1998

Foreword

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The tension between expanding economic production and maintaining environmental amenities has always defined society's relationship with environmental law. The anxiety a generation ago over burning rivers, polluted air, hazardous waste, and species extinction led to the enactment of environmental laws that sought to protect public health and the environment with little regard for the cost of compliance. Yet, even if these environmental laws were complied with, increasing economic activity, coupled with steady population growth, will breed widespread ecosystem deterioration.

First conceived in 1972 in the *Stockholm Declaration*, sustainable development has been the clarion for many as the answer to the jobs versus environment dilemma. Twenty years later, *Agenda 21* and the *Rio Declaration*, drafted at the United Nations Conference on Environment and Development in 1992, tried to place the concept of sustainable development at the center of international policy so that in the coming decades economic development would proceed in a fashion compatible with environmental protection. However, despite all this discussion, many argue that "sustainable development" is too "slippery" a concept to have meaning.

Conceiving the general concept is one thing; explicitly defining it and making it happen is quite another. The basis of this symposium is the belief that through law, we can set limits to accommodate both concepts and concretely to guide daily decisions towards a sustainable economy. In this symposium, legal scholars and practitioners will examine how law can define sustainable development and mold conduct, domestically and internationally, to implement the concept concretely.

To answer the question "What is the role of law in defining sustainable development?" we must understand the role of law generally in defining society's governing principles. Law achieves its power to order society from law's ability to set standards against which conduct can be measured. For instance, contract law defines legally binding promises and establishes remedies for broken promises. Property law defines what things a person may own, defines ownership, and assigns standards of proof by which ownership can be establish. Taken together, the legally enforced definitions of property and contract rights establish the essential prerequisites to a market economy. Tort law, which defines civil duties each person owes not to harm others; criminal law, which extends these standards to define conduct that society will punish; and statutory and administrative law, which, by legislation and regulation expand the common law rules defining acceptable conduct, operate to correct social, informational and transactional failures inherent in the market system created by property and contract

rights. Constitutional law defines limits on government's power. Even more broadly, public international law tries to define conduct among nations. Across this diverse legal universe, a common theme emerges: law, when it is effective, provides a yardstick against which we measure conduct. The yardstick, exact or approximate, quantitative or qualitative, properly calibrated or inaccurate, orders relations in society.

What is equally true, but less obvious, is that our evaluation of events is shaped by the data we use to measure the events. To accurately evaluate phenomena our measurement data must be both valid and reliable. To be valid, it must be congruent with the phenomena purported to be measured. To be reliable, data generated by consistent measurement techniques must give consistent results over time. Because understanding of complicated things is both enabled and limited by the measurements we make, how we define measurement criteria can dramatically change how conduct or phenomena are perceived and evaluated.[1] Thus, it is the means by which law measures compliance with duties and obligations that defines legal duties and affects conduct, not the larger policies, goals or aspirations behind the law, for in complying with law, a person need only do that which is measured.

The problem of measurement and definition is particularly crucial when trying to understand sustainable development. Arguably, to be sustainable, wealth must allow its beneficiaries to enjoy an income without diminishment of capital, whether monetary, human or natural. Yet, for example, even a concept as familiar as wealth depends entirely on the definitions and measurements used. What does it mean for a person, a company, a country, a region, or the world to be wealthy? What does it mean for that wealth to be durable over time? Unfortunately, the means by which we measure wealth are so variable that even at the seemingly mundane level of routine financial accounting, e.g., whether a company made a profit or loss for any given period, answers are fundamentally uncertain. For instance, in 1993 the six month net profit reported by a major German manufacturing firm (Daimler) was +DM 168 million, according to German accounting standards. However, if calculated using American generally accepted accounting practices, Daimler would have reported a six-month loss of -DM 949 million.[2] Thus, the simple definitional choice between German or

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1. Robert Solow, *An Almost Practical Step Toward Sustainability*, An Initial Lecture on the Occasion of the Fortieth Anniversary of Resources for the Future 7 (1992) ("[T]alk without measurement is cheap. If we - the country, the government, the research community - are serious about doing the right thing for the resource endowment and the environment, then the proper measure of stocks and flows ought to be high on the list of steps towards intelligent and foresighted decisions.").

2. Kaspar Meuller, *A financial analyst's perspective II*, CLIMATE CHANGE AND THE FINANCIAL SECTOR 139 (Jeremy Leggett ed., 1996).

American accounting standards changes the result by more than DM 1.1 billion, a difference of approximately $660 million (based upon the exchange rate on June 28, 1993 of U.S.$0.5885 per DM.)

More generally, traditional economic analysis is limited by "the fallacy of misplaced concreteness"[3] that causes economic and business decisions to be based upon idealized expectations not necessarily related to the physical world. As rational economic beings, we gladly forget to consider, or consciously ignore, the external consequences of our actions, and make decisions based only on private benefits and costs, not on public harms external to market forces. But real sustainable development depends on legal norms that validly and reliably include all significant adverse external consequences of our decisions.

Because the definitional dilemma of what is sustainable development is both so central and unresolved, the role of law in defining sustainable development is preeminent and indispensable, yet largely ignored. Conceiving the general concept is one thing; defining it explicitly and making it happen is another. This symposium, *The Role of Law in Defining Sustainable Development*, was assembled in the belief that through the rule of law we can set limits that define sustainability and concretely guide daily decisions toward an ecologically sustainable economy.[4] Each of the participants, whether an academic or a practitioner, is a lawyer dedicated to examining how law can define sustainable development and mold conduct, domestically or internationally, to convert the vision of sustainable development to reality.

This symposium seeks to answer three questions about the role of law in defining sustainable development: 1) what is sustainable development? 2) does existing law promote or require conduct consistent with sustainability? and if not, 3) how must existing laws be modified or new laws enacted to channel conduct in the direction of sustainability?

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3. HERMAN E. DALY AND JOHN B. COBB, JR., FOR COMMON GOOD 25 (1989). "[T]he fallacy of misplaced concreteness" (ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 11 (1929)) occurs when practitioners of an intellectual discipline apply the abstract thinking of the discipline "to the real world without recognizing the degree of abstraction involved." Economists have been particularly prone to committing the fallacy of misplaced concreteness, in that they "forget the degree of abstraction involved in thought and draw underrated conclusions about concrete actuality." As a result, "[i]t is beyond dispute that the sin of standard economics is the fallacy of misplaced concreteness." DALY at 36, quoting NICHOLAS GEORGESCU-ROEGAN, THE ENTROPY LAW AND THE ECONOMIC PROCESS 320 (1971).

4. The symposium was co-sponsored by the American Bar Association Section of Natural Resources, Energy and Environmental Law and was presented in cooperation with the American Bar Association Standing Committee on Environmental Law.

This Volume begins by introducing the definitional dilemma sustainable development poses and how the concept evolved to the state it is in.[5] Whatever else sustainable development may mean, it must mean that in every development decision policy-makers must be accountable for the environmental externalities imposed on others by the decision. My article proposes an analytical framework within which to measure whether legal structures are consistent with this definition and applies this evaluative mechanism to the law thought to be the most "sustainable," the National Environmental Protection Act (NEPA). The article demonstrates how NEPA "has become a worldwide public relations vehicle to paint decisions that significantly affect the environment as sustainable, when nothing could be further from the truth"[6] and then proposes how NEPA could be modified so that it, in fact, promotes sustainable development. Jeff Lewin's thoughtful response[7] later in Volume III considers whether my proposal should be understood as an accountability model instead of a full internalization model of sustainable development law. Prof. Lewin suggests that these two models are compatible and should be combined into "a program of comprehensive cost internalization."[8]

J.B. Ruhl began the first session of the Symposium, which focused on sustainable development and land use law, by taking on the bete noire of modern America - suburban sprawl. In *Taming the Suburban Amoeba in the Ecosystem Age: Some Dos and Don'ts*,[9] Ruhl suggests ten principles for "the difficult task of designing law and policy to manage" the conflicting forces of explosive demographic growth in our suburbs and the need for regional ecosystem protection that is biologically sustainable. His tenth principle, "Share the Costs and Benefits Broadly Throughout the Community,"[10] is the springboard for Florence Wagman Roisman's original, thought-provoking contribution to both the sustainable development and race/urban development literature, *Sustainable Development in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*.[11] Roisman's keen and passionate analysis demonstrates, first, that "the 'sustainability' of suburbs is inextricably linked to the 'sustainability' of the cities to which they append" and, second, that racial, ethnic, and economic residential integration in suburbs and cities is essential to

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5. David R. Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 WIDENER L. SYMP. J. 1 (1998).

6. *Id.* at 8.

7. Jeff L. Lewin, *Which Externalities Should We Internalize?* 3 WIDENER L. SYMP. J. 327 (1998).

8. *Id.* at 346.

9. 3 WIDENER L. SYMP. J. 61 (1998).

10. *Id.* at 85.

11. 3 WIDENER L. SYMP. J. 87 (1998).

'sustainability.'[12] Prof. Roisman argues that to achieve sustainable development will require a paradigm shift in the attitudes and legal structures that define our urban environments.

G. Gordon Davis describes attempts to translate sustainable development into a region's land use scheme to protect and manage growth in the vast, ecologically important Lake Baikal Watershed.[13] The article describes the effort to marry the American principles of land use planning developed in the Adirondacks to sustainable development, and the immense difficulty presented both in making this marriage and applying the concepts to a foreign cultural and legal system, completely unversed in land use planning law. Davis' fascinating account teaches the painful cross-cultural lesson that "to achieve actual impact on policies and to accomplish affirmative sustainable development results in the real world, results that will survive after the project has ended, the first objective must be to create a local constituency for sustainable development planning that is knowledgeable of the techniques and fully invested in the process.[14] It is a remarkable story of enthusiasm and frustration, that teaches crucial lessons for achieving sustainable development.

Jim May's response, *Of Development, da Vinci and Domestic Legislation: The Prospects for Sustainable Development in Asia and its Untapped Potential in the United States*,[15] uses Gordon Davis' reflection on watershed planning in Lake Baikal as an opportunity to examine whether American law promotes sustainable watershed policies. May suggests that integrating the water quality provisions of the Clean Water Act and the ecological species protection mandate of the Endangered Species Act can advance us towards the goal of sustainable use of our nation's water.

The symposium then considers how the structure of our legal systems affect sustainable development. David C. Esty suggests that the cooperative federalism built into our environmental laws can either promote or obstruct the sustainability of our environmental decision making.[16] Professor Esty powerfully argues that in a large, complex world, with diverse environmental problems, sustainability cannot be achieved unless legal decision-making structures correspond in scale, from local, state, regional, federal to international levels, to the nature of the problems.

Dean Suaguee agrees with Professor Esty's thesis, but responds that Professor Esty ignores the actual and potential contribution of Indian tribal

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12. *Id.*

13. G. Gordon Davis, *Land Use Planning in Furtherance of Sustainable Development in Asia*, 3 WIDENER L. SYMP. J. 119 (1998).

14. *Id.* at 157.

15. 3 WIDENER L. SYMP. J. 197 (1998).

16. David C. Esty, *Substantial Development and Environmental Federalism*, 3 WIDENER L. SYMP. J. 213 (1998).

governments within our federal system.[17] Professor Suaguee invokes us to consider that federalism requires a sense of national community, something about which tribal communities have much to teach: "the environmental stewardship reflected in tribal cultural values could help all levels of governmental entities reach decisions that are more environmentally sustainable."[18]

Professor Nicholas A. Robinson expanded on this theme of examining legal structures by considering the importance of comparative international environmental law to sustained development.[19] To Professor Robinson, environmental law, evaluated across nations through the techniques of comparative law, is both a foundation for sustainable development in terms of *Agenda 21* and an indicator of the success or failure of a nation's measures to attain or maintain sustainable development. Professor Robinson argues that we must learn how to find and compare environmental laws so we can measure the potential of legal systems to advance sustainable development. John Dernbach's commentary[20] on Professor Robinson's article reminds us that environmental law is the starting point of any discussion about sustainable development. Sustainable development, with its concern for intergenerational equity and social development, requires that environmental, social and economic issues be simultaneously addressed by law. Thus, Professor Dernbach urges that we extend our comparative law study beyond environmental law to "sustainable development law"[21] so that we can learn from each other as to how we can achieve a law of sustainable development.

The Symposium then examines how law can link environmental and economic policy to forge a new sustainable world economy. Alan Miller begins by addressing the reality of the new world economy, in which private foreign investment in developing countries is outpacing government supported foreign aid.[22] He describes how after the fall of communism, the United States reduced its development foreign aid dramatically, while the percentage of the world economy resulting from private trade has expanded just as rapidly. However, while the developed countries—the world's major polluters—now have an environmental conscience, the developing countries resist expensive environmental prophylactics without economic assistance

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17. Dean B. Suaguee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability*, 3 WIDENER L. SYMP. J. 229 (1998).

18. *Id.* at 245.

19. Nicholas A. Robinson, *Comparative Environmental Law Perspectives on Legal Regimes For Substantial Development*, 3 WIDENER L. SYMP. J. 247 (1998).

20. John C. Dernbach, *Reflections on Comparative Law, Environmental Law, and Sustainability*, 3 WIDENER L. SYMP. J. 279 (1998).

21. *Id.* at 285.

22. Alan Miller, *Environmental Policy in the New World Economy*, 3 WIDENER L. SYMP. J. 287 (1998).

from the industrialized world. This assistance, not forthcoming as aid, can come from the private sector through a variety of emerging measures, such as international environmental standards, business performance standards, such as ISO 14001, joint implementation of the Climate Change Convention, green taxes, fiscal policies, government procurement policies and other methods that can harness the power of world trade.

Professor Andrew Strauss follows up on Alan Miller's analysis of the changing world economy by focusing on the potential of harnessing the World Trade Organization's emerging institutional prominence to integrate world trade with environmental concerns.[23] In particular, Professor Strauss argues that when international environmental agreements are negotiated the agreements should be structured to "take advantage of the WTO's unique negotiating and compliance machinery."[24] To Professor Strauss, the presence of the WTO means that "the real question . . . is not whether WTO practices must . . . be coordinated with environmental policies, but rather the relative role the WTO will play in creating and administering environmental policy."[25]

Finally, the symposium explores the practical implications of linking climate change mitigation to trade. Laura Kosloff reviews the idea of using market mechanisms to mitigate climate change under the Climate Change Convention.[26] In particular, she traces the evolution of a regime to mitigate climate change and the impact such a regime might have on developing countries and sustainable development. In doing this she highlights the critical role of the private sector in mitigating public harm from climate change. Donald M. Goldberg and Glenn M. Wiser, while agreeing that a public/private partnership is vital to mitigate climate change, focus on the need for independent verification and evaluation of mitigation projects to insure that the climate change benefits promised by the projects in fact are realized.[27] Without a legal regime that can verify project success and qualify mitigation credits, the development of global trading to combat climate change will be severely hobbled.

This Volume also contains the transcript of key portions of the Twenty Fifth Annual Spring Conference On The Environment of the American Bar Association's Standing Committee on Environmental Law, *Sustainable Development in the Americas: The Emerging Role of the Private Sector*, which

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23. Andrew L. Strauss, *The Case For Utilizing The World Trade Organization As A Forum for Global Environmental Regulations*, 3 WIDENER L. SYMP. J. 309 (1998).

24. *Id.* at 326.

25. *Id.*

26. Laura H. Kosloff, *Linking Climate Change Mitigation With Sustainable Development: A Status Report*, 3 WIDENER L. SYMP. J. 351 (1998).

27. Donald M. Goldberg and Glenn M. Wiser, *Rethinking the JI Pilot Phase: A Call for Independent Evaluation and a Legal Framework*, 3 WIDENER L. SYMP. J. 387 (1998).

focused entirely on the role of lawyers in advancing sustainable development. The materials contain the opening keynote address by Kathleen A. McGinty,[28] Chair of the White House Council on Environmental Quality, the insights of experts on financing sustainable development,[29] and the closing keynote address of Jonathan Lash, Co-Chair of the President's Council on Sustainable Development and President, World Resources Institute.[30]

28. 3 WIDENER L. SYMP. J. 427 (1998).
29. *Id.* at 435.
30. 3 WIDENER L. SYMP. J. 461 (1998).