

SUSTAINABLE DEVELOPMENT AND NATIONAL GOVERNANCE: THE CHALLENGES AHEAD

John C. Dernbach

Widener University Law School, USA

A. Dan Tarlock

Chicago-Kent College of Law, Illinois Institute of Technology, USA

Keywords : sustainable development, national governance, laws, national institutions

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Summary

In June 1992, at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, the nations of the world agreed to an ambitious and unprecedented global plan of action for addressing the related and growing problems of environmental degradation and poverty. "Humanity stands at a defining moment in history", they stated in Agenda 21, each committing itself to domestic implementation of the Agenda 21 program. Countries also agreed on twenty-seven principles, contained in the Rio Declaration on Environment and Development, to guide their efforts. Agenda 21 and the Rio Declaration embrace "sustainable development", a conceptual framework for achieving economic development that is socially equitable and protective of the natural resource base on which human activity depends. Sustainable development is a response to the deeply held view that environmental degradation is the small price we pay to achieve progress; the price is not small, however, and environmental degradation prevents or threatens social and economic progress. Because of UNCED, sustainable development is also an internationally recognized normative framework for guiding and evaluating the behavior of national governments and other actors.

Yet ten years later, in 2002, the World Summit on Sustainable Development concluded a comprehensive review of progress since UNCED by stating that the "global environment continues to suffer," and that the "ever-increasing gap between the developed and developing worlds poses a major threat to global prosperity, security, and stability." . Most countries were able to identify some domestic achievements, and there appeared to be a higher level of public support for sustainable development. In that ten-year period, however, few countries adopted or modified laws or policies to change the overall trajectory of their unsustainable development patterns.

A starting point for making progress in the United States and other countries, is recognition of the domestic implications of sustainable development. This Chapter synthesizes Agenda 21, the Rio Declaration, and other texts into a conceptual framework for national governance. It focuses on sustainable development as a framework for national governance because the primary texts do. The basic point of Agenda 21, after all, is action at the national level. Indeed, national governance was a major theme for the ten-year review of progress since Rio. Although it is not a complete theory for governance, sustainable development would modify both the purposes of national legal systems as well as their means of governance.

The international texts, such as Agenda 21, are important because they have focused international attention on sustainable development, have shaped the meaning of the concept, will continue to shape its meaning, and have begun to make it relevant to national and international decision-making. These texts also help answer many critics of sustainable development.

Second, this chapter argues that sustainable development provides a powerful and attractive set of tools for reinvigorating governance. Sustainable development is a pragmatic, coherent and positive response to deteriorating global conditions. It would make governance more economically efficient, more socially productive and more environmentally protective. As a framework for governance, sustainable development

also provides a response to many current trends that undermine the legitimacy and effectiveness of national governments in general, particularly globalization of the economy and the free market ideology that has become more prevalent since the collapse of the Soviet Union in 1989. Indeed, sustainable development provides an alternative to that ideology.

Finally, this chapter addresses a key unresolved legal and institutional issue with sustainable development. The ultimate test of a concept such as sustainable development, which is intended to have legal force and profound social and economic consequences, is whether it changes behavior at both the individual and institutional levels.

The implementation of sustainable development would require that all governance institutions, representative bodies, the laws that assign the rights and conditions for resource use and the agencies that implement them, must be restructured to encourage more “balanced” extraction, production and consumptive patterns. It will not be enough to put a “Save the Whales” sticker on a lumbering, gas-guzzling sport utility vehicle. The basic reason for the disconnect between sustainable development and governance institutions is that our current institutions are structured to encourage unsustainable resource use. They do this by providing deeply embedded incentives for immediate resource consumption that at best reflects a small percentage of the total social cost of consumption and offer few, if any, alternative incentives for exploitation and consumption which is more consistent with sustainable development. This is not to say that sustainable development cannot be achieved. But it does suggest that there are formidable institutional obstacles to its achievement.

This Chapter has three parts. Section 1 explains the relationship between traditional development and sustainable development. The basic governing principles for sustainable development are explained in Section 2. Section 3 explains what national governments would need to do to encourage and foster sustainable development, the daunting obstacles that exist, and the ways in which these obstacles can be overcome.

1. Sustainability and National Governance

Sustainable development would change the purposes of national governance as they have been understood in the postwar period to include protection of the environment and natural resources, and to preserve not only the environment but also existing social and economic attainments for future generations. In addition, sustainable development would result in greater equity within and among nations.

1.1. Old Model: Development

Development is often understood as a synonym for economic development or economic growth. Because sustainable development builds on and modifies the international approach to development, however, development needs to be understood more broadly. In the international community, development in the past half-century includes at least four related concepts: peace and security, economic development, social development and national governance that secures peace and development. Each concept is reflected

in major multilateral treaties that provide a common framework for relations among sovereign nations as well as a shared set of national purposes. These agreements, however, are virtually silent about environmental protection.

National sovereignty provides the basic context for international relations. The ability of states to govern themselves and make decisions based on their understanding of their own interests has been recognized in international law for centuries. The United Nations Charter recognizes national sovereignty by seeking to "develop friendly relations among nations" and by prohibiting the United Nations from intervening in matters that are "essentially within the domestic jurisdiction of any state". These four concepts, however, provide a framework within which that sovereignty is to be exercised.

The need for peace and security was the primary reason for formation of the United Nations at the end of World War II. The United Nations was created to "maintain international peace and security" through a variety of means. Member nations are obliged not to use, or threaten to use, force against the territorial integrity of other nations. The U.N. Security Council is expressly authorized to use economic sanctions, military force and other measures against "any threat to the peace, breach of the peace, or act of aggression." A substantial number of multilateral and bilateral treaties also limit the use of particular weapons and weapons systems.

Economic development is in many ways the most prominent component of development, and it represents a dominant policy goal of most governments. Several important financial institutions and international agreements were created in the postwar period to foster development, especially economic development. The International Bank for Reconstruction and Development, known as the World Bank, was created to rebuild war-damaged economies and to encourage development "in less developed countries" by providing low-interest loans, grants and other assistance. The 1947 General Agreement on Tariffs and Trade attempted to raise standards of living and develop the economies of member states by progressively removing barriers to trade. The U.N. Development Programme, the development arm of the United Nations, was created in 1965 by merging two development funds, one of which had been established shortly after the founding of the United Nations.

Social development is closely linked to human rights. The U.N. Charter commits the organization to promoting "higher standards of living, full employment, and conditions of economic and social progress and development". Two human rights treaties opened for signature in 1966 provide a more complete expression of, and commitment to, social development. The first, the International Covenant on Civil and Political Rights, includes such rights as freedom from torture and degrading punishment; the right of a person charged with an offense to be informed of the charge; "freedom of thought, conscience and religion"; the right to peaceful assembly; the right to vote in "genuine periodic elections", and the right to equality before the law regardless of race, religion, sex or other status. The other treaty, the International Covenant on Economic, Social and Cultural Rights, recognizes the right of each person to have, among other things: an opportunity for gainful employment; a decent standard of living, "including adequate food, clothing and housing"; the highest attainable standard of health; education; and an

opportunity to participate in cultural life. A variety of other treaties concerning these or related human rights have come into force, including many regional treaties.

These three components are closely related. Social and economic development are impossible in the absence of peace. Economic and social development are themselves interrelated. Countries that have emphasized education, health and related aspects of social development tend to have the best economic performance.

Social and economic development, as well as peace and security, require supportive national governance. Peaceful conditions cannot occur unless states behave in certain ways. Economic development requires nations to provide a stable legal and financial structure for investment and commerce. Because they contain obligations by states to protect rights, the two basic human rights covenants also reflect a particular philosophy about the means by which governmental power should be exercised and the purposes of national government. Parties to the International Covenant on Civil and Political Rights are obliged to treat persons according to certain rules, to adopt necessary laws and to provide effective remedies. Similarly, the International Covenant on Economic, Social and Cultural Rights requires each party, "to the maximum of its available resources", to take steps "with a view to achieving progressively the full realization of the rights" stated in the convention.

Perhaps the most direct international assertion about development before UNCED is found in the 1986 Declaration on the Right to Development, when the U.N. General Assembly recognized an "inalienable human right" to development. The Declaration describes development as a comprehensive process that involves political freedoms and "equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income". Each human being, the Declaration states, is "entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized". The claim of a right instead of a goal underscores the perceived centrality of development to human dignity and well-being.

The Declaration expressly refers to peace, economic development, social development and supportive national governance as the basic foundations for development. It recognizes that "international peace and security are essential" to development. In addition, it seeks "to promote more rapid development of developing countries", makes several references to economic development or economic rights, and encourages international cooperation for development, although it does not specifically refer to the economic treaties or the institutions they created. The Declaration also emphasizes the realization of human rights as a basic necessity for development, specifically identifying the two human rights covenants. Finally, it acknowledges that states have the primary responsibility for creating conditions favorable to development.

A major feature of this orientation to development has been developed countries' provision of financial and technical assistance to developing countries. Countries have provided this assistance through institutions such as the World Bank and the U.N. Development Programme as well as through direct assistance to individual countries.

Since 1970, the United Nations has suggested that developed countries aim for official development assistance in the amount of 0.7% of their gross national product.

1.2. Failure: Environmental Degradation and Poverty

The world's economy has grown with unprecedented speed since World War II, and most people have experienced a rise in their standard of living. Yet the traditional development model has foundered for two related reasons: growing poverty and a deteriorating global environment.

A growing number of people live in hunger and poverty, and the gap between rich and poor continues to widen. More than a third of the world's population lacks access to a safe water supply. Health risks from the degradation of natural resources and the improper use of chemicals also are increasing. At the beginning of the next century, about two thirds of the world's population will live in urban areas, and mostly without adequate housing and sanitation.

Unfortunately, the condition of the global environment is also deteriorating. Among other things, we face widespread and even accelerating extinction of plant and animal species, growing emissions of greenhouse gases into the atmosphere, the depletion of fish stocks in oceans throughout the world, loss of farmland and grazing land through overuse and poor practices, and growing and improper use of chemicals. In every region in the world, these conditions are deepening. Despite some positive efforts since UNCED, the state of the global environment has continued to deteriorate.

These are large—even overwhelming—problems, and they are getting worse. The world's growing population, which reached six billion in 1999, will probably be 8.9 billion by 2050. In the same period, the global economy will grow to between four and five times its present size. Although current problems are unlikely to become ten times worse by the middle of the twenty-first century, the basic direction in which conditions are heading is obvious. Even if consumption levels remain stable (which is doubtful), it will take an enormous effort to meet the needs of these additional people.

These problems are complicated by the increasing globalization of the economy, a phenomenon that has become particularly prominent since UNCED. Globalization is fostered by advances in information technology and transportation as well as treaty-driven trade liberalization over the past few decades. Although the extent to which globalization has penetrated national economies is disputed, its effect has been to facilitate the flow of capital around the world for trade, investment and production. Globalization has greatly contributed to economic and social development in some countries, but other countries and regions are being left behind, further widening the gap between the rich and poor. The influx of investment capital may foster environmental protection in some countries, but international competition for capital may make it even harder for other countries to successfully address environmental degradation and poverty.

The global scale and severity of environmental degradation and poverty are unprecedented in human history. Major adverse consequences are not inevitable, but

they are likely to occur if these problems are not addressed. Many civilizations collapsed or were severely weakened because they exhausted or degraded the natural resource base on which they depended. In addition, substantial economic and social inequalities have caused or contributed to many wars and revolutions. These problems are intensified by the speed at which they have occurred and are worsening, making it difficult for natural systems to adapt. The complexity of natural and human systems also means that the effects of these problems are difficult to anticipate. The potential impact of global warming on the transmission of tropical diseases in a time of substantial international travel and commerce is but one example.

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Biographical Sketches

John C. Dernbach is Professor of Law. He is internationally recognized for his work on sustainable development in the United States. He has published a detailed assessment of efforts in the USA to address sustainable development, *Stumbling Toward Sustainability*.

Professor Dernbach has written more than a dozen articles for law reviews and peer-reviewed journals, and has authored, co-authored, or contributed chapters to five earlier books. He has lectured to local, state, national, and international audiences on environmental law and sustainable development.

Professor Dernbach received his bachelor degree from University of Wisconsin-Eau Claire and his law degree from University of Michigan, where he was an editor of the *Journal of Law Reform*. He is a member of the Pennsylvania Bar. He is currently on leave from full-time teaching; he is Director of the Policy Office at the Pennsylvania Department of Environmental Protection (DEP). This office is responsible for developing and coordinating policy and regulatory initiatives for DEP, including the integration of sustainable development concepts into DEP programs.

A. Dan Tarlock is Distinguished Professor of Law and Director of the Program in Environmental and Energy Law. He is an internationally recognized expert in environmental law and the law of land and water use. He has published a treatise, *Law of Water Rights and Resources*, and is a co-author of four casebooks, *Water Resource Management*, *Environmental Law*, *Land Use Controls*, and *Environmental Protection: Law and Policy*.

Professor Tarlock is a frequent consultant to local, state, federal and international agencies, private groups and law firms, and is an elected member of the American Law Institute. From 1989 to 1992 he was the chair of a National Academy of Sciences/National Research Council committee to study water management in the western United States. In 1996 to 97 he was the principle report writer for the Western Water Policy Review Advisory Committee.

Professor Tarlock received his bachelors and law degrees from Stanford University, where he was an officer of the *Stanford Law Review*. He is a member of the California Bar. He is currently one of three United States special legal advisors to the NAFTA Commission on Environmental Cooperation. He teaches courses in land use, property, energy and natural resource law, environmental policy, and international environmental law.