THE BUSINESS OF SUSTAINABILITY

by Michael Curley

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What is the role of business in achieving national or global sustainability? In short, what is the "business of sustainability"? By definition, a "business" is a legal structure for earning money. Businesses make things and perform services. They sell both for money. For small companies, the money goes to the owner. For big companies, it goes to the shareholders. What does all this have to do with sustainability?

"Sustainability" is a word that was seldom heard until the latter part of the 20th century. Much like the concepts of climate change, greenhouse gas, and global warming, these words only entered the public mind after a major international conference, the Earth Summit, which was held in Rio de Janeiro in 1992. This meeting was officially known as the United Nations Conference on Environment and Development. It is also called the Rio Summit.

Environmental and sustainability issues had been festering among the Members of the United Nations (U.N.) for several years. The U.N. General Assembly decided to convene a conference on these matters as far back as 1969. And so, the U.N. Conference on the Human Environment was held in Stockholm in 1972, the same year that the U.S. Congress passed the Clean Water Act (CWA).[1]

Eleven years later—now even more haunted by the impact of industrialization on the environment—the U.N. Secretary-General created the World Commission on Environment and Development, which soon took on the name of the Commission's dynamic chair, the prime minister of Norway, Gro Harlem Brundtland, and became known as the Brundtland Commission. In October 1987, the Brundtland Commission issued its report entitled *Our Common Future*. This document defined—for the first time—the term "sustainable development," as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[2]

In addition, *Our Common Future* set the stage for the Rio Earth Summit in 1992, where the modern approach to addressing climate change was born. The Rio conference, which lasted six months, produced two major declarations: (1) Agenda 21, a blueprint/action agenda for achieving sustainable development; and (2) the Rio Declaration on Environment and Development, consisting of 27 principles to guide sustainable development.

By far, the most important outcome of the Earth Summit was the negotiation of the U.N. Framework Convention on Climate Change (UNFCCC).[3] The purpose of this groundbreaking treaty was "to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[4] As of today, 195 nations are signatories to this agreement. One of the provisions of the UNFCCC is that the Parties would convene each year to assess progress, in meetings called the Conferences of Parties (COPs). In 1997, the COP was held in Kyoto, Japan, where a further agreement was reached, known as the Kyoto Protocol.[5]

The Kyoto Protocol attempted to set binding limits for developed countries on the emission levels of six greenhouse gases, including carbon dioxide, methane, and nitrous oxide. Each developed country was to reduce the emissions of these six gases to 1990 levels. By 1997, the Kyoto Protocol had been signed by 84 countries, but had only been ratified by 46.

In the United States, the Kyoto Protocol was signed by President Bill Clinton in 1998, but has never been ratified by the U.S. Senate. So the Kyoto Protocol has no legal effect in the United States. Neither China nor India is bound by the Kyoto Protocol, which is a major reason cited for the United States' non-ratification. Canada pulled out in 2012 for much the same reasons.

But the Kyoto Protocol was not the last chapter in the sustainability book. According to the U.N. Department of Economic and Social Affairs, the U.N. General Assembly met in New York City in September 2015 to adopt 17 Sustainable Development Goals (SDGs) to serve as its "2030 Agenda."[6]

The U.N.'s 17 SDGs aim to:

1. End poverty in all its forms.
2. End hunger, achieve food security and improved nutrition, and promote sustainable agriculture.
3. Ensure healthy lives and promote well-being for all at all ages.
4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.

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1. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
2. World Commission on Environment and Development, Our Common Future (1987).
3. United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, 1771 U.N.T.S. 107.
4. United Nations Climate Change, *About the Secretariat*, https://unfccc.int/about-us/about-the-secretariat (last visited Sept. 5, 2023).
5. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148.
6. *See* U.N. Department of Economic and Social Affairs, *The 17 Goals*, https://sdgs.un.org/goals (last visited Aug. 17, 2023). *See also* Governing for Sustainability (John C. Dernbach & Scott E. Schang eds., ELI Press 2023).

5. Achieve gender equality and empower all women and girls.
6. Ensure availability and sustainable management of water and sanitation for all.
7. Ensure access to affordable, reliable, sustainable, and modern energy for all.
8. Promote sustained, inclusive, and sustainable economic growth for all.
9. Build resilient infrastructure, promote inclusive and sustainable industrialization, and foster innovation.
10. Reduce inequality in and among countries.
11. Make cities and human settlements inclusive, safe, resilient, and sustainable.
12. Ensure sustainable consumption and pro= duction patterns.
13. Take urgent action to combat climate change and its impacts.
14. Conserve and sustainably use the oceans, seas, and marine resources for sustainable development.
15. Protect, promote, and restore sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.
16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels.
17. Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development.

While there have been lots of sustainability meetings and conferences and protocols by the U.N. and many governments and organizations, like the European Union, all around the globe, what does all this have to do with American business? These global issues helped frame the beginning of a private-sector movement that has come to be called "environmental, social, and governance" (ESG), of which American business has become an integral part.

On August 28, 1963, some 200,000 Americans gathered at the Lincoln Memorial in Washington, D.C., to demand equal justice under the law for all people—the event known as the March on Washington. On that day, the Reverend Doctor Martin Luther King Jr. gave his stirring address that has become known as the "I Have a Dream" speech. President John Kennedy was reportedly very moved by both the March and Dr. King's address, but he did not live long enough to act on it. His successor, however, did. President Lyndon B. Johnson had wielded great power as a senator and lost none of it when he became president. The following July 2, Congress passed, and Johnson signed into law, the Civil Rights Act of 1964, the first major piece of social legislation enacted in the United States in several decades. This was the beginning of the "S" in ESG.

For the past 50 years, the federal government has also been heavily involved in protecting the environment. Congress passed, and respective presidents have signed, five major environmental statutes: the National Environmental Policy Act (NEPA),[7] the CWA, the Clean Air Act (CAA),[8] the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (also known as the Superfund law),[9] and the Resource Conservation and Recovery Act (RCRA),[10] which deals with hazardous waste.

Many states have been heavily involved as well. New York, Pennsylvania, and Montana adopted "green amendments" to their state constitutions. The commonwealth of Pennsylvania was the first state to adopt such an amendment, more than 50 years ago. The amendment, which added §27 to Article I of the commonwealth's constitution, reads as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

This provision was adopted on May 1, 1971.

According to the National Caucus of Environmental Legislators, there are 12 additional states that are considering green amendments to their constitutions, including Arizona, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maine, Nevada, New Mexico, Tennessee, Texas, and West Virginia. These green amendments typically elevate having clean air, safe drinking water, and a healthy environment to the level of a constitutional right. If people are now going to have a constitutional right to a healthy environment, businesses must play their part in providing it.

Sustainability is the long-term version of ESG. An organization that practices quality environmental and social policies over time is a sustainable entity. As the collective environmental consciousness has grown over the past 50 years, the past 20-30 years have also witnessed growth of the awareness of race, gender, and sexual orientation as major social issues right alongside the environment. These are also part of the "S" in ESG.

At this stage of the 21st century, ESG/sustainability is the responsibility of everyone and everything, from the government to the military, to private businesses, and to private individuals. We must all respect each other's environmental and social rights. Today, sustainability in fact means business.

McCormick & Company is a well-known name to anyone who spends time in the kitchen. It is a Fortune

7. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
8. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
9. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
10. 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011.

500 company and the world's largest spice producer, with more than $6.3 billion of annual sales in 170 countries and about 14,000 employees. There are about 370 million shares of common stock in McCormick, about 85% of which are owned by large institutional investors with the other 15% owned by the general public. McCormick does not do many—if any—television ads. It does not need to. However, a few feet from its corporate headquarters in Hunt Valley, Maryland, is an employee parking lot. Most of the parking spaces are covered with solar panels.

Does McCormick need to do this? Are they trying to save money on their electricity bill? No, McCormick built the array of solar panels because they believe in addressing global warming, and they believe in doing at least some small part in retarding the spread of greenhouse gases from the power plants that sell electricity in Hunt Valley. It does not hurt the *esprit de corps* among their employees either. But what about the rest of the business world? What about companies who do not sell products to major segments of the world population?

The Organisation for Economic Co-operation and Development (OECD) defines "small and medium sized enterprises" as "non-subsidiary, independent firms which employ fewer than a given number of employees." It goes on to note that the number of employees varies from country to country, but that the predominant number is 250, which is used by the European Union.[11]

On April 11, 2019, the *Albany Business Journal* reported a federal government estimate that there are some 32.7 million businesses in the United States. It then characterized 76.2%, or about 25 million of these firms, as "non-employer" companies (i.e., businesses without any paid employees). The article went on to note that in 2016, the Census Bureau had reported that there were 7.7 million "establishments" with at least one paid employee.[12] How do these 7.7 million businesses that are not Fortune 500 companies become sustainable?

The 17 SDGs adopted by the U.N. clearly do not apply to businesses anywhere. There are not too many businesses—big or small—that can, for example, "conserve and sustainably use the oceans, seas, and marine resources for sustainable development." But the U.N.'s SDGs can serve as the guideposts for a series of sustainability goals that can apply to businesses.

Here is what some "Sustainability Goals for Business" might look like:

1. Pay workers a living wage.
2. Provide good health insurance.
3. Treat people of all races, genders, ages, and sexual orientations fairly and equally.
4. Use as little power as possible. When possible, source it from utilities that sell clean energy like solar, wind, or geothermal power.
5. Minimize waste and dispose of it correctly.
6. Use the environment well, and encourage workers to do so too. Support the protection of water bodies and forests. Help prevent land degradation and promote biodiversity.
7. Promote peaceful problem resolutions with inclusion, accountability, and justice for all.

Some of these principles are obviously good for businesses. No decent business leader should have to be told to "minimize waste" or "use as little power as possible." Some of these principles, however, are a bit of a stretch for most modern businesses. Corporate leaders may well personally "support the protection of water bodies and forests" and want to "prevent land degradation," but they are very unlikely to turn these feelings into business practices.

In short, left to their own devices, most businesses likely are not going to adopt sustainable business practices. If they are to do so, they will probably need some external encouragement—encouragement, yes, pressure, no. Businesses will probably need some carrots to become sustainable, but definitely not sticks.

The overwhelming number of businesses can be classified as small businesses. Politically speaking, small businesses are like farms and churches: politically untouchable. No county executive is ever going to tell farmers in his or her area to plant tree buffers or build constructed wetlands on their property at their own expense. No mayor is going to tell the pastor of a large urban church to rip up the two acres of asphalt in his parking lot and replace it with stormwater-friendly permeable pavement, and by the way, Reverend, take the money out of the church's weekly collection plate.

The same is true of small businesses. Politicians are loath to tangle with them. This means that there are going to be few, if any, government rules or regulations pushing businesses into sustainability or punishing them for not being sustainable. There will definitely be environmental laws that limit toxic discharges. There will also be civil rights laws that prohibit discrimination on the basis of race, gender, and sexual orientation. But there will not be statutes that require firms to hire by gender or racial quotas, and so on. And there will not be laws requiring businesses to undertake environmentally beneficial projects such as planting rain gardens on their property. (The exception to this rule is in the stormwater area, where some local governments may require private organizations to undertake projects to reduce stormwater runoff.)

So, no sustainability sticks in general, but what about some sustainability carrots? Governments—at every level—can certainly create sustainability carrots. Obvi-

11. Gert Wehinger, *SMEs and the Credit Crunch: Current Financing Difficulties, Policy Measures, and a Review of Literature*, 2013 OECD J.: Fin. Mkt. Trends 1, 28 n.1 (2014), https://www.oecd.org/finance/SMEs-Credit-Crunch-Financing-Difficulties.pdf.
12. Todd Kehoe, *What Counts as a "Business"? It Might Not Be What You Think It Is*, Albany Bus. Rev. (Apr. 11, 2019), https://www.bizjournals.com/albany/news/2019/04/11/number-of-businesses-in-the-united-states.html.

ous business sustainability incentives already lurk in government lending and purchasing programs. The U.S. government certainly does not have a corporate finance department. It does not finance business in general. But it does finance some businesses—like small businesses. The federal government's Small Business Administration (SBA) makes loans to small businesses.

The SBA helps five classes of small business. They include women-owned, disabled veteran-owned, disadvantaged-owned, and historically underutilized business zone (HUBZone) businesses. The fifth SBA class of businesses is "8(a) small businesses," which might be termed "none of the above."[13] These categories are very important to the government. The SBA has a goal of awarding 3% of all federal contracts to small HUBZone businesses each year.[14] The U.S. government could easily add another category of preferred small business. The sixth category could be "sustainable small businesses."

In addition, another federal small business finance program that is much less well known is the State Small Business Credit Initiative. According to the Center for Regional Economic Competitiveness (CREC):

> The State Small Business Credit Initiative (SSBCI) was created through the Small Business Jobs Act of 2010. . . . SSBCI was funded with $1.5 billion to strengthen state programs that support financing of small businesses. Treasury awarded funding to all 50 states, the District of Columbia, and all U.S. Territories, based on their proportion of unemployed persons as a percentage of the national total.[15]

Funding ranged from about $13 million for states with relatively small proportions of unemployed persons, to California, which received more than $168 million.

So, the federal government—and state governments too—can provide financing to sustainable small businesses. But what about other, non-small businesses? How can governments encourage businesses—regardless of size—to become sustainable? The answer: contracts, government contracts. When awarding contracts, can governments create preferences for sustainable businesses as a means of encouraging all businesses to become sustainable? Would such a practice be unfair? Apparently not.

But the question immediately arises: How would the federal government identify a "sustainable business"—big or small? It is easy to prove that the owner of a small business is a woman or a disabled veteran. It may be a little more difficult proving that the owner of a small business is disadvantaged, but very possible. And the government has its own HUBZone maps, so no problem there.

For sustainability, however, there would be a need both for widely accepted sustainability criteria and for a means of checking to determine whether specific small businesses met those criteria. All these considerations suggest the need for an independent organization that can set sustainability criteria that would be universally respected, and that can verify that specific businesses actually met these criteria. To make sustainability work for business, what is needed is a *National Business Sustainability Council*.

This National Business Sustainability Council would develop and promulgate sustainability criteria much like the seven "Sustainability Goals for Business" listed above. It would also be able to evaluate whether specific small businesses are meeting those criteria. Most importantly, it should be able to "certify" that a small business is, in fact, meeting these criteria, and is therefore "sustainable." If the preferential awarding of government contracts is the desired goal, the government will want to know if a business is sustainable. The Council's criteria and its evaluation methodology should be both rigorous and transparent, such that when the Council awards a sustainability certification to a business, the federal and state governments will accept that certification.

The Council should not develop its sustainability criteria in a vacuum. It should work closely with governments to make certain that its standards are widely acceptable. The same is true of the Council's evaluation criteria and its evaluation methodology. The Council should make certain that these procedures are also acceptable. The goal is that once a small business is certified by the Council, governments at every level would accept the certification with no questions asked. So, the sixth preference criterion for awarding contracts to small businesses would be that the company is a "certified sustainable small business."

What about the National Business Sustainability Council itself? It should clearly be a not-for-profit corporation, a 501(c)(3) corporation organized for the purpose of encouraging and guiding businesses across the country to adopt sustainable policies and to practice them. The Council would demonstrate to businesses across the country how sustainable policies can be adopted to benefit their employees, customers, suppliers, and the public at large—and ultimately thereby, the small business itself.

The Council could develop an extensive inventory of sustainable practices that deal with energy and environmental issues, as well as social issues such as race, gender, age, and sexual orientation. It would work with businesses desiring to adopt sustainable policies to develop a list of such policies that are both feasible and beneficial for each particular business. The Council would solicit members from the ranks of businesses across the country, and would charge only modest membership fees. Its principal responsibility would be to develop a Sustainability Certification Program. As member firms agree to adopt certain sustainability policies, the Council would certify such company as a "Certified Sustainable Business" and authorize those firms to use a specially designed "SUS" logo that identifies them as such on all of their stationery, signage, and

13. U.S. General Services Administration, *Set-Asides and Special Interest Groups*, https://www.gsa.gov/small-business/register-your-business/explore-business-models/setasides-and-special-interest-groups (last reviewed Aug. 4, 2023).
14. SBA, *HUBZone Program*, https://www.sba.gov/federal-contracting/contracting-assistance-programs/hubzone-program (last updated Aug. 8, 2023).
15. CREC, *State Small Business Credit Initiative (SSBCI)*, https://www.creconline.org/resources/ssbci/ (last visited Aug. 17, 2023).

most importantly on their government contract bidding documents. The Council would also work with other national and regional organizations that promote sustainable policies.

The Council could engage faculty members and other experts in sustainability-related programs and disciplines at colleges and universities across the country to assist in the development of both sustainability policies and certification criteria for sustainable businesses. Universities are becoming major players in the sustainability game. Wake Forest University has its Center for Energy, Environment, and Sustainability, and a graduate program in sustainability as well. Arizona State University and San Diego University have sustainability graduate programs. And there is already an Association for the Advancement of Sustainability in Higher Education, which counts Case Western Reserve University, West Chester University of Pennsylvania, and even the Universidade do Estado do Pará in Brazil as members. (The Brazilian state of Pará is home to much of the Amazon rain forest.) The Massachusetts Institute of Technology (MIT) has a program too, and describes it with a particularly eloquent *raison d'être*: "The time to act is upon us, and increased focus on sustainability provides businesses with significant benefits, from reductions in waste and costs to additional opportunities for investment as consumer behavior evolves."[16]

In addition to universities, there are several international organizations that promote sustainability. The International Society of Sustainability Professionals and the Global Council for Science and the Environment, which was founded in 1990, are two of the major ones.

Through its affiliations with colleges and universities, the Council could also engage graduate students pursuing studies in sustainability-related disciplines (1) to work with individual small businesses to prepare recommendations for them on the specific types of sustainable practices and policies they might adopt; and (2) to periodically review the progress of individual member firms to determine if they are actually practicing the sustainability policies they have agreed to adopt.

In addition to its roles of defining sustainability practices and certifying their implementation, the Council could also define sustainable public policies that businesses could support. For example, reducing carbon emissions is a major environmental goal of all countries across the globe. In addition to installing solar panels on their own property, if feasible, companies could support public policies to install them on government properties and nongovernment properties with the owners' support. In addition to solar power, wind power projects could be built and even nuclear power plants. According to the International Energy Agency (IEA): "Over the past 50 years, the use of nuclear power has reduced carbon dioxide (CO_2) emissions by over 60 gigatonnes—nearly two years' worth of global energy-related emissions."[17] Further, if power from nuclear fusion comes online, it could well become the "holy grail" of sustainability.

Other than modest membership dues, the Council could support its activities by soliciting grants and other funding from governments, organizations, and individuals interested in promoting sustainability.

The above has dealt with how businesses can be brought into the sustainability world. Creating something like a National Business Sustainability Council is key. So, American people interested in promoting sustainability have a major action item on their agenda: the creation of the Council to teach American businesses the ABCs of ESG.

Persuading businesses of any size to deal with the "S" in ESG may not be easy. As noted above, the "S," or social element, deals with issues of race, gender, age, and sexual orientation. In the 59 years since President Johnson persuaded Congress to pass the Civil Rights Act of 1964, we have come far in terms of racial equality, but much still remains to be done. The other three elements of the "S" are also ongoing. Issues of gender, age, and sexual orientation are very real. Businesses and all other social organizations and institutions, including governments, must confront them every day.

Another major manifestation of sustainability in business relates to how it deals with its transportation needs. What are the environmental implications of a company's transportation policies? When considering a company's policies on transportation—not only for its deliveries, but also for the receiving of supplies and its employees' needs as well—there are three primary environmental issues: vehicle tailpipe emissions, zero emission vehicles, and mass transit, including light rail.

The national campaign to reduce vehicle tailpipe emissions is called "clean car standards." These standards were adopted in 2010 in California.[18] To date, 13 states and the District of Columbia—which make up 40% of the auto market—have followed California's lead by adopting their own clean car standards, modeled on the California initiative. The CAA allows California to be more progressive and for other states to follow suit. They are Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. Currently, Virginia and three other states—Minnesota, Nevada, and New Mexico—are also considering some sort of legislative or executive order action on clean cars.

In March 2020, the Donald Trump Administration formally rolled back the clean car standards.[19] But that was

16. MIT Professional Education, *Sustainability: Strategies and Opportunities for Industry*, https://professional.mit.edu/course-catalog/sustainability-strategies-and-opportunities-industry (last visited Aug. 17, 2023).

17. IEA, Nuclear Power in a Clean Energy System 1 (2019), https://iea.blob.core.windows.net/assets/ad5a93ce-3a7f-461d-a441-8a05b7601887/Nuclear_Power_in_a_Clean_Energy_System.pdf.

18. Cal. Code Regs. tit. 13, §1961.4.

19. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24174 (Apr. 30, 2023).

not the end of the game, the Joseph Biden Administration reinstated the standards.[20] So, the 14 states are now pressing ahead with their clean car standards programs. Small businesses that are in the 14 states will have ready access to clean cars. In the other 36 states, however, they will have to search for them.

Taking a page from the U.N.'s Rio Summit in 1992, mass transit, "sustainable public transportation," may be an option for businesses, too, depending on their location. Businesses that have wide choices for facility locations should strongly consider mass transit routes, so that their employees do not have to drive an automobile to work, let it sit in a parking lot for eight hours, and then drive it home again. Public transportation saves the carbon output of millions of gallons of gasoline. But in addition, there are public transportation systems that are even more environmentally friendly. For example, monorail and light rail, both powered by electricity, are totally zero emission forms of transportation when the electricity is cleanly generated, as noted above.

The Walt Disney Company has one of the oldest and most widely used monorails at its Walt Disney World Resort near Orlando, Florida. Disney opened its first monorail line at the amusement park in 1971 and added two more lines in 1982, including one to EPCOT (Experimental Prototype Community of Tomorrow). The Walt Disney World Resort monorails carry an average of more than 150,000 riders a day. This is only surpassed by the monorail run by the city of Tokyo, Japan, with about 300,000 riders a day and the monorail in the city of Chongqing, China, which serves about 900,000 a day on its two lines. There are about 75 monorail systems in cities throughout the world. This includes 19 in the United States, 10 in Japan, and 7 in China.

In conclusion, the prospects for large numbers of sustainable businesses in the United States are very strong. What is needed is a National Business Sustainability Council to develop and harness the many incentives to bring the millions of businesses into the new world of ESG, and its long-term partner: sustainability.

20. Exec. Order No. 14037, Strengthening American Leadership in Clean Cars and Trucks, 86 Fed. Reg. 43583 (Aug. 10, 2021).