and the need to take into account the competence of U.S. aid-giving agencies to develop and implement practical, effective programs. Such programs must also take into consideration the needs and priorities of recipient countries. In a broad framework, U.S. assistance should concentrate on establishing law-based constitutional and government structures that enable political pluralism and market economies to flourish, and which protect the rights of all individuals and groups, especially in countries with sizable ethnic or religious minorities. Public education programs in recipient countries are especially important, particularly in countries that do not have a tradition of democratic institutions and market economies, or where ethnic conflicts persist.

D. Past Efforts

U.S. foreign assistance programs in the past have not focused heavily on promoting the development of stable democratic societies and human rights. Perhaps too much emphasis was placed on Cold War foreign policy objectives and too little attention was paid to evaluating results. Circumstances, however, have changed and so too should U.S. foreign assistance. Furthermore, except in rare cases of clearly overriding U.S. security interests, monetary and certain forms of in-kind assistance should not be provided to governments whose acts and policies are antithetical to democratization, human rights, and the rule of law.¹¹

³(…continued)

¹⁰ See FAA, §§ 281 ("Utilization of Democratic Institutions in Development"), 116 ("Human Rights"). These are the two primary sections of the FAA that deal with -- and only in a limited manner -- democratic development. However, the SEED Act of 1989 and the Freedom Support Act of 1992 both provide for extensive programs for democratic institution-building.

¹¹ Acceptance of this principle does not imply that no aid should be given to such countries. It may be possible to deliver aid in a way that will assure that it will reach the intended beneficiaries or that will ally the aid-giver with the cause of reform. Further, aid in the form of technical (continued...)
E. The Means of Delivery

As discussed in more detail in Part IV of this Report, in promoting democratization and human rights, U.S. foreign assistance should go beyond bilateral efforts. Emphasis on multinational efforts should become a basic part of U.S. foreign assistance. The United States should consider means by which its own activities can be augmented and supplemented (financially and in terms of programs) by encouraging multinational agencies (such as the various U.N. specialized agencies and regional agencies) to restructure their governance and reorient their programming so they would be able to become more effective in addressing difficult problems. Now that the Cold War is behind us, the U.N. specialized agencies have the possibility of being better able to focus their concerns, to reach consensus on policy objectives, and to develop cooperative programs designed to address contentious and long-neglected issues. The United States can influence this process and coordinate its own program with those of the U.N. and regional agencies.

F. Elements of a Law for Development Program

The outline below provides an inventory of the major forms of technical assistance that the U.S. government could provide through bilateral or multilateral assistance in the areas of democratization, promoting the rule of law and protecting human rights. It does not deal with the related, but different, issue of providing technical assistance to promote economic reform, growth, and stability that is discussed in Part II of this Report. Some of the forms of assistance noted below would be more or less appropriate depending on the particular recipient country or region, its existing historical traditions and its level of political and social development.

1. Rule of Law and Human Rights
   a. Assist in the development of constitutional, criminal, and civil laws
   b. Assist in the development of administrative procedure laws and regulations
   c. Assist in the development of an independent judiciary and the training of judges and lawyers to function within such a system

\[\text{\footnote{\ldots continued}}\]

assistance of the type advocated here (as opposed to monetary assistance or other types of in-kind assistance) may assist in advancing democratization, human rights, and the rule of law, because it strengthens the education base, and potential support for a law-based society. In that sense, it is unlike dams and roads.
d. Assist in the development of parliamentary procedures and the training of legislators

e. Assist in the development of law schools, and the training of prosecutors and public defenders

f. Assist in the establishment of civilian control of the military and the training of police

g. Provide human rights training to leaders of non-governmental organizations, labor unions and other advocacy organizations

h. Encourage ratification of and adherence to U.N. and regional human rights agreements

i. Assist in fostering compliance with laws, by

(i) promoting public education efforts to foster compliance

(ii) assisting in the development of anticorruption programs

2. Independent Media

a. Promote the establishment of government policies facilitating the independence of media

b. Provide training to journalists and broadcasters

c. Assist in the development of broadcast regulations, libel laws

3. Democratic Pluralism, Social and Political Process

a. Supply support for free elections -- monitoring, equipment, election commissions

b. Assist in the development of political parties

c. Assist in the development of free independent democratic trade unions

d. Assist in the development of non-government organizations ("NGOs"), civic organizations and citizens' networks
e. Provide educational reform; train teachers
f. Assist in establishing universities; providing fellowships for students and professors to study in the United States

4. Democratic Governance and Public Administration
a. Assist in the training of city and municipal managers
b. Provide training in organizational management
c. Provide training in budgets and finance
d. Provide training in contracting and procurement
e. Provide training in personnel systems

To provide effective assistance in these areas will require expertise in the subject matter, combined with expertise in the country or region. Since it is unlikely that any agency will (or should) possess the full range of subject-matter expertise, it will necessitate an ability to mobilize a variety of outside resources, public and private. However, it is important that the U.S. government provide effective project development and oversight, because outside contractors will not have the breadth of perspective nor the long-term view that the government can bring to bear.  

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12 In our view, the lead U.S. foreign assistance agency needs "subject matter expertise" in the process of political development, but not in all the specific substantive areas that such development may implicate. It needs some appreciation of comparative law issues, and particularly of the differences between common and civil law societies.

13 There may, of course be exceptions (and we believe there are), but the need for stewardship will remain simply to ensure that taxpayer funds are properly spent.
II. U.S. Foreign Assistance to Promote Economic Development: Goals and Mechanisms

A. The Role of Law in Economic Development and the Goals of Technical Assistance in "Law for Development"

Promoting economic development has long been a goal of many foreign assistance programs. The economic development activities we are proposing do not, however, fall under the rubric of traditional "infrastructure" projects (although we would argue that they are structurally even more basic than a dam or road). Rather, our focus is on development of a legal infrastructure for commercial activity, both among nationals of the developing country, and with those from outside — what we have previously referred to as "law for development".

We believe that law for development should be a central element of U.S. foreign assistance programs seeking to promote economic development and the rule of law. Legal institutions constitute social learning: a set of rules that facilitate and guide social and economic interaction. If we are able to reform the rules in a developing country, and enhance their general acceptability and thus improve its societal "mind", we will help it to be productive and to adapt by itself. Below are examples

14 While business and technological skills are also critical to economic development, these capabilities are more likely to flow naturally if the appropriate legal and institutional environment is available. In a market economy, such capabilities will not necessarily be provided by the government, or by other governments. On the other hand, law is the natural and appropriate function of government, and legal and governing skills may not develop naturally by market mechanisms.

15 Perhaps an example is in order. An economy that has been directed through state planning in the past is in need of a new brain for allocating capital. In the past in these countries, capital was allocated by plan, with bureaucrats deciding priorities and determining efficiencies. These bureaucrats are increasingly being turned out of their jobs, but how is capital to be allocated? In the U.S. model of a market economy, capital is allocated largely by entrepreneurs, business organizations, banks and securities markets. These allocators harness market forces to discipline the allocation of capital and also decentralize decisions regarding the allocation of capital. But as we have seen countless times, financial institutions need appropriate regulation in order to operate efficiently and without disasters. Technical assistance efforts may provide assistance in instituting appropriate legal and regulatory systems, and thereby help to (continued...
of what law for development may accomplish in developing countries.

1. Law for Development as a Part of the Transformation to a Market Economy

Legal infrastructure is necessary for successful privatization and transformation of a centrally-planned economy for several reasons. First, it is necessary to facilitate economic transactions that comprise a market economy: appropriate laws allow more efficient transactions by providing a framework for them. Second, it is necessary to avoid the abuse that may arise in an unregulated market economy. Many reformers in developing countries are as market-oriented as one can be, failing to recognize that the market presents significant opportunities for abuse that a society cannot sustain. By providing appropriate laws and regulations, abuse can be limited and a possible backlash away from a market system can be avoided.

2. Law for Development as Promoting Economic Activity and International Trade

Technical assistance in law and regulation can play an important role in helping developing countries and emerging democracies develop their own enterprises. It also incidentally contributes to the development of market opportunities for U.S. goods.

- With an effective financial system, manufacturers in developing countries can obtain financing to establish plants and to acquire raw materials or equipment needed to produce for the domestic or export markets.

- In addition, in the area of intellectual property, technical assistance can help to produce acceptable intellectual property laws and enhance the degree of enforcement of those laws. Importantly, this kind of assistance has the effect of encouraging trade in markets that U.S. producers might otherwise be reluctant to enter.

- Finally, by helping to create impartial and fair legal and regulatory systems,

15(...continued)

establish a mechanism that can allocate capital appropriately in developing countries. We could continue with examples in other areas of law, all illustrating the same point: Developing countries need appropriate and efficient legal and regulatory systems in order to make use of the abilities and resources they have, and thereby, to develop.

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international trade will be enhanced. Thus, legal and regulatory assistance can help to create appropriate conditions for U.S. foreign investment, and markets for U.S. goods and services. One need only look to our southern neighbor, Mexico, to understand the relationship between enhanced U.S. trade and domestic law reform in developing countries, in areas such as intellectual property, environmental protection, labor protection and foreign investment law.

Legal reform in the area of democratic institution-building, as recommended in Section I, in addition to providing the political infrastructure for a stable existence, works synergistically with efforts to improve the legal infrastructure for business and economic relations. For example, an impartial legal system for the regulation and facilitation of a market economy will serve to establish and protect against arbitrary governmental power, a society in which the rule of law may flourish. Without a sound administrative law and court system, effective regulation is impossible, and dispute resolution relating to transactions will be unavailable, raising the costs of doing business.

Finally, although discussed separately in Part III of this Report, fostering environmental protection and sustainable development is one element of the law for development agenda. Training and technical assistance in developing and implementing appropriate environmental laws and institutions is important in order to help provide the capabilities to regulate this highly technical area, and to ensure that economic development is not achieved at an unacceptable price (not only to the developing country but to the international community) in terms of environmental degradation.

B. Current Efforts in Legal Technical Assistance

1. Bilateral Efforts

U.S. bilateral "law for development" efforts to date have been relatively modest in goals and effects. The most significant projects in terms of scope and level of funding have been AID projects in Eastern Europe and Indonesia. In addition, many other U.S. agencies, including the Commerce Department, the SEC, the Federal Reserve, the Justice Department, the State Department, the Treasury Department, the Internal Revenue Service and the EPA, engage in legal technical assistance programs. Such a plethora of assistance-givers creates a challenge for coordination. Furthermore, all these efforts draw significantly on external expertise, often relying on a number of separate for-profit or not-for-profit contractors. This may raise difficult issues of coordination, consistency, conflicts of
interest, excess cost, continuity of advice and completeness of advice.

2. **Multilateral and Foreign Bilateral Efforts**

The World Bank and the UN, other multilateral agencies and other governments have for some time been concerned about the importance of legal reform in the developing countries, but only recently have they begun to engage in significant efforts in the technical assistance for law applicable in the development field. However, these efforts often are not coordinated with those of AID or with other agencies of the U.S. or other governments.

C. **Elements of a Law for Development Program**

For the reasons set out previously, we believe that technical assistance in the area of "law for development" offers enormous benefits, by providing the tools needed for self-sufficiency, allowing recipient countries finally to "graduate" from their dependence. Today, much of what passes for technical assistance in law for development is too short-term, and too superficial, or even too narrow and technical, to be of lasting utility. In addition, resources are wasted by competing donor institutions, each offering short-term or superficial assistance. It is clear that there are no quick fixes in law for development. Rather, law for development requires the sustained application of analytical resources from both the donor countries and the recipient country. Set forth below is a list of critical areas to be developed in the legal systems and a list of tasks that should be undertaken in that process.

1. **Generally Applicable Commercial Laws**

   a. Competition policies and laws
   b. Banking and finance laws
   c. Tax laws
   d. Securities laws
   e. Sale-of-goods laws
   f. Secured transactions laws
   g. Real property laws
   h. Personal property laws
   i. Intellectual property laws
   j. Business organization laws
   k. Bankruptcy laws
   l. Administrative laws
   m. Procurement laws
   n. Environmental laws
   o. Labor laws
2. **International Trade/Investment Laws**
   a. Foreign investment laws
   b. Customs and import laws
   c. Unfair trade practices laws
   d. Arbitration laws

D. **Developing Laws in the Relevant Areas**

In terms of process, developing laws in these areas implies a series of tasks:

1. **Assess the needs of the society involved.**
   What laws or legal institutions are needed? Consider what laws and institutions exist and what is the appropriate order for the introduction of new laws and institutions.

2. **Assess the local legal, economic, political and social context.** How should the appropriate laws or legal institutions be devised to fit local society in terms of its domestic and international goals?

3. **Undertake a comparative law effort, examining various foreign laws and legal institutions.** Which of them would fit local society the best? The choice must be made by the recipient society, through democratically validated institutions of government.

4. **Tailor laws and institutions for local society.**

5. **Devise a plan of implementation.** This plan should include appropriate explanations to legislators, appropriate education for those to be charged with enforcing, operating or complying with the law and appropriate follow-up to assess the utility of the law or institution to achieve the goals set for it and recommend mid-course corrections.

Each of these tasks requires the active engagement of local legal, economic and political personnel, as well as foreign experts. As in any professional relationship, these experts must work in close consultation with their clients -- the host government in this case -- and, following consultation, conform to their instructions. It is necessary that experts from many disciplines, including not only law, but also economics, politics and sociology, work together in these efforts. Any particular law and development program would be structured over a period of several years, and benefit from consistent and continuous management over that period.

E. **Coordination of Efforts**

We believe that recipient governments should be given a full array of models from which to choose in establishing legal
regimes. The U.S. model is not necessarily the most useful for many countries. Coordination is desirable, however, to avoid redundancy, bureaucratic competition, and confusing cacophony. It is for this reason that we recommend maximum centralization of law for development efforts, at least among U.S. agencies. Although government agencies have different substantive expertise that can and should be brought to bear -- one can hardly imagine, for example, any serious efforts to develop securities laws without significant input from the SEC -- there is much about the law for development process that is generic. There would be great inefficiency if each agency possessing substantive expertise had to learn for itself how to provide its services effectively around the world. Thus, we see a need for a clearinghouse/coordinating function within the U.S. government. In this way, law for development efforts could be applied in a coordinated, coherent and continuous manner, under the guidance and direction of dedicated "in-house" professionals.

If AID were to be designated the coordinator of legal technical assistance among U.S. agencies, its substantive resources in law would need to be increased. Alternatively, another agency could be given the lead in this area. In either event, a staff of law for development specialists could coordinate and guide the efforts of functional specialists from both within and outside the government. It could provide the sensitivity to different societies, and to the process of law for development, that most separate law for development efforts presently lack.

In addition or alternatively, responsibility for these efforts could be delegated to a multilateral organization, which could work in conjunction with national program coordinators. If this were done, little increment to AID resources would be required, as these resources would be better located in the multilateral organization.

The World Bank, the IFC, the OECD, the Inter-American Development Bank, and the UN have begun to engage in some commendable law for development efforts, and their initial work has been promising. However, greater focus and specialization within any of these organizations would be required before it would be appropriate for any of them to be accorded centralized responsibility with respect to law for development.

As the pressures of a global economy demand greater harmonization of domestic law (e.g., with respect to the intellectual property, environmental, labor and foreign investment provisions of NAFTA, or the single market initiative of the European Community, or the uniform laws on commercial topics produced by UNCITRAL), a centralized clearinghouse of technical assistance in law might help to avoid unnecessary inconsistencies and differences that may act as impediments to trade.
Of course all countries will continue to have varying preferences and cultures, and therefore varying legal systems. Successful technical assistance in law for development, as we have learned, must be predicated on the desire and interest of the host country, and not imposed from above. Whatever the means of delivery, this fundamental principle must be respected. At the same time, the opportunity for countries to develop consistent approaches where consistency is desired must not be thwarted.

III. Foreign Assistance Relating to Environmental Matters and Sustainable Development

A. The Justification for Assistance in this Area

It has become well-established that the type of development to be promoted around the world is development that is sustainable by the host country. The term sustainable development refers to development that is environmentally sound. It connotes a variety of things, including use of appropriate technology, as well as available inputs and supplies, local workforce training, and last but not least, protection of the environment.

Promoting host-country development that is environmentally sound is in the interest of the United States. This follows from the realization that the countries of the world share a global commons, and that damage to a local environment -- for example, a tropical rain forest -- from economic or other activity can have an impact thousands of miles away, in the form of climate change, ozone depletion, loss of species diversity, and perhaps from other effects unknown to us today. Moreover, low environmental standards can have adverse trade effects.

Developing and developed countries will not always find common ground on the issues of the importance to be given to environmental protection efforts, or the particular projects or programs to be supported. These differences in perspective -- flowing from disparate levels of resources, stages of development, and from the fact that the global damage from a given activity may be less than the perceived local harm -- make the need for foreign assistance in this area even more compelling.

This Report assumes that there is a reasonably high degree of consensus surrounding the proposition that only development that is environmentally sound should be supported by U.S. foreign assistance efforts. The question then becomes what specific steps should be taken, and what programs should be adopted, by which agencies, to achieve the goal of environmentally sound development.
B. Current Programs

The question of what is appropriate is not an easy question to answer. AID's current efforts in the environmental area do not appear to represent an integrated part of its programs. Perhaps due to the grafting of specific conservation and environmental-protection mandates on to the FAA, AID has tended to focus on a limited universe of so-called "green" projects, involving conservation efforts under the rubric of its agricultural programs. At the same time, it has given less attention (except in its analysis of environmental impacts) to issues arising in other areas, such as hazardous waste disposal, and air and water pollution (so-called "brown" activities), that may be equally if not more important from an environmental standpoint. This has been exacerbated by funding decisions that may be project-oriented, rather than focused on the agency-wide development of skills and tools necessary if environmental issues are going to be integrated into programs in general.

That environmental issues cannot be confined to narrow or traditional concepts is underscored by the recent experience in the NAFTA negotiations. Clearly, many types of activities that have heretofore not been analyzed in terms of their environmental effects now will be. The same should be true for the activities funded by foreign assistance.

C. Elements of a Program

We recommend that the following be made priority tasks in connection with advancing the goal of environmentally responsible development assistance:

1. Environmental concerns need to be integrated into the program development and implementation processes of each development agency in which the U.S. participates. To achieve this integration, each such agency needs to have a section that is concerned with environmental issues, headed by a high-level appointee. While that section will be the most visible locus of institutional expertise on environmental issues, non-specialists within the agency should also be given training on environmental issues. (This is in fact an existing mandate for AID that has not been effectively implemented due to lack of funding.) Such training is particularly important for regional staff, who may be involved in project conceptualization and implementation.

2. The U.S. should support the establishment of training programs for host countries, in areas such as cross-sectoral environmental planning for activities that affect a
variety of different sectors, and the development of appropriate institutions to deal with environmental issues.\(^\text{16}\)

3. Just as legislation to establish the legal infrastructure for commercial activities has been recommended, so the U.S. should provide technical assistance in the development of appropriate laws and regulations regarding environmental issues faced by developing countries. The democratization, human rights, and rule of law objectives described in Section I of this Report should be expanded to include an environmental component. The subcomponents of an environmental element would be:

a. the development of administrative procedures for the safeguarding of public and individual rights in the field of the environment;

b. the development of mechanisms for the integration of technical and scientific information into legislative and administrative processes;

c. public information and participation rights regarding environmental issues and decisions; and

d. possibly others, including the development of NGO organizations.

4. The law for development technical assistance for regulatory programs recommended in Part II of this Report also has an environmental dimension to it. Environmental regulation is one of the central parameters that countries establish in order to curb the deemed excesses of private conduct. Legal technical assistance in this arena would include:

a. development of pollution, air and water quality standards;

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\(^{16}\) The United States has already "exported", through the FAA and otherwise, one of its most potent tools, the environmental impact statement ("EIS"). While some may disagree about the utility of that tool in foreign contexts -- and certainly it cannot operate in a vacuum without surrounding laws and institutions -- it is already a reality in many contexts. Countries that are required to prepare such statements, in order to receive U.S. assistance or to comply with their own domestic laws, need training in the preparation and use of such statements. Providing such training gives those responsible for administration of environmental laws and regulations in the host country a tool for gathering and analyzing relevant information. Given the U.S. parentage of the EIS concept, we have a natural leadership role in technical assistance in this area.
b. establishment of incentive structures to promote anti-pollution activity, and conversely, the development of liability standards, all as appropriate; and

c. the development of remediation schemes.

5. Because the priorities of developing countries will not necessarily coincide with those of the developed world regarding environmental issues, any foreign assistance program also needs to include a component for identifying, promoting and supporting projects whose global implications may be greater than their local implications or importance.

As with the other areas discussed, the precise dimensions of projects will vary from country to country and from region to region. Therefore, technical expertise in environmental issues will need to be married with regional expertise. Approaches that have worked in the more established systems of Latin American countries may not work in the newly-independent states of the former Soviet Union, for example.

IV. Foreign Aid Delivery Mechanisms

Parts I through III of this Report have focused on possible goals and objectives of U.S. foreign assistance in the post-Cold War era. In view of those proposals, this Part considers the pros and cons of two of the delivery mechanisms that may be employed to provide such aid: multilateral agencies and U.S. bilateral sources of assistance. The Working Group has not attempted to analyze the particular merits and/or drawbacks of development financing associated with each of the numerous multilateral development agencies. Similarly, it was not our intention to provide a comprehensive analysis of the structure and operations of AID. Rather, our goal in this portion of the Report is to provide a somewhat generic assessment of multilateral and bilateral assistance in view of the specific U.S. foreign assistance goals the Working Group has proposed.

A. A Dual-Track Approach to Foreign Assistance

As prior Parts of this Report suggest, the United States should continue to provide development assistance through both multilateral and bilateral channels. We view these two approaches as complementary. It is important for this country to continue to participate in -- and vigorously and consistently support -- multilateral aid institutions. In fact, the foreign assistance goals this Working Group has identified earlier in this Report may lend themselves to increased utilization of

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17 As noted in the introduction to this Report, our analysis focuses on economic and development assistance rather than military aid programs.
multilateral financing mechanisms. As a consequence of recent and profound changes in our world, institutions such as the International Bank for Reconstruction and Development (the "World Bank") today count the countries of the former Eastern Bloc and the former Soviet Union among their members. American dollars channeled through such multilateral institutions work to support the growth and development of private enterprise and democracy in nations that only a few years ago represented a version of life unpalatable to most Americans.

While recognizing the importance of providing assistance through multilateral channels, the Working Group notes that the changing geopolitical environment has not obviated the need for a U.S. bilateral assistance program. Indeed, bilateral assistance has historically been the predominant emphasis of the U.S. program.\textsuperscript{18} To the contrary, the United States is uniquely positioned to provide direct assistance to countries now embarking on the path of developing market-oriented economies and nascent democratic systems. The Working Group recognizes and welcomes AID's focus on these two areas as key elements of its strategy of supporting "sustainable development" world-wide. The challenge at this juncture is to more clearly define the role of U.S. foreign assistance in a changed -- and changing -- world.

B. The Pros and Cons of Each Approach

In the early 1980s, the debate over the choice between multilateral and bilateral aid was laid out succinctly in an address by David Rockefeller before the Brookings Institution.\textsuperscript{19} In his remarks, Mr. Rockefeller listed the following arguments -- pro and con -- as those heard most frequently:

\textsuperscript{18} Report of the Task Force on Foreign Assistance to the Committee on Foreign Affairs, U.S. House of Representatives, H.Rep. 101-32, February 1989, at 8 (noting that "[m]ultilateral aid emerged in the early 1960s in conjunction with the 'development for development's sake' view, but has never become a dominant feature in American aid.").

Bilateral Aid

**Pros**
- ability to focus on politically congenial nations
- ability to focus geographically
- ability to focus programmatically (such as family planning)
- ability to link closely to private efforts on a project-by-project basis

**Cons**
- limited reach -- only one country at a time
- lack of multiplier (we don't get the benefit of the help of other nations)
- danger of becoming identified with unsavory governments with resulting resentment by local population
- possible "colonialist" interpretation
- reduced flexibility through congressional earmarking
- resentment of other countries not receiving bilateral aid from us

**Multilateral Aid**

**Pros**
- multiplier effect
- relative political neutrality and ability to insist on sound development practices
- broad impact
- shared "ownership"
- greater continuity and consistency

**Cons**
- lack of U.S. control (ideological, geographic and programmatic)
- difficulty of tailoring for private involvement on case-by-case basis

Based on our experience and observations, we would add to that catalogue the following additional elements:

**Bilateral Aid**

**Pros**
- ability to foster U.S. bilateral foreign relations

**Cons**
- U.S. model and experiences may not be appropriate
ability to foster people-to-people relationships
ability to project U.S. values
ability to be tied to U.S.-source goods, services, and systems
increased political leverage/influence
more flexible
counterweight to other countries' bilateral aid programs

**Multilateral Aid**

**Pros**
- greater diversity of models (at least ideally)
- may have greater latitude to experiment (less subject to political constraints)

**Cons**
- slow moving
- bloated international bureaucracies with expenses
- we cannot control
- dragged down by countries opposing assistance

This head-to-head comparison brings the 'multilateral vs. bilateral aid' debate into stark relief. The original list also demonstrates the Cold War's significant influence on the underlying analysis. For example, the criticism that multilateral aid precludes the U.S. from exercising control over the recipients of such aid has to some extent (although certainly not completely) been diluted. Concerns with supplying U.S. dollars to "communist" nations lay at the heart of that concern. However, as a consequence of the recent political changes in Eastern Europe and the former Soviet Union and the resulting end of the Cold War, such reservations appear to have been substantially reduced.20

Furthermore, a growing consensus with respect to development objectives among both lending and borrowing nations

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20 Some would argue that new reasons for exercising control over foreign assistance have replaced the Cold-War concerns.
has led, in the World Bank's view, to a "greater reliance on markets and a strong, but more limited role for government."\textsuperscript{21} Broader acceptance of a market-based approach to economic development has in turn allowed the Bank greater flexibility to support programs that promote privatization and the institutionalization of systems that underlie more democratic forms of governance.\textsuperscript{22} As noted recently, "[t]ypically, two of every three Bank operations include components that explicitly support private-sector development, up from about 40 percent four years ago."\textsuperscript{23} This is a remarkable fact. As noted in Part II of this Report, establishing an institutional infrastructure in which the private sector can operate is critical to long-term development efforts.

C. Alternative Forms of Assistance are Both Complementary and Necessary

Overall, as a consequence of the changes our world has undergone in the last several years, the terms of the multilateral-bilateral assistance debate may have been significantly altered. Countries such as Russia and Poland are now full-fledged members of the World Bank, for example; this was not the case during earlier phases of the debate.\textsuperscript{24} Today, greater receptivity to the assistance and influence of multilateral institutions can help pave the way for further change; the U.S. should be an active participant in this discourse.

The utility and value of multilateral assistance notwithstanding, bilateral assistance can and should play an important role in U.S. foreign assistance policy. Multilateral aid will never replace bilateral aid where key U.S. interests are involved. The three areas discussed in this Report are all areas where important U.S. interests are at stake, although not necessarily to the same extent in different places around the


\textsuperscript{22} See generally, World Bank Information Brief D.01.4-93, "Toward a Market Economy," (noting that in moving from centrally-planned economies to free market economic and social institutions, "[l]aws governing private corporations, banking and financial institutions must be put in place covering everything from ownership to bankruptcy, including intricate aspects of institutional, legal, and regulatory reforms.")

\textsuperscript{23} The World Bank: Annual Report 1992, at 60.

\textsuperscript{24} See generally, World Bank Information Brief J.01.4-93, "The Former Soviet Union and the World Bank," April 1993, (noting that in 1992, fourteen of the fifteen countries that comprised the former Soviet Union had become members of the World Bank).
globe. The foreign assistance challenge of the 90's will be prioritization of programs and allocation of limited resources. Where material but not necessarily key interests are not at stake, the multiplier effect of multilateral efforts may make that option more desirable.

While endorsing a continued strong bilateral program, we should reemphasize our concerns about how such a program is conceived and administered. A foreign aid program that is built around enduring values, which can be implemented programmatically on a long-term basis, will be a credible, sustainable program.

A reform of the FAA could serve as the vehicle for articulating the fundamental premises of a U.S. program in a clear and cogent fashion. We believe that the time is ripe to recognize that congressional micro-management, and politicization of foreign aid, has not produced the desired results, and that a new, more enduring approach is needed.

Respectfully submitted,

James H. Carter
Chair, Section of International Law and Practice

February 1994
Attachment A

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Section of International Law and Practice
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GENERAL INFORMATION FORM

Submitting Entity: Section of International Law and Practice

Submitted By: James H. Carter, Chair of the Section of International Law and Practice

1. **Summary of Recommendation.**

   The Recommendation urges that the American Bar Association support fundamental reform of the U.S. foreign assistance program. It further urges support for a foreign assistance program that has among its central components foreign assistance delivered through both bilateral and multilateral agencies, as appropriate, to address the following: promotion of democratization, human rights, and the rule of law; promotion of the establishment of the legal infrastructure necessary for economic development and international commerce; and the promotion of sustainable development that is environmentally sound.

2. **Approval by Submitting Entity.**

   This Recommendation was approved by the Council of the Section of International Law and Practice at its meeting on August 7, 1993 in New York City, and was reaffirmed after further consideration by the Council at its meeting on January 22, 1994 in Denver, Colorado.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**

   This Recommendation has not previously been submitted to the House or Board.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

   No existing policies would be affected by approval of this Recommendation.

5. **What urgency exists which requires action at this meeting of the House?**

   Approval of this Recommendation and Report by the House of Delegates at this Meeting is needed because it is anticipated that the Clinton Administration will introduce legislation proposing reform of U.S. foreign assistance programs in early 1994.
6. **Status of Legislation.** (If applicable.)

Legislation has not yet been introduced, but is anticipated in early 1994.

7. **Cost to the Association.** (Both direct and indirect costs.)

None.

8. **Disclosure of Interest.** (If applicable.)

None.

9. **Referrals.**

As of January 28, 1994, this Report and Recommendation was referred to all other ABA Sections and entities.

10. **Contact Person.** (Prior to the meeting.)

The principal contact person in the Section of International Law and Practice is:

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12. **Contact Person Regarding Amendments to This Recommendation.** (Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)

No proposed amendments have been received. The person to contact concerning proposed amendments is:

Claire S. Wellington