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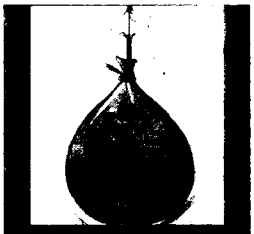
Why Lawyers Should Care

John C. Dernbach



COVER STORY

Why Lawyers Should Care

Sustainable development — the subject of the upcoming Johannesburg summit — redefines progress to include environmental protection. Domestically, it provides the United States with a wonderful opportunity to comprehensively address its environmental problems through better legal mechanisms while laying the groundwork for economic and social progress in the coming decades

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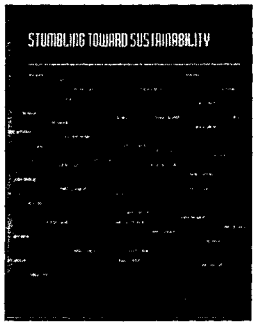

ELI's book prepared for the World Summit on Sustainable Development, "Stumbling Toward Sustainability," is a comprehensive review of U.S. efforts to achieve sustainable development since Rio. It brings together 42 distinguished experts from a variety of backgrounds and academic disciplines. It is among the most thorough assessments ever conducted of U.S. law and policy concerning the environment.

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Despite endless discussions of reform and reinvention, and some progress here and there, the environmental debate in the United States has not moved far from where it was a decade ago, when the U.N. Conference on Environment and Development was held in Rio de Janeiro. Using an old and shopworn script, Congress and the president argue the merits of more environmental regulation versus less environmental regulation, ignoring the lessons and ideas of the Earth Summit, the experience and ideas of other countries in the years since, and even the experience of U.S. states and municipalities.

The United States has unquestionably begun to take some steps toward sustainable development. In fact, those who see sustainable development as including prior and ongoing efforts, such as conservation and pollution control, could rightly say that the 1990s saw a continuation, and in many respects improvement, of activities that began before the Earth Summit. However, looking back from the threshold of "Rio Plus Ten" — the upcoming World Summit on Sustainable Development in Johannesburg, South Africa — the United States is now far from being a sustainable society, and in many if not most respects is farther away than it was in 1992. That is doubly unfortunate, because global sustainability requires a sustainable America.

These are the main assessments contained in *Stumbling Toward Sustainability*, which has just been published by the Environmental Law Institute. The book, which I edited, looks at U.S. efforts to achieve sustainable development in the decade since the Earth Summit. The chapters focus on a wide range of issues, including energy, forestry, agriculture, fresh water, right to know, toxic chemicals, municipal waste, international trade, official development assistance, higher education, public health and medical care, business and industry, and governance. The book's 42 contributors are leading minds at universities and law schools from around the country, nongovernmental organizations, the private sector, and state government.

As the authors make clear, tomorrow's environmental problems are not limited to air pollution, water pollution, waste, and other issues for which the United States has a well-developed body of law. The problems also include consumption of energy and materials, biodiversity, climate change, and public health, to name just a few. These problems are not just domestic, or even primarily so. They will exist and grow even if we choose to ignore them. They are already impinging on our environment *and* on our economic development. Thus they are profoundly important to the United States.

And to U.S. environmental lawyers. Unfortunately, environmental lawyers tend to see sustainable development either as synonymous with environmental law (and thus not needing special attention) or as utterly different. Both views contain a grain of truth. Environmental laws in the United States have helped us move toward sustainable development. But if we take sustainable development seriously, it will wholly transform our environmental laws. As we continue to discuss reinvention of environmental regulation, we can refight yesterday's wars with yesterday's weapons and strategies, or we can try to understand tomorrow's challenges and prepare accordingly. Sustainable development *is* reinvention, but one aimed at the most important, overarching goals — a healthy, prosperous people within a healthy, thriving ecosystem — rather than mostly dis-

crete sets of process improvements and localized environmental results.

Further, environmental lawyers in this country tend to see sustainable development as mostly for other countries, and mostly the poorest — one of those policy things that are always being put out by international bodies, and which can be safely ignored because it is not a regulatory or legal imperative. And, to the extent that it is followed closely in the United States, sustainable development manages the unusual feat of being disdained by large segments at both ends of the political spectrum. Many in business see it in the same light as they view the anti-globalization movement, as an unwarranted fetter on industrial progress and profits. And many in the environmental community see it as greenwash, as a term coopted by business to inoculate growth from environmental concerns.

Those views could not be more profoundly wrongheaded. This article aims to persuade the U.S. environmental law profession that sustainable development is important to them, in their various roles as advocates, counselors, and citizens.

That's because it's important to their clients or businesses or causes or communities. As federal, state, and local governments move to sustainable development, they will need the guidance of the legal profession in the fundamental law reform that is required, including not only better environmental statutes but also the widespread adoption of new legal instruments such as economic tools, tax laws, property laws, and land use and planning authorities — a system that sets overall environmental quality as a goal and looks at it systematically and holistically, viewing entire watersheds and other ecosystems, for instance, and the entire lifecycle consequences of basic human activities such as manufacturing and energy. Corporations will need the service of counsel to embrace the new, more comprehensive system of regulation, incentives, and contracts, including implications for compliance and liability, as well as opportunities for profit. For companies doing business overseas, this will be true no matter what the U.S. response to Johannesburg. And citizens organizations will need the best possible lawyering to ensure that implementation protects the public interest.

We tend to see sustainable development either as synonymous with environmental law or utterly different

And environmental lawyers should care because it's important to the future of America. Sustainable development is squarely within the U.S. national interest, as traditionally defined — in our economic interest, in our social interest, in our security interest. Why? The United States is by far the world's largest consumer of energy and materials, and the world's largest polluter, so it is impossible to achieve sustainable development on a global basis without U.S. participation in a broad international effort, including implementation across American society. In turn, U.S. economic health depends on foreign resources and foreign markets, including, importantly, those in the poorer countries. Further, national security requires stable countries and regions, and long-term stability requires sustainability. And, finally, committing to sustainable development in the United States lets us to rethink how we do environmental protection, allowing us to get it right this time.

Although many disciplines and tools are needed for sustainable development, lawyers and laws are essential. This article does not set out how sustainable development will impact legal practice and how lawyers can help achieve it, beyond the description just given. Rather, it attempts to persuade the profession that lawyers should care deeply about the issue. Given the threat to our nation and our planet, however, sustainable development may require more than participation by attorneys; it may imply a new professional duty.

The World Summit on Sustainable Development in Johannesburg, scheduled for August 26 through September 4, gives the United States and other countries an opportunity to take stock of what has happened in the past 10 years, and to think about how to proceed in the next 10 years and beyond. At the 1992 Earth Summit, the United States and the rest of the world's nations endorsed

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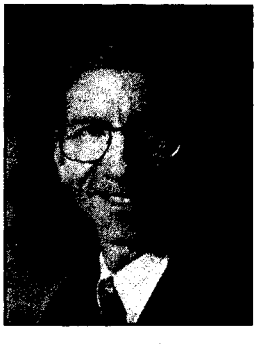

an international plan of action for implementing sustainable development, called Agenda 21, and a set of 27 principles for sustainable development, called the Rio Declaration. The idea was that each nation would implement the action plan at home and in its international activities. But in the last decade in the United States, progress toward sustainable development has been limited by at least four factors. These factors have made many if not most U.S. environmental lawyers uncomfortable with the concept and its implementation:

- A sense that sustainable development is at odds with basic American values, primarily due to uncertainty or confusion about its meaning in the context of American language and culture;
- An assumption that the environment and sustainable development are outside the realm of moral or religious concern;
- A sense that sustainable development is impossible and thus a diversion from more pressing tasks; and
- A belief that sustainable development is primarily if not exclusively for other countries — developing countries.

This article will take up each of these problems in turn.

But, briefly, sustainable development has a reasonably definite meaning. Sustainable development is ecologically sustainable *human* development; it includes but is not limited to economic development, the traditional way development has been understood in the United States. Sustainable development is more than a new term for protecting the environment; it is a framework for integrating environmental protection and restoration with human development, and ensuring that both are realized at the same time.

Sustainable development responds to a situation that is both different and more threatening than that which policymakers saw when modern U.S. environmental law was adopted in the 1970s and 1980s. This situation, fueled by massive and growing environmental degradation around the world and a growing gap between rich and poor, cannot continue much longer. Sustainable development *may* be impossible, but the continuation of this unsustainable development *is* impossible.

Sustainable development also raises issues that are critically important to the United States, including this country's massive consumption of materials and energy, its trade and foreign assistance policies, land use, and even the way that laws and governance address environment and natural resources. It embraces many significant pieces of the current debate about regulatory reform, but also many others that have not been central to that debate — and really need to be. But more significantly, perhaps, it would change the focus of that debate from means and procedures to ends and outcomes.

Sustainable development does not fit traditional categories for environmental politics in the United States. It is neither left nor right, liberal nor conservative, Democratic nor Republican. It is also not primarily environmentalist or primarily business-oriented. Among other things, sustainable development is premised on the importance of private efforts and the removal of subsidies — two themes that are consistently emphasized by the right. But it is also premised on an ambitious and broad set of environmental goals and a desire to eradicate large-scale poverty — two themes that are consistently emphasized by the left. Sustainable development could — and should — become the bipartisan framework within which these issues are addressed.

U.S. lawyers tend to see sustainable development as mostly for other countries, and mostly the poorest

The path to sustainability is not an easy one, because we have little if any experience with modern societies that are ecologically sustainable. Still, as *Stumbling Toward Sustainability*'s contributors make clear, legal and policy tools are available to put the United States on a direct path to sustainability, to our great advantage and without major dislocations.

Sustainable development, or ecologically sustainable human development, is consistent with American goals and values.

American values include freedom, opportunity, and quality of life; a desire to make a better world for those who follow us; more effective and responsive governance; greater efficiency; a willingness to find and exploit opportunities; a quest for a safer world; and a sense of calling to play a constructive, leadership role in international affairs. These are also the values of sustainable development.

This alignment of values has been unclear to Americans because of the definitional issue. The marriage of "sustainable" with "development" is particularly problematic for

many, because development has usually been understood to require the destruction of natural features such as forests and fields. Development, in other words, is seen solely as economic development rather than human development. Further, some critics refer to hundreds or even thousands of definitions that have been offered, and use the variety of these definitions as a way of suggesting that sustainable development has no core meaning. The Rio agreements also lack the rhetorical power of the historic texts Americans see as embodying their values.

Although not particularly eloquent, the Rio agreements do provide a reasonably clear statement of what sustainable development means. Agenda 21 says national governments should ensure "socially responsible economic development" while protecting "the resource base and the environment for the benefit of future generations." In 1997, at the five-year review of progress since Rio, countries agreed that "economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development." These, as the Rio Declaration states, all depend on peace and security. It is this definition that represents the agreed international understanding of sustainable development, which is now embodied in a host of international environmental accords.

But sustainable development is more than a definition. Since the end of the Second World War, the United States and most of the world community have successfully sought economic development as well as social development (or human rights) and greater peace and security. They have also sought national governance that supports these goals, even though they recognize that international efforts are also needed. As understood internationally, *these* are the elements of development — *human development*. This understanding of development grew out of the experiences of the last world war and the Great Depression that preceded and contributed to it, and a firm desire to ensure that the conditions that led to them would not occur again. Put differently, development is improvement in freedom, opportunity, and quality of life.

This definition is also the way Americans have defined and measured progress for more than half a century. And there has been a great deal of progress. The world is more free, there is more opportunity, and most humans have a higher quality of life now than they did in 1945. But until recently, protecting and restoring the environment was not among these goals. Indeed, achieving these other goals was considered to outweigh or even justify any environmental degradation that occurred.

As the World Commission on Environment and Development, chaired by Norwegian Prime Minister Gro Harlem Brundtland, concluded in 1987, progress in the past half century has come with a price we cannot ignore and can no longer afford, for it threatens to reverse progress: massive and growing environmental degradation, and a growing gap between rich and poor. Every major international and regional report on the condition of the environment shows continuing and deteriorating environmental conditions. At the same time, the total number of people in poverty has decreased only slightly since Rio. When nations of the world endorsed sustainable development in 1992, they redefined progress to include environmental protection and restoration.

Sustainable development may require more than participation by lawyers; it may imply a new professional duty

Poverty and environmental degradation undermine and hinder traditional methods of economic and social development. They also are mutually reinforcing. Deforestation and over fishing mean that many people and businesses can no longer earn a livelihood. Pollution impairs human health and thus human betterment. Poor people often live or work in the most polluted or degraded environments, thus worsening their poverty. These and other problems are profoundly destabilizing because they mean less freedom and opportunity and lower quality of life. Although poverty and environmental degradation are important in their own right, they also can cause or contribute to wars, starvation, ethnic tensions, and terrorism, which are more likely to get headlines than their underlying causes.

The pressures caused by poverty and environmental degradation are likely to increase in the next half-century. Global population is expected to grow from roughly 6 to 9 billion — an increase of 50 percent — by 2050. The global economy is likely to grow by a factor of three to five in the same period. As difficult and challenging as things now appear, they are likely to become much, much harder in the decades ahead if we stay on our present course. Sustainable development is thus about future generations as well as the present one. The Brundtland Commis-

sion report, *Our Common Future*, puts intergenerational equity at the center of its widely cited definition of sustainable development: "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

Despite the Brundtland definition and its more explicit formulation in the Rio agreements, many environmentalists from the United States and other developed countries see environment as the junior partner in sustainable development. And the reaction of many corporations to sustainable development — often describing token environmental actions as evidencing sustainable development — lends support to claims of corporate greenwash. At the same time, many in developing countries see sustainable development as a new form of developed country imperialism, and worry that the environmental effects of developed country consumption will limit their ability to meet the basic needs of their own people. But neither environmental tokenism nor environmental imperialism is sustainable development.

Sustainable development will create economic opportunities in the United States — a very American value ...

The agreed international understanding of sustainable development, as embodying the values we seek as part and parcel to our national being and purpose, suggests many reasons that Americans should support and work for it. The United States sought independence to achieve greater opportunity and higher quality of life for its citizens, established a legal and economic system premised on their importance, endured a civil war to protect that system and expand its opportunities to others, and fought two world wars and numerous other conflicts to protect ourselves and help make those same opportunities available to others. By addressing the destabilizing effects of poverty and environmental degradation around the world, sustainable development would help provide those opportunities and thus make life more secure in the United States and other countries. That has special meaning for both ourselves and others, particularly after September 11.

Americans also pride ourselves on providing our descendants greater opportunities and a better quality of life. Indeed, the Constitution's preamble is directed at "ourselves *and* our posterity." We understand that freedom, opportunity, and improved quality of life exist only if they are possible for those who will later inhabit our country. On health care, education, retirement security, and the national debt, among other issues, we repeatedly (if not always successfully) recognize the need to protect future generations.

Sustainable development would lead to a stronger and more efficient America because our government would be pursuing social, economic, environmental, and security goals in ways that are more mutually reinforcing or supportive over time. The result would be a country that provides its citizens and their descendants increasingly more opportunities in a high-quality natural environment.

Finally, sustainable development would create significant economic opportunities for U.S. business — a *very* American value. An aggressive domestic effort on behalf of energy efficiency, energy conservation, and renewable energy, for instance, would attract considerable investment capital, talent, and experience. In the U.S. market, that would likely foster the kind of continual improvement — in quality and reduced costs — that would make this technology and know-how more competitive, both in the United States and internationally. We know this, because the United States already exports pollution control and hazardous site cleanup technologies and skills that were developed because of its environmental laws. In the not-too-distant future, when these technologies become much more competitive, countries and companies that have been thinking ahead will benefit enormously. In these and other ways, sustainable development is not just a challenge; it is also an opportunity.

Sustainable development has a profound moral and even religious foundation.

Americans tend to see the environment as separate from themselves, and to see their moral or ethical responsibilities primarily in terms of their relationships with other people. Thus, the environment and sustainable development are not particularly relevant to their individual or social obligations. But that view is mistaken and dangerous, and there are signs that it is changing.

The idea that environmental degradation is connected to everything else we care about leads to an important moral insight: virtually everything that harms the environment also harms other people. Air pollution dam-

ages human health. Deforestation hurts people who use or depend on the forest, from indigenous people to hikers to people living downstream who experience greater flooding. Similarly, intergenerational equity is not just something we desire for our children and grandchildren; it is part of our moral obligation to others.

The sacred texts and beliefs of the world's religions are also supportive of sustainable development, according to theologian Dieter Hessel, even if that has not always been true of their practices. Buddha taught respect for all life. Native American religious beliefs recognize the connectedness of all life. The Jewish and Christian traditions teach that God made the world, that God declared creation to be good, that the earth belongs to God, and that humans are to exercise stewardship or dominion (not domination) over creation. Professors Mary Evelyn Tucker and John Grim of Bucknell University are leading an international project to clarify and emphasize the environmental aspects of the teachings of the world's major religions.

Another effort has led to the Earth Charter, a statement of moral or ethical principles broadly supportive of sustainable development. Representatives of all major religions participated in the drafting of the Earth Charter. Proponents liken the Earth Charter to the Universal Declaration of Human Rights, a statement of human rights principles the U.N. General Assembly adopted in 1949. The Universal Declaration provided the moral foundation for major human rights treaties that were subsequently negotiated and put into force. To clarify and strengthen the moral or ethical basis for sustainable development, proponents thus hope to have the General Assembly endorse the Earth Charter.

Of course, the texts and beliefs of each of the world's major religions also teach responsibility toward other humans. For the faithful, these teachings give religious significance to moral or ethical responsibilities to other people.

Americans see themselves as a moral and religious people, according to polls, and they are beginning to see how the environment fits into their views and beliefs. In 1995, for instance, evangelical Christians, who are ordinarily associated with Republican causes, helped defeat a proposal by Republicans in the U.S. House of Representatives to weaken the Endangered Species Act. If Americans continue to make the connections, the moral and religious premises for sustainable development will have increased political significance.

Necessity is the mother of invention, and therefore sustainable development is possible.

Many argue that sustainable development is impossible — that environment and traditional development cannot be reconciled. They may be right. Redefining progress is no small thing, and most people still tend to see environmental degradation as the necessary price of progress. Most of our technologies and institutions are consistent with that view.

... And without it, we cannot have true security. Sustainable development is in the national interest

But if sustainable development is daunting, continued unsustainable development is impossible. In his environmental history of the 20th century, Georgetown University Professor J.R. McNeill found large and almost certainly unsustainable changes in the pressure humans put on the earth between the 1890s and 1990s. World population grew by a factor of 4, the world economy by a factor of 14, energy use by a factor of 16, and industrial output by a factor of 40. Atmospheric lead emissions became 8 times greater, sulfur dioxide emissions 13 times greater, and carbon dioxide emissions 17 times greater. In the same period cropland increased by a factor of 2, water use by a factor of 9, and marine fish catch by a factor of 35.

Humans will not be able to add pressure to the earth in the 21st century in the same way that they did in the 20th. Yet that is the trajectory we are on. By 2025, according to a U.N. report prepared for the Johannesburg summit, "as much as two-thirds of the world's population could live in countries with moderate or severe water stress." Three-fourths of the world's marine fisheries are already fished to capacity or overfished. Deforestation and the destruction of coral reefs continue at an alarming rate. Greenhouse gas emissions and energy consumption continue to increase. McNeill expects "formidable ecological and societal problems in the future." While he doesn't predict the form these problems will take, "it is easier to predict who will have the worst of it. The poor and powerless cannot shield themselves from ecological problems today, nor will they be able to in the future." Wholly apart from environmental consequences, again, current trends are a recipe for global instability.

Fortunately, there is evidence that sustainable development is possible. U.S. conservation and environmental law provides some of it. The Adirondack reserve in upstate New York was set aside in the late nineteenth century to ensure an adequate and continuing supply of water in the Hudson River and Erie Canal. Proponents recognized that deforestation and traditional development was compromising the availability of water, including its availability to the city of New York.

Our air is clearer, our fresh water is cleaner, and hazardous waste is managed much more safely than it was in 1970, even while our economy has been growing and more jobs were being created. A 2002 report by the Organization for Economic Cooperation and Development identified a number of environmental variables that have declined among developed countries even as their economies have grown, including sulfur dioxide emissions. Using evidence from many countries, the report concluded that further "decoupling" of environmental pressures from economic growth is possible. Sustainable development requires us to build on these and other experiences. If we are capable of acting to address these problems based on enlightened self interest, necessity will make sustainable development possible.

It is premised on the importance of private efforts and removing subsidies — two themes important to the right ...

Sustainable development is for America, and not just for other countries.

According to Gary C. Bryner, the director of the Natural Resources Law Center at the University of Colorado, the soundbite that summarizes the U.S. response to Rio is "sorry, not our problem." After all, the United States is a developed country with a well-developed body of environmental law. It is other countries, the argument goes, that need both development and environmental protection.

This view has considerable support in the Rio agreements as well as the documents that pointed the way to Rio. U.S. conservation laws for soil, fish, wildlife, forests, and other resources helped provide the intellectual foundation for the 1980 World Conservation Strategy that first articulated sustainable development. Agenda 21 specifically endorses air quality, water quality, hazardous waste, and community right-to-know laws very much like those contained in U.S. law. Similarly, the Rio Declaration urges other countries to adopt a NEPA-like environmental impact assessment law.

But the Rio texts also demonstrate that there are large issues that the United States has yet to address. Many but not all of these issues are based on law and policy. These legal and policy issues are broader and different from those ordinarily raised by U.S. environmental and conservation law in several respects.

To begin with, sustainable development will require a greater range of legal instruments than environmental regulation. These include economic instruments, tax laws, laws relating to property, required public disclosure of information, and planning. That suggests more choices to solve problems as well as the need for additional professional skills, in part because most environmental lawyers are not also tax lawyers, land use lawyers, etc. Nor are they economists. Economic instruments, especially incentives, will be extremely important. Given the ambitious goals required to achieve sustainable development, traditional regulatory instruments by themselves will simply not be sufficient.

Another challenge is recognizing and addressing the fact that U.S. law and policy encourage unsustainable development in a variety of ways. Some of these are regulatory. These include subsidies, "grandfather" provisions for existing and more polluting facilities and activities in pollution control laws, and fragmented local decisionmaking that encourages sprawl. Such laws and policies, which could be described as "anti-environmental law" or "unsustainable development law," mean that individuals and corporations have fewer choices, and less sustainable choices, than they would otherwise.

In addition, sustainable development is likely to change the way we think about environmental protection. Many of our environmental laws are directed more at preventing bad things (e.g., extinction of species) than at achieving good things (ecosystem or biodiversity conservation). This damage control model slows down the rate at which things get worse, but it is not ultimately sustainable. Sustainable development would move laws and private activities toward environmental restoration. More generally, sustainable development would oblige us to imagine, work toward, and develop laws and policies to achieve the kind of future we want, rather than simply avoiding or preventing certain things we don't want.

Some of the most important specific challenges to U.S. environmental and conservation law are as follows:

Production and consumption of materials and energy. Energy and materials consumption grew substantially in the past decade, and reduced or outweighed many specific environmental achievements. As Agenda 21 observes, "The major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production, particularly in industrialized countries." With 5 percent of the world's population, the United States was at the time of the Earth Summit responsible for about 24 percent of the world's energy consumption and almost 30 percent of the world's raw materials consumption. Materials use in the United States has increased 10 percent since the Earth Summit, primary energy consumption has increased 21 percent, and energy-related carbon dioxide emissions have increased by 13 percent. Over and over, increases in materials and energy efficiency, and in the effectiveness of pollution controls for individual sources, were outweighed by increases in consumption. Despite a significant increase in municipal waste recycling in the past decade, for example, U.S. generation and disposal of municipal solid waste per capita has been growing since 1996. This level of consumption cannot be replicated by the rest of the world's population. According to Harvard biologist Edward O. Wilson, "four more planet Earths" would be needed for "every person in the world to reach present U.S. levels of consumption with existing technology."

And ironically, as other countries emulate U.S. consumption, they contribute to problems such as global warming that can also hurt the United States. Indeed, the United States is already experiencing severe effects from climate change. As a recent submission by the United States under the U.N. Framework Convention on Climate Change indicates, Alaska is America's ground zero for global warming. Average surface temperatures on the lower 48 states increased about one degree Fahrenheit over the past century; the average surface temperature increase in Alaska during the same period was almost three times greater. The effects, which are almost entirely negative, include the loss of at least 2.3 million acres of spruce forest on the Kenai Peninsula to beetles that were previously kept under control by colder weather, and the potential destabilization of the Trans-Alaska Pipeline from melting permafrost.

U.S. consumption is also contributing to adverse effects on other parts of the world. The United States is responsible for 30.3 percent of the carbon dioxide emitted into the world's atmosphere since 1900, according to the World Resources Institute. Historic and continuing U.S. emissions of greenhouse gases are likely to adversely affect others by contributing to rising sea levels and higher temperatures around the world, and also by contributing to flooding and droughts. This is not just a scientific certainty issue; it is also a political and legal issue. These events are destabilizing by themselves, but they are destabilizing in a different and more dangerous way if it can be plausibly said that the United States is the single largest contributor. Some legal scholars, including Professor Andrew Strauss of Widener University Law School, also believe the United States is exposed to substantial potential liability for the damage that global warming causes other nations. Their argument is based on the famous Trail Smelter case, in which an arbitral tribunal decided that Canada had to pay damages for harms caused in the United States by sulfur dioxide emissions from a private smelter operating in British Columbia.

... It is also premised on environmental goals and eradicating poverty — two themes important to the left

The United States needs to recognize that its substantial consumption levels, coupled with domestic population growth, have serious environmental, social, and economic impacts. Several legal and policy tools are available to address this issue. Perhaps the most widely discussed approach is a tax shift. A revenue-neutral shift in taxes from labor and income to materials and fossil fuel consumption would encourage labor and productivity while reducing resource consumption and resulting pollution. A 2001 report by the OECD surveyed the literature on the effectiveness of taxes in European countries and elsewhere on carbon dioxide, sulfur dioxide, nitrogen oxides, ozone depleting chemicals, and other substances, including countries that have also begun to introduce a tax shift. According to the OECD, the "available evidence shows that environmentally related taxes are often effective policy instruments to reduce pollution and waste and to create incentives for product shifts and resource conservation." Such a tax shift suggests an important insight into the consumption issue: to a significant degree, it is not consumption itself that it is the prob-

lem; it is the environmental and social effects of specific forms of consumption.

Another option is to encourage the development of new technologies and to retire existing technologies. This is not an area where environmental law has been particularly effective, despite its professed aims. In fact, U.S. environmental law has too often frozen existing technological capabilities at a particular point of time, making it difficult or at least pointless to subsequently improve technological performance of emission control systems. For energy conservation and renewable energy, however, there is a growing body of expertise and law on how to encourage the development and diffusion of new technologies into the marketplace, and when to let these technologies succeed or fail on their own after they have been introduced. These laws, which include tax credits as well as funding programs supported by utility customers, could be adapted to other situations or applied more broadly.

Still another option is to reduce subsidies for environmentally damaging activities. These subsidies exist in direct and indirect forms, at the federal, state, and local levels, for a variety of unsustainable efforts, including suburban sprawl, highway construction, and the use of fossil fuels. The most basic suggestion is to eliminate them. Congress has even done that for certain types of coastal development as well as certain activities that would adversely affect air quality in polluted urban areas. But as the recent farm bill demonstrates, subsidies are also a way of rewarding politically powerful constituencies, and thus are not likely to disappear quietly. Congress could take a middle course between the status quo and banning subsidies by treating them more like administrative regulations, which are subject to public disclosure and comment and are reviewed for their environmental and economic effects before they can be adopted. Economist Doug Koplow and I have suggested the creation of a public registry of basic information about subsidies, analogous to the Code of Federal Regulations, and required public disclosure and comment on their effects.

If we take sustainable development seriously, it will wholly transform our environmental laws ...

Governance. The Rio agreements assign national governments the primary responsibility for achieving sustainable development. These agreements also suggest that issues be dealt with at the lowest effective level of governance, which in the United States gives an important role to state and local governments.

On the surface, governance looks like a non-issue for the United States. In the negotiations leading up to the Johannesburg summit, the United States has been actively advocating good governance as an essential element of sustainable development. Good governance, the United States has been saying, involves public participation, an effective legal system, transparency, and the absence of corruption. But that's not enough for sustainable development. Because the United States is relatively strong in these areas, and has a relatively effective environmental law regime, the U.S. approach feeds into the notion that sustainable development is primarily for other countries.

At day's end, governance for sustainability means governance that integrates a country's security, economic, environmental, and social goals, and that treats those goals as having equal weight. That ultimately requires a national strategy, an effective means of developing and implementing it, and a set of indicators for measuring progress. This is different from good governance as traditionally understood, but it is essential to good governance in the 21st century.

A core problem with governance as usual, as the Rio agreements emphasize, is that these goals are each pursued by separate departments or agencies, and often in ways that contradict the others. Ensuring that these goals are mutually supportive would require, for instance, that the government not subsidize with one hand what it restricts on the other.

Integrated decisionmaking is a core element of good governance because it means more coherent and effective governance. It may even be less costly governance, because governmental funding would not be needed to compensate or pay for the cleanup of problems that the government itself has created, either directly or through misregulation of the private sector. This type of integrated decisionmaking would also require more public involvement in many decisionmaking processes because public input is more likely to ensure that these goals are harmonized.

But 10 years after Rio, the United States has no national strategy for achieving sustainable development, and no generally accepted indicators to mark progress along the way. Nor does the United States have a meaningful or effective strategy to address climate change, biodiversity, and many other issues.

Neither the executive branch nor Congress systematically analyzes proposed activities to find ways to make significant progress on economic, environmental, social, and security goals at the same time. The President's Council on Sustainable Development made recommendations during the Clinton administration, but there was little executive-level implementation of these recommendations and the council no longer exists.

A national strategy for sustainable development would harness all sectors of society to achieve our economic, social, environmental, and security goals. The strategy could be modeled on that of the European Union and several U.S. states. An executive-level entity would be needed to coordinate and assist in the implementation of the strategy. A counterpart entity in Congress would also be helpful. The strategy would more likely be effective if there was a set of indicators to measure progress in achieving its goals. States such as Minnesota, New Jersey, and Oregon are already implementing sustainable development strategies and using indicators to measure their progress. New Jersey's strategy was initiated under the leadership of then Governor Christine Todd Whitman.

The United States already has legal authority for such a strategy at the federal level, thanks in part to the Government Performance and Results Act of 1993. GPRA obligates federal agencies to develop and implement multi-year strategic plans, to establish specific performance goals and performance indicators showing progress in achieving them, and to report annually on their progress in meeting these goals under the plans. The National Environmental Policy Act, moreover, declares the "continuing policy of the federal government" to "create and maintain conditions under which man and nature can exist in productive harmony, and to fulfill the social, economic, and other requirements of present and future generations of Americans." The U.S. government can use these statutes to ensure that these agency strategies consistently and progressively foster sustainable development. Some agencies, such as the Forest Service, are already expressly using GPRA for that purpose. As ELI Senior Attorney James McElfish and others have argued, the president should use this legal authority to issue an executive order requiring all federal agencies to develop and implement sustainable development strategies.

International leadership. In a few areas, the United States has played a significant and constructive international leadership role. These include the protection of high seas fisheries, the prevention of lead poisoning, integration of environmental considerations into trade agreements, and incorporation of environmental impact reviews and public participation in World Bank projects. But on balance the United States has not exercised the kind of international leadership necessary to encourage or support sustainable development around the world. The United States is not a party to many treaties and international agreements that are intended to foster sustainable development in specific contexts, including the Convention on Biological Diversity, the Kyoto Protocol to the Climate Convention, the Cartagena Protocol on Biosafety, the Aarhus Convention on Access to Information, the Rotterdam Convention on Prior Informed Consent, the Stockholm Convention on Persistent Organic Pollutants, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes. Current patterns of international trade cause environmental harm and impair sustainable development in part because U.S. trade policy tends to put short-term domestic economic goals ahead of sustainable development. U.S. official development assistance has declined since Rio; measured as a percentage of gross domestic income, it is the lowest of all industrialized countries.

... Sustainable development is reinvention, but one aimed at the most important, overarching goals

International efforts, moreover, are not simply about what we do in other countries. For better and for worse, U.S. domestic activities are imitated throughout much of the world, including many activities that are not sustainable. U.S. domestic actions that make significant progress toward sustainable development would encourage or nudge other countries to make significant progress. In fact, our domestic actions may have more significant international consequences than our foreign policy. The failure of the United States to take domestic actions is understood by countries with fewer resources as an excuse to do little or nothing.

The United States has benefitted greatly from international trade and globalization. Yet critics of globalization claim that economic benefits of trade are unequally distributed, and that economic growth is often accompanied by social problems and environmental degradation. Since the breakdown of trade talks in Seattle in 1999, it has been clear

that further progress in reducing trade barriers will not be possible unless these issues are addressed. In other words, further globalization may depend on further progress in global sustainable development.

Sustainable development is consistent with the "special role" of the United States in international affairs. This country has always seen itself as unique in international matters, although for different reasons at different times. At least two are relevant now. Most obviously, we have the largest economy and the most powerful military in the world. We also have enormous capability to bring to bear in the pursuit of sustainable development, including financial resources, technological capability, and knowledge. Our special role means that our power and influence requires us to act responsibly and constructively. Even if we don't seem to think so, our allies and most other countries do.

Finally, our government agreed to Agenda 21 and the Rio Declaration at the Earth Summit. These documents are not legally binding, but it is in the national interest to honor political commitments. The United States has also ratified several treaties that are directly supportive of sustainable development, including the Climate Convention. Although the convention does not contain legally binding timetables, it does commit the parties to a multilateral process for achieving timetables, and commits developed countries to a leadership position in reducing emissions. The unilateral U.S. withdrawal from the Kyoto Protocol to the convention, however, is not consistent with a commitment to a multilateral process or to developed country leadership. It has also damaged our political credibility as well as the willingness of other countries to take action to reduce emissions.

The United States can play a leadership role in sustainable development, but it is not leading ...

It is often said that nations or individuals can lead, follow, or get out of the way. The United States is in an unparalleled position to play a key international leadership role in sustainable development, but the United States is not leading. The United States could instead permit the European Union, Japan, and other developed countries to play the leadership role, and follow their lead. That would be unpalatable to many, but it would be better than doing nothing. But the United States is not following either. Because of its dominant role in international affairs, however, the United States cannot simply get out of the way. If it does not lead or follow, it will continue to be an obstacle to international efforts to achieve sustainable development, and, because of the sheer size of its economy, an overwhelming one.

Social equity. Environmental justice became a prominent issue in the last 10 years, a development that brought environmental and social concerns closer together. While environmental justice was addressed in several presidential executive orders and other actions, the available social and institutional infrastructure and supports continue to cause environmental degradation and underserve the poor.

A sustainable transportation system, in Agenda 21's words, is "more efficient, less polluting, and safer." Yet the negative environmental impacts of transportation increased during the past decade, despite significant legislative changes. The cost and availability of automobile transportation is particularly a burden for the poor in areas that lack effective mass transit. "The first step," say Kaid Benfield and Michael Replogle of the Natural Resources Defense Council and Environmental Defense, respectively, "is to recognize clearly that travel choices available to most Americans have been sharply curtailed by past policies, from high subsidies to housing to tax polices and zoning laws, that have made it unattractive or impossible to choose more sustainable options." A next step, they add, is "to establish and work toward specific transportation goals, such as increased energy efficiency, equal access to jobs, and a safe walking route to school for each child."

Public health and medical health care remain problematic for major segments of the U.S. population. The U.S. sanitation system remains vulnerable to breakdowns and the level of communicable diseases is high when compared to other developed countries. Dollar for dollar, public health is the least expensive and most proactive approach to human health, yet the public health system is underfunded. In addition, over the last 10 years, according to Professor Ed Richards of Louisiana State University Law School, there has been no progress in improving access to medical care in the United States. Indeed, there are some indications that the quality of available care has diminished due to economic pressures.

Environmental and natural resources protection. Many Americans seem to believe that

the United States has largely accomplished its environmental mission, and that the rest is mostly a mopping-up operation. While U.S. environmental laws have achieved a great deal, there is still a long way to go.

As a whole, the condition of America's natural resources and ecosystems has not improved since Rio, and appears to have deteriorated slightly. There was no discernible improvement in our rivers, streams, and lakes, and the quality of our ocean coastal waters appears to have deteriorated. Greenhouse gas emissions increased. More than 1,200 U.S. species were listed as endangered in 2000 under the Endangered Species Act, and 66,000 were estimated to be at risk of extinction. Inorganic fertilizers, pesticides, and runoff from U.S. agriculture continue to impose significant costs on others. Urban sprawl continues relatively unabated despite some state and local efforts to bring it under control. Air quality improved slightly, but not enough to fully protect human health.

A major problem with the regulatory reinvention debate over the past decade has been its emphasis on means. Much is said about incentives, public information, risk, cost-benefit analysis, devolution of policy to states and local governments, management systems such as ISO 14001, and enforcement. Except for air and water quality, where standards define the goals toward which controls are directed, very little is said about the substantive goals toward which those environmental laws should be directed. We have few if any national goals for biodiversity, oceans and estuaries, and many other natural features. The European Union, by contrast, has set several environmental goals, including goals for establishing biodiversity indicators by 2003 and halting the loss of biodiversity by 2010. Goals such as these, and the public process required to credibly establish them, would go much farther toward clarifying and establishing what we are actually trying to achieve than endless wrangling about process alone.

Protection of natural resources and the environment should thus focus more holistically on the resources to be protected, and on understanding those resources. Congress and the states need to assure that these resources are protected from all significant threats, and are protected from those threats to the same degree. In addition, the type of substantive goals that exist in the air and water pollution control programs, as well as supportive implementing mechanisms, should be applied to biodiversity, climate change, oceans under U.S. jurisdiction, forests, and other natural resources. The United States also needs to fund or support the development of more complete and reliable information about ecosystems as well as about the connections between its economic, environmental, social, and security goals.

These issues — consumption, governance, international leadership, social equity, and environmental protection — are not the only major issues sustainable development raises for the United States. But they indicate that sustainable development will require more than fine tuning of our existing laws and policies.

... Or it can let the EU and Japan take the lead, but it is not following. And it is too big to get out of the way

Fortunately, a few people and organizations throughout the United States have already begun to exercise leadership for sustainability during the decade since Rio. A small number of federal agencies (such as the Fish and Wildlife Service and the Forest Service), state governments (especially Minnesota, New Jersey, and Oregon), local governments (including Austin, Chicago, and Burlington, Vermont), corporations (such as DuPont, Genencor International, and IBM), higher education institutions (including Georgia Institute of Technology, Middlebury College, and the State University of New York at Buffalo), and others have taken a leadership role in moving toward sustainable development. The leaders represent a minority position among their peers, and nearly all of these efforts contain room for improvement. Still, they provide more evidence that it is both possible and desirable to reconcile environmental, security, social, and economic goals. The United States would take a large and decisive step toward sustainability if individuals, businesses, educational institutions, local and state governments, federal agencies and others would simply adopt and build on the leading sustainability practices of their counterparts.

In the final analysis, the decisions Americans make about sustainable development are not technical decisions about peripheral matters, and they are not simply decisions about the environment. They are decisions about who we are, what we value, what kind of world we want to live in, and how we want to be remembered. And they are decisions that are central to America's future. •