

## **The Implementation Gap: What Causes Laws to Succeed or Fail?**

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### **Abstract**

*It is important to go behind the “paper systems” many countries and private sector actors have created to manufacture the appearance of commitments to responsible economic activity, environmental protection and social justice. This produces the need to penetrate the veils that mask governments’ “apparent compliance” with the terms of sustainable development, and to be honest about the inability of voluntary codes of practice to shape the behavior of business and government.*

*Implementation requires effective systems to carry out the law and policy mandates. Laws and policies are often poorly designed or deliberately sabotaged in their creation, but in many instances the ineffectiveness occurs at the level of the implementing agency or ministry. Inadequacy and sabotage at this level tends to be more invisible than at the point of enactment where politicians seek to take credit for their “positive” actions. Laws and policies are sabotaged both in a law’s creation and in their application. One common form of sabotage is that an intended gap is built into the formulation of legal standards that use law to create the appearance of law without creating “real” law.*

*A common strategy is that the language is made to appear powerful and eloquent on the surface in the form of a legislative “sound bite” while containing qualifications that dilute and impede the actual effects of implementation. This can be done by imposing exceedingly high (or expensive) standards of proof on parties seeking to enforce the law through private actions. Or it may require complex processes that take long periods of time, delay outcomes and impose significant financial costs. Another strategy incorporates assumptions of validity regarding agency decision-making, or requiring levels of empirical proof in situations most appropriate for political, preventative and legal standards of validity that operate on different levels than that of hard science.*

*Even if the tests of validity applied to a legal standard or policy are agreed on, it is common practice to sabotage the efficacy of a law at the executive and regulatory levels where laws are implemented and enforced. This is done by underfunding essential functions necessary to implementation. The law may impose significant duties on the entities being regulated but construct a system in which the staffing and other financial resources required for monitoring, processing and implementation are grossly inadequate. Failure to support the core costs of implementation results in inadequate staffing of the components required to make the system work. This occurs on the level of investigation, monitoring, training, inspection and enforcement.*

### **The “Impurity” and Inefficiency of Implementation**

Even in the best situation there is an inevitable falling off between the “pure” act of creating policy and law and the “impure” act of implementation. When a law is created it is primarily a hypothesis about the situation it purports to address. Aristotle invented the concepts of equity and the need for judicial interpretation of laws to reflect the different conditions presented by the real conditions that exist when laws are applied as opposed to when they are initially created.<sup>1</sup>

In theory, at least, law and policy are facilitators of desired behavior and inhibitors of behavior we want to reduce or eliminate. Law and policy operate on multiple levels, through a variety of institutions, and take on many forms. These include treaties, constitutional provisions, statutory schemes and regulatory provisions that can function globally, multilaterally, bilaterally, or at national, regional or local levels. Effective law and policy are inevitably reliant on some degree of public force, sanction or source of influence. Voluntary codes simply are not law even if they represent a statement of policy to some extent. But neither are many supposedly treaties and regulatory schemes that lack adequate sanctions, monitoring and enforcement systems necessary to achieving their purported goals.

“Law-on-the-books” and the existence of institutions purportedly responsible for implementing laws are necessary but insufficient conditions of a system that works. In a society where the demands on the supply of social goods are intensified by the stresses of globalization and the breakdown of traditional relationships there is an even greater role for law. Because we have lost the traditional forms of homogenous community and are made up of diverse political fragments that lack a shared set of consensual norms and values, we can not rely on common values to direct our behavior. Law thus becomes a critically important element of social ordering.

There are legitimate and illegitimate reasons for the failure of law and policy. One legitimate reason for the inevitable gap between the creation and implementation of a law is that the data on which legislators rely when they create the policy and law is imperfect. This can be in its accuracy or its lack of completeness. But even if the original data were wholly accurate and complete at the moment of the law’s creation, the newly created law generates a dynamic and transformative pressure that alters the nature of the system being addressed. The creation, existence, institutionalization, and application of the law alter the social, economic and cultural realities to which the law is applied. The law itself becomes a new variable that generates foreseen and unforeseen consequences. The situation that legislators seek to regulate is thus a “moving target” in relation to which conditions are changing and adaptations occurring.<sup>2</sup> The processes of implementation generate adaptive responses within the targeted system as it attempts to adjust to, avoid, and take advantage of the new conditions.

### **Sabotage in Law Making**

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<sup>1</sup> Aristotle, *The Nichomachean Ethics*, Ch. X. “Equity and Justice.”

<sup>2</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago 1974).

The types of considerations listed above are legitimate imperfections in the creation and implementation of law. There are also illegitimate factors by which the implementation of a law is sabotaged and this occurs both in a law's creation and in its application. One illegitimate though common form of sabotage is that an intended gap is built into the formulation of legal standards that use law to create the appearance of law without creating "real" law. This is not only applicable to the voluntary and aspirational codes but to law created in ways where it is intended to fail in achieving its claimed purposes.

In these situations a common strategy is that the language is made to appear powerful and eloquent on the surface while containing qualifications that dilute the law's actual effects. This is also done by imposing exceedingly high (or expensive) standards of proof on parties seeking to enforce the law through private actions. Or it may require complex processes that take long periods of time, delay outcomes and impose significant financial costs. Another strategy incorporates assumptions of validity regarding agency decision-making, or requires scientific levels of empirical proof in situations most appropriate for political, preventative and legal standards of validity that operate on different levels than that of hard science.<sup>3</sup>

### **Sabotage of Law and Policy at the Executive and Agency Levels**

Even if the tests of validity applied to a legal standard are agreed on, it is common practice to sabotage the efficacy of a law at the executive and regulatory levels where laws are implemented and enforced by underfunding essential functions necessary to implementation.<sup>4</sup> The law may impose significant duties on the entities being regulated but construct a system in which the staffing and other financial resources required for monitoring, processing and implementation are grossly inadequate.<sup>5</sup> Failure to support

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<sup>3</sup> For two individuals arguing in favor of imposing the highest scientific standards of proof on the political process see, Patrick J. Michaels, "Memo to Al: Stop basing environmental rules on non-science," *Roanoke Times & World News*, March 30, 1993. (criticizing Gore's governmental efficiency commission), and, S. Fred Singer, "Cancer Risk Analysis: Major Policy Changes on the Way?" *The Scientist*, October 26, 1998.

<sup>4</sup> For a discussion of how this works, see, Sidney A. Shapiro and Thomas O. McGarity, "Responsible Regulation Sabotaged," Center for American Progress, September 22, 2004. <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=191228>. Visited 1/19/06. In addition to urging readers to obtain their recently published book on the subject, *Sophisticated Sabotage: The Intellectual Games Used to Subvert Responsible Regulation* (2004), the authors argue: "In the 1960s and 1970s, Congress passed a number of landmark bills regulating the business community, and promoting such widely accepted goals as clean air, clean water, safe products, and protection of the environment. These goals, in turn, reflect our commitment to moral values, including the protection of human life, the obligation of the present generation to preserve the environment for our children and grandchildren, and the importance of holding those who cause harm to others accountable for their actions. Recognizing that most Americans agree with these fundamental commitments, but unwilling to give up their health- and life-endangering ways, polluting industries have sought to stymie regulation in ways that hide their efforts. In our recently published book ... we show how corporate interests and business-friendly think tanks have used economic and statistical tools to sabotage regulatory protections. Those who use these tools invariably claim they are merely neutral techniques for sorting out good from bad regulation. In reality, these tools have serious conceptual flaws, rely on slippery empirical data, and are easily manipulated to reach conclusions hostile to government regulation."

<sup>5</sup> Karl S. Coplan, "Of Zombie Permits and Greenwash Renewal Strategies: Ten Years of New York's So-Called "Environmental Benefit Permitting Strategy" " *22 Pace Env. L. Rev.* 1 (2005).

the core costs of implementation results in inadequate staffing of the essential components required to make the system work. This occurs on the level of investigation, monitoring, training, inspection and enforcement.<sup>6</sup>

An example is found in the monitoring and investigation of illegal timber cutting in Brazil. There are clear laws against illegal logging but there are an extremely small number of inspectors responsible for the entire Amazonian region, an area the size of Western Europe.<sup>7</sup> With travel arduous and dangerous and with limited time and money the system of enforcement is not only poorly designed but designed to fail.<sup>8</sup> A similar method of sabotage is loading so many tasks and regulatory responsibilities on a government agency that it is incapable of carrying them out adequately.

Political influence is a common strategy used to undermine the implementation of law. The well-known “Iron Triangle” between governmental officials and legislators, regulators, and those who are regulated operates in ways that sabotage implementation, not only in terms of weakening regulatory enactments but in the nature of enforcement and the penalties imposed, if any, for violations.<sup>9</sup> This occurs through direct intervention

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<sup>6</sup> Yates, *supra*, n. 22, argues that identifiable factors for inadequate regulation include: 1. consensual neglect, 2. regulatory overload, 3. cutting corners, 4. inadequate resources for enforcement, 5. penalties are little known, and 6. inappropriate enforcement mechanisms.

<sup>7</sup> It has been suggested that the failure to enforce existing laws is deliberate. See: “Critics say government inspectors are simply not enforcing these environmental rules and allege that local state governors have close links with logging companies from East Asia.” “Rise in Destruction of Rainforest,” *BBC News*, Monday, January 26, 1998.

<http://news.bbc.co.uk/1/hi/world/americas/50813.stm>. Visited 12/19/05. Nor has the situation changed for the better. See, Adrian Cowell, “Deadly battle with Amazon’s mafia,” November 16, 2005, *BBC News*, [http://news.bbc.co.uk/1/hi/programmes/this\\_world/4429612.stm](http://news.bbc.co.uk/1/hi/programmes/this_world/4429612.stm). Visited 12/19/05.

<sup>8</sup> One report suggests how dismal the situation has become in the Amazon. “After exhausting much of the rainforests of Malaysia, and working on the rainforests of Papua New Guinea, Asian timber companies are bringing their legacy of rapacious exploitation to the rainforests of Brazil by buying controlling interests in area logging companies and purchasing rights to cut down vast rainforest territories for as little as three U.S. dollars an acre. Fifteen percent of the Amazon is now threatened with immediate logging as these companies quadrupled their South American interests in the last few months of 1996. According to the Wall Street Journal, up to 30 million acres are at stake. Major players include the Malaysian companies WTK Group, Samling, Rimbunan Hijau and Mingo; Fortune Timber of Taiwan, and several companies from China, the Associated Press reports. These timber companies devastated the forests of Sarawak, Malaysia within a decade, leaving social dislocation and a landscape marred with silted rivers and eroded soil in their wake. Papua New Guinea is suffering similar consequences with allegations of graft and environmental mismanagement. Even before the arrival of these Asian companies, annual deforestation rates in the Brazilian Amazon increased from about 2.8 million acres in 1991 to nearly 3.8 million acres in 1994.” Press Release, Worldwide Forest/Biodiversity Campaign News, “Asian Logging Companies Move Into Heart of Amazon Rainforest,” [http://forests.org/archived\\_site/today/recent/1997/brasiapr.htm](http://forests.org/archived_site/today/recent/1997/brasiapr.htm). Visited 12/19/05.

<sup>9</sup> In the recent Sago mine disaster in West Virginia Senator Arlen Specter, a member of the Senate subcommittee with responsibility for providing funding for mine inspections was reported to indicate: “the subcommittee plans to look into the adequacy of funding for mine inspections and to explore whether there are connections between the Sago mine’s safety violations in recent years and the accident. [Specter stated] “It’s been reported that there were quite a number of violations -- I don’t know that to be a fact, but I’d like to hear from the mine inspectors as to what they found,” Mr. Specter said yesterday. “The next question is what action did the mine owners take on correcting them. The third question is whether any of the violations were causative of the problems.”” Steve Levin, “Sago Mine disaster inquiry starting: Ex-federal safety official to head W.Va. investigation,” *Pittsburgh Post-Gazette*, Tuesday, January 10, 2006. <http://www.post-gazette.com/pg/06010/635352.stm>. Visited 1/21/06.

related to specific situations, political contributions, employment expectations by regulatory staff who hope to move to lucrative positions in the regulated industry, and by appointment of industry personnel to the regulatory positions, thus ensuring favorable treatment.<sup>10</sup>

While the use of law for appearance goes far beyond the environmental sphere, the implementation gap occurs in many laws from inherent flaws.<sup>11</sup> These include poor understanding of the systems being regulated, as well as deliberate legislative and regulatory sabotage aimed at rendering the implementing systems incapable of achieving the law's goals. This problem is exacerbated at the bureaucratic level where the same strategies are used to weaken regulatory standards and rules critical to effectiveness.

### Why Strategies Fail

Laws fail in their original conception or their implementation for reasons that include:

1. Inadequate understanding of the needs being addressed
2. Failing to include factors whose inclusion is integral to effectiveness
3. The law is too broad and ambiguous
4. The law tries to do too much
5. The law is too narrow to deal with the situation

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<sup>10</sup> The idea of the Iron Triangle is defined as: "The closed, mutually supportive relationships that often prevail in the United States between the government agencies, the special interest lobbying organizations, and the legislative committees or subcommittees with jurisdiction over a particular functional area of government policy. As long as they hang together, the members of these small groups of movers and shakers tend to dominate all policy-making in their respective specialized areas of concern, and they tend to present a united front against 'outsiders' who attempt to invade their turf and alter established policies that have been worked out by years of private negotiations among the 'insiders.'" *A Glossary of Political Economy Terms*, [http://www.auburn.edu/~johnspm/gloss/iron\\_triangles](http://www.auburn.edu/~johnspm/gloss/iron_triangles). Visited 12/19/05. This factor can be given great play when the amount of administrative discretion is great. See, Bradford C. Mank, "The Draft Title VI Recipient and Revised Investigation Guidances: Too Much Discretion for EPA and a More Difficult Standard for Complainants?" 30 *Env. Law Reporter* 11144 (December 2000). See also, Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, "Choosing How To Regulate," 29 *Harv. Env. L. Rev.* 179 (2005).

<sup>11</sup> One of the most glaring flaws is the lack of sanctions sufficient to deter undesirable behavior, including the levels of fines. On this issue, see, "Environmental fines "still small change," *United Kingdom Environment News*, September 2003. The report indicates: "Although fines for environmental offences rose by 38% in the last twelve months, the average level of these was still only [pounds sterling] 8,744 according to the Environment Agency in its 5th Spotlight on business environmental performance in July. Chief Executive, Barbara Young, said that the level of fines were "still small change for big business". Worryingly, the Spotlight also showed a number of repeat offenders even amongst companies who claim to be serious about corporate social responsibility." See also, "Inadequate sanctions to enforce EU environmental law," *United Kingdom Environment News*, September 2003. "The report also found that the sanctions currently used by Member States were "not sufficient" to achieve compliance with EU law. It would like to see countries introduce measures providing for criminal sanctions."

6. The law is created to benefit special interests, or contains provisions for special interests that inhibit its effective implementation
7. The law lacks monitoring capability or the capability is insufficient
8. The law lacks investigation capability or the capability is insufficient
9. The law lacks implementation systems or the systems are insufficient
10. The law contains no sanctions for failure to comply
11. The sanctions are so inadequate that “bad actors” are willing to risk the potential penalty because the sanctions are *de minimus*, the probability of detection or prosecution is low, or the benefit for violation is high relative to the sanctions
12. Interference by special interests in the creation or implementation of the law
13. Lack of private institutional capacity needed to understand or act according to the legal requirements
14. Complexity of the systems being targeted
15. The economics, externalities and internalities, and stage of investment cycles in which the business activity finds itself dictate against willingness to follow the law
16. The subtlety and difficulty of detection or proof of causation of any harms that might occur to potentially affected human and natural systems
17. The “tragedy of the commons” in which the benefits of the systemically undesirable action are delivered to the business but the consequences are incurred over time by the overall system
18. The attempt to achieve a Garden of Eden state of nature that can’t be achieved
19. Tolerance of significant “avoidance behavior” and “free riding” by some of those engaging in the regulated activity

### **Why Strategies Succeed**

I suggest the following offer some of the most important reasons.

1. Consistency/fit with the values and concerns of the people who must comply with the law
2. Consistency/fit with the values and concerns of the people who are responsible for regulation and enforcement
3. Realistic obligations being imposed on the people who must take action for the outcome to be positive, including business, government and consumers
4. Asking people to do things they are willing to do
5. Asking people to do things they are capable of doing
6. Achieving clear, simple, positive outcomes
7. Effective monitoring, investigation and enforcement systems that make it likely undesired behavior or failure to act as intended by the law will lead to detection and meaningful sanctions of a kind sufficient to deter undesirable behavior by most actors
8. Sanctions sufficient to inhibit targeted behavior, fear of consequences by those who would otherwise not obey the law
9. Sense of fairness concerning allocation of duties and benefits

10. Incentives for compliance by private actors
11. Incentives for compliance by public actors
12. Applicable to others similarly situated
13. The requirements do not unnecessarily impact on economic activity
14. The laws contain “pass through” opportunities by which added costs can be recouped

### **Understanding Bureaucratic Dynamics, Values and Behaviors**

Implementation requires effective systems to carry out the law and policy mandates and ensure compliance with the requirements. While laws and policies are often poorly designed or deliberately sabotaged in their creation, in many instances the ineffectiveness occurs at the level of the implementing institution. Inadequacy and sabotage at this level tends to be more invisible than at the point of enactment where politicians seek to take credit for their “positive” actions.

It is important to go behind the “paper systems” many countries and private sector actors have created to manufacture the appearance of commitments to responsible economic activity, environmental protection and social justice. This produces the need to penetrate the veils that mask governments’ “apparent compliance” with the terms of sustainable development, and to be honest about the inability of voluntary codes of practice to shape the behavior of business and government.<sup>12</sup>

The elements that determine whether a legal system is capable of being implemented effectively at the bureaucratic level include factors such as:

- Is funding adequate for all relevant regulatory and enforcement components?
- Is there sufficient staffing to carry out all relevant responsibilities?
- Are the quality and clarity of institutional mandates sufficient?
- Is there adequate expertise at all relevant levels?
- Is there cooperative institutional behavior among regulatory components?

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<sup>12</sup> “Unfortunately, very little attention has been paid by the political and scientific community to the changing patterns and new developments in the public sector (for example, the introduction of new information technologies, measures to decentralise industry, the further internationalisation of policy and law, etc.) and their impact on implementing public policies. Little has been done to evaluate innovative and new methods (and instruments) carried out in the private and public sector that could improve the implementation of environmental law, especially as regards its application and enforcement. Analysts should now go beyond cataloguing seemingly inexhaustible suggestions and shift their attention to designing strategies to improve compliance, application and enforcement. We shall argue in this study that strategies to improve implementation need to take into consideration the innovations and changes taking place in the public and private sector. Public policies must remain flexible and able to adapt to new circumstances (adaptive implementation).” “Towards Effective Environmental Regulation: Innovative Approaches in Implementing and Enforcing European Environmental Law and Policy,” Christoph Demmke, *Annual Survey on the Implementation and Enforcement of Community Environmental Law* (1996/7) (SEC 1999/592, adopted as Commission Services’ working paper on 27.4.1999). <http://www.jeanmonnetprogram.org/papers/01/010501.html#TopOfPage>. Visited 12/2/05.

- Is there effective monitoring at planning, permitting, construction, operational and termination phases?
- To what extent is there political interference?
- Is there corruption interfering at key points in the system?
- Is there adequacy of enforcement?
- Are sanctions adequate and imposed if there are violations?
- Is there a comprehensive understanding of the systems to be regulated?
- Is there clear agreement on the goals to be facilitated by the regulation?
- Is there honesty about the existing system and how it functions in ways that protect institutional jurisdictions and “turf” to the extent it is difficult to achieve cooperative action between governmental components?
- Are decision-makers being honest about the allocation of private and public power and how it will impact upon efforts to achieve desired results?
- Do the decision-makers and affected parties understand the real limits and capabilities of governmental institutions?
- Does political will exist on the level required to fund, regulate, monitor and enforce the activities necessary to make the regulated system work responsibly?
- Is the regulatory system designed in a way that it has “staying power” and the ability to operate as an ongoing regulatory system not subject to the transitory whims of changing political administrations?
- If the responsibilities are allocated to different segments and levels of government, do those distinct parts work together or do they operate in ways that interfere with the ability to regulate the industry?
- If there is a focused regulatory strategy, what are its most important elements?

Understanding bureaucracy is essential because it is both instrument for effective implementation of law and obstacle to achieving the desired ends. The organizational structure of governmental agencies frequently creates an obstacle to effective implementation. In analyzing the implementation deficit relating to European governments’ repeated failures to create an effective legal regime, even with a host of laws on the books intended to effectively regulate in ways that mitigate environmental harms or advance the concept of sustainable business activity, Christoph Demmke argues that: “The concept of implementation is now seen more and more in a context which encompasses a number of factors. Implementation of a legal act is neither a pure legal process nor is it only about money and resources. Rather, it involves a complex set of factors that needs to be addressed.”<sup>13</sup>

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<sup>13</sup> Demmke argues that: “If policy objectives are to be achieved a number of interrelated

For purposes of responsible economic activity that is environmentally and socially beneficial all ministries are not created equal. In any government the ministries, agencies and other institutions responsible for the different functions of environmental protection, economic development, foreign trade and commerce, finance and banking, natural resources, policing and enforcement activities, the judiciary, science and research, health, education and social services traditionally operate according to distinct and often inconsistent missions and constituencies.

Building the economy of a developing country tends to be done through attracting foreign investors and being able to satisfy consumer demands in wealthy countries for exports of goods and services from the economically poorer nation. In many nations, and particularly in many developing nations, the finance, foreign trade, and economic development agencies are considerably more powerful and influential than those responsible for environmental protection and social issues. This inequality is completely understandable because in most nations the alleviation of poverty and its many destructive and deadly consequences is assigned a higher priority than environmental protection. But the inequality is driven also by the fact that foreign trade, finance, exploitation of natural resources and economic development are the areas where money can be made by bureaucrats and governmental officials and where lucrative deals can be brokered to the personal enrichment of the governmental actor and associated cronies.

Those who seek to preserve their existing wealth or desire access to opportunities through which they can expand their personal resources are much more likely to gravitate to ministries where money and power exist than to ministries charged with responsibilities for environmental enforcement or social welfare unless those latter ministries have control of valuable resources. Environmentalists and residents of smaller local communities will therefore find themselves in a situation similar to that faced by Native Americans whose lands were taken and exploited by gold miners, buffalo hunters and fur trappers, ranchers and farmers. The fact that such actions are not morally right and are often achieved by deception, abuse of government power, and oath-breaking on the part of the governments and other powerful interests, does little to protect the less powerful residents of an “invaded” area from being overwhelmed and displaced by the tides of development.

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preconditions must be fulfilled:

- *Motivation* (implementation will be deficient if those who need to implement the policy have no incentives to comply with it).
- *Information* (effective implementation depends on the quality of information about community law and information provided to citizens, the public and the private sector).
- *Knowledge of the law* (lawyers and both regulatees and regulators need to have detailed knowledge of Community law).
- *Deterrence and threats* (violators must be aware that violations will be sanctioned).
- *Resources* (sufficient technical, personal and financial resources are crucial for sustained success).
- *Skills* (officials, managers, inspectors, etc. need to be trained and must have sufficient knowledge to fulfil their tasks).
- *Efficient management and coordination structures* (correct implementation depends on the ability of the various actors and organisations to communicate, cooperate, integrate and coordinate policy objectives).” Demmke, *Annual Survey on the Implementation and Enforcement of Community Environmental Law*, *id.*

The culture of bureaucracy, along with habitual ways of acting and the fragmentation created by ultra-specialized scientific and technical competencies, present other obstacles. So does the desire to protect existing bureaucratic fiefdoms. The gross disparity in the power and influence of the different types of agencies means that laws attempting to combine agencies in the interest of achieving responsible economic development or laws that create overlapping mandates and requirements of interagency cooperation in regulatory activities, are more likely to fail than to succeed. In any country, career bureaucrats are skilled at sabotaging efforts to change the way they behave.

Governmental bureaucracies in every country and in every government become fixed bastions of special interests committed to protecting their territorial turf from others keen on expanding their own shares of power. Such self-protective behavior is the nature of government. People with authority within those governmental institutions are not about to become the willing facilitators of smoothly functional “super-agencies” in which cooperation and harmony are the order of the day. The *Bureaucrat’s First Law* is that politicians come and go while the bureaucratic fiefdom is the only constant within government.

In any event, even if the desire to cooperate is present, the people in the ministries and other government agencies that would be necessarily involved in constructing a coherent and integrated system leading to responsible economic development lack the required training, orientations, and incentives. They lack the training to appreciate the enormous range of complexity. There are no disciplines capable of educating people in the diverse categories of knowledge that would be required to function as “philosopher kings” of the kind needed. Even if a cadre of people were trained appropriately they would soon be spending most of their time in diversions caused by continual bureaucratic infighting that would sabotage even the most brilliant efforts.

### **Failure of Law through “Legal” and Illegal Corruption**

Laws fail not only through ignorance, poor design, underfunding and lack of political will but through corruption. While it is easy to assign the problem of corruption to Third and Fourth World regimes, corruption is endemic to human activity in all countries. It simply takes different forms depending on the culture and context. Much of the corruption in the U.S. has, for example, been legalized through enactment of loose laws on campaign contributions, lobbying, defense industry contracts and lack of oversight. It doesn’t stop there. We also have the *UN Global Compact* with its lofty sounding platform of anti-corruption at the same time we have the Iraq Oil-for-Food scandal reaching high into the UN’s hierarchy. Corruption is inescapable in both the public and private sectors. At best it can only be deterred and inhibited, and even then there must be strong systems in place to detect and sanction responsible parties. The likelihood of those systems being created and implemented in our business and political systems is close to nil.

We can argue from moral and legal perspectives that people ought not to use political contributions, bribes, invisible benefits to family members, political networks and affiliations and so forth to achieve non-transparent outcomes that serve the interests of cronies, subordinates and powerful patrons. Similarly, we are morally entitled to claim that it is absolutely wrong for powerful cliques within a society or across a multilateral society to receive special entitlements. The problem is that while we may be able to create laws that inhibit the worst of such behaviors in some locales, we cannot stop it.

Robert Klitgaard has offered a formula on political and bureaucratic corruption that helps explain why laws fail. It applies equally to the business realm.<sup>14</sup> He argues:

[C]orruption may be represented as . . . a formula:  $C = M + D - A$ . Corruption **equals** monopoly **plus** discretion **minus** accountability. Whether the activity is public, private, or nonprofit . . . one will tend to find corruption when an organization or person has monopoly power over a good or service, has the discretion to decide who will receive it and how much that person will get, and is not accountable.<sup>15</sup>

Klitgaard concludes that “corruption is a crime of calculation, not passion. . . . [T]here are both saints who resist all temptations and honest officials who resist most. But when bribes are large, the chances of being caught small, and the penalties if caught meager, many officials will succumb.”<sup>16</sup>

We can all point to exceptional people who act in ways consistent with the highest-level of ethical behavior. But accountability or the lack thereof is at the core of behavior. We are flawed human beings who know that if we act unethically, illegally or negligently there is some reasonably substantial risk of detection and personal accountability. On the other side of this is the fact that in a corrupt system there really is a strong degree of accountability. If someone fails to act corruptly within the rules of a corrupt system that person is ostracized or otherwise endangered. So it is not a matter of no accountability, but one of to whom one is accountable and who has the power to punish and reward behavior.

Once when in Colombia I was traveling with a former Port Captain of a major coastal city. Off the coast U.S. naval vessels patrolled against drug smugglers in an attempt to interdict the traffic. This former official asked me “what would you do if a drug boss

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14. See Robert Klitgaard, “International Cooperation Against Corruption,” in *World Dev. Rep.* (1997) [hereinafter Klitgaard, Corruption]; see also Robert Klitgaard, *Controlling Corruption* (1988). Klitgaard observes that: “The reminder that corruption exists everywhere—in the private as well as the public sector, in rich countries and poor—is salutary, because it helps us avoid unhelpful stereotypes. . . . Corruption is a term with many meanings. . . . Viewed most broadly, corruption is the misuse of office for unofficial ends. The catalogue of corrupt acts includes—but is not limited to—bribery, extortion, influence peddling, nepotism, fraud . . . and embezzlement. Although people tend to think of corruption as a sin of government, it also exists in the private sector. Indeed, the private sector is involved in most government corruption.” *Id.*

15. Klitgaard, “Corruption,” *id.* Klitgaard also states that, “Different varieties of corruption are not equally harmful. Corruption that undercuts the rules of the game—for example, the justice system . . . devastates economic and political development.” *Id.*

16. Klitgaard, Corruption,” *id.*

came to you when you were a Port Captain responsible for overseeing all the shipping in and out of the system, and he said: “I will pay you \$5 million to let my shipments go through without opposition. If you do not do this, I will torture and murder one of your children each week and then when they are all gone, I will do the same to your wife.” The former official then asked what I would do. This is the nature of a truly corrupt system in which big money is involved. To greater and lesser degrees this is what many people face when we speak of doing away with corruption.

Even Klitgaard offers a hope that is more wishful than realistic. He concludes: “Combating corruption . . . begins with designing better systems. Monopolies must be reduced or carefully regulated. Official discretion must be clarified. Transparency must be enhanced. The probability of being caught, as well as the penalties for corruption (for both givers and takers), must increase. . . . Laws and controls prove insufficient when systems do not exist in which to implement them. Moral awakenings do occur, but seldom by the design of our public leaders. If we cannot engineer incorruptible officials and citizens, we can nonetheless foster competition, change incentives, and enhance accountability—in short, fix the systems that breed corruption.”<sup>17</sup>

The problem with such analyses is that in contexts where there is no real tradition of law, including monitoring and fair and balanced institutional enforcement, the economic and political systems are filled with corrupt behavior regardless of the most eloquent rhetoric that often flows from the lips of the most corrupt actors. It is not uncommon to see political and business leaders prattle endlessly about fairness, justice, equity and the like in their public personas while making millions of dollars (and sometimes even billions) through graft and corruption.

But in its own way the U.S. is as corrupt as any other. Think about the manipulation for political reasons of the data relating to global warming data by the *Bush II* White House, a situation where the person responsible then leaves to take a lucrative position in a major oil company.<sup>18</sup> Other examples of questionable behavior are easily found in forestry, energy policy and drilling, wetlands protection, air and water quality and much else. If even a strong Rule of Law system such as exists in the U.S. works quite imperfectly and with ongoing corruption and political influence, other systems based on personal power and the use of naked force to achieve ends has few restraints.

Basing strategies on “fixing the systems” through which corrupt behavior occurs and is sustained unfortunately represents another “if only” analysis. “If only” people did not behave as they do. “If only” institutions weren’t filled with people opposed to change and committed to protecting their authority, turf and careers. “If only” those who benefit

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<sup>17</sup> Klitgaard, “Corruption,” *id.*

<sup>18</sup> For an example of corruption *see*, Andrew C. Revkin, “Bush Aide Softened Greenhouse Gas Links to Global Warming,” *New York Times*, Wednesday, June 8, 2005. <http://www.commondreams.org/headlines05/0608-05.htm>. Visited 1/21/06. Revkin reports that Philip A. Cooney was a lobbyist for the American Petroleum Institute before entering government service, lacks scientific training, and softened key paragraphs of an EPA report on the dangers of global warming. Mr. Cooney unfortunately was Chief of Staff for the President’s Council on Environmental Quality. Cooney left CEQ and was immediately hired by ExxonMobil in June 2005.

from the power and wealth of an existing system would put noble missions ahead of their own interests and give up part or all of their power to others who were more “deserving” or simply hadn’t had a chance at power themselves. “If only” recited *ad infinitum* and *ad nauseum*.

Why should we expect those who benefit from a corrupt system to change willingly? If there are no serious international regimes with the authority, power and political will to compel the changes it is unreasonable, naïve and irrational to expect them to occur. Nor would many of us actually desire such a system if we fully understood the extent of invasive authoritarian control that would be needed and the inevitability of abuse and overreaching that would occur.<sup>19</sup>

### **Strategies of “Small Wins,” Key Factors for Success and Failure, and Key Points of Leverage**

We need to abandon the rhetoric of sustainability and adapt strategies of accountability. Accept the cliché that politics is indeed the “art of the possible.” You can’t force reality into a singular controlled pattern. Reality “IS” change and strategic adaptation is an essential part of dealing with that change. It is more important and more effective to monitor conditions, create buffers against the worst consequences, and develop the means to adapt our behavior to events at an early enough point to avert the worst of the consequences. Utopian strategies are like King Canute standing on a shore ordering the unheeding tides to recede and being “upset” when the sea rolled right over him. There are too many unforeseeable variables and feedback loops with multiplier effects. There are too many “butterflies” to capture in our data “nets” and projections.

We are in the midst of a transformative *Kondratiev Long Wave* that has been going on for at least twenty years and will last another two decades.<sup>20</sup> We cannot know its real costs and consequences until it has dissipated and the new structure that is being created settles in. Even then we will not be in a condition of stasis. We must improve our decision-

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<sup>19</sup> Part of the problem is the scale of what is being regulated. It is very expensive and difficult to regulate an industry where the scale of the business organizations is relatively small and the numbers of business actors are large. The difficulty of regulating and enforcing small and medium sized businesses has been analyzed in: Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next Generation Environmental Regulation* (GreenLeaf Publishing, 2002). This book was ably reviewed by Ian Campbell and Benoît Leduc, Policy Research Initiative, Department of Foreign Affairs and International Trade, Government of Canada Policy Research Initiative, Book Reviews v. 6, # 4. [http://policyresearch.gc.ca/page.asp?pagenm=v6n4\\_art\\_12](http://policyresearch.gc.ca/page.asp?pagenm=v6n4_art_12). Visited 1/19/06. Campbell and Leduc remark: “The SME context is characterized by a large number of small companies, such that effective monitoring and therefore a credible threat of enforcement are all but impossible. Small- and medium-sized companies represent more than 90 percent of all enterprises in Organization for Economic Cooperation and Development (OECD) economies, and account for approximately 70 percent of all pollution in the United Kingdom. Many SMEs operate at the margins of profitability, and view environmental protection as an added financial burden they cannot afford. While there may be some win-win solutions for SMEs, they often require an investment in processes, equipment, or expertise that many are ill-equipped to make, through lack of specialized knowledge or available capital. These characteristics make environmental regulation of SMEs particularly challenging from a public policy perspective.”

<sup>20</sup> Kondratiev, *The World Economy and its Condition During and After the War*; Kondratiev, “The Long Waves in Economic Life.”

making in order to cope with this environment. We need to learn how to “ride the wave” of continual change and adaptation but this doesn’t mean we can’t do some good things.

There are some basic areas where we can create protective zones and produce some positive effects. These include issues of land rights, social organization, food security, careful economic development, equity and human rights. Part of what is required is the abandoning of false ideals such as sustainable development. Beyond that we need to focus on strategies involving what have been called “small wins.” This needs to be based on the identification of what business strategist Kenichi Ohmae described as *Key Factors for Success* (KFS) and *Key Factors for Failure* (KFF).<sup>21</sup> These approaches—“small wins,” KFS and KFF—must be applied inside strategies aimed at specific systems based on an analysis that I think of as *Key Points of Leverage* or, since we are using acronyms, KPL. In every situation there are key factors that provide maximum leverage. There are others that lead to success or other paths of action that result in failure.

Achieving goals requires honest and simple strategies to which we can commit ourselves and that ordinary people can understand and implement within the constraints of existing institutions. It is important to concentrate on “small wins” that are achievable over a relatively short period of time rather than anticipating a vast retooling of existing institutions and fundamental changes in human behavior. Such transformational shifts would require that we collectively gain a level of understanding beyond our capability. Even if we somehow changed our character and that of our institutions special interests would remain that would sabotage the efforts.<sup>22</sup> Many of the governments upon which we must rely to regulate effectively change composition frequently. New office holders often fail to understand the reasons for pre-existing policies or they the policies as those of their opponents. A result is weakening or abandonment of the effort.

### **Strategies Involving Fair Trade, Certification, and Socially Responsible Investment**

The “Fair Trade” and certification movements offer an example of more practical ways to influence behavior through the use of certification systems by which consumers can identify acceptable products. Such efforts will never be enough but they are productive strategies within their limitations. One of the intentions of the Fair Trade movement, certification systems, and organic labeling is to create market and investment niches that allow producers who “do it right” from a social or ecological perspective to gain a decent return on their activity. These approaches can also assist socially concerned investors interested in channeling their investments to economic activity consistent with their affirmative value systems. While positive, these approaches will have difficulty going beyond eight to ten percent of their particular market sector. This is because a price

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<sup>21</sup> For the idea of key factors for success and failure see Kenichi Ohmae, *The Mind of the Strategist: The Art of Japanese Business* (McGraw-Hill 1980).

<sup>22</sup> For the concept of “small wins” see, Karl Weick, “Small Wins: Redefining the Scale of Social Problems,” *American Psychologist*, January 1984. See also, Floyd Rudmin, “Round Table Conferences: An Application of Small-Wins Theory,” *Bulletin*, May 2003, [http://scienceforpeace.sa.utoronto.ca/Essays\\_Briefs/Rudmin/Rudmin-RoundTableTheory.html](http://scienceforpeace.sa.utoronto.ca/Essays_Briefs/Rudmin/Rudmin-RoundTableTheory.html) [visited June 17, 2005].

premium is a required element and the proportion of the consuming population willing to pay the premium is limited.

Product niches based on various criteria allow certified products to be sold under “green” labels. These labels attest to the ways in which those products were manufactured or grown. This allows a pricing premium that reflects the different production methods or increased costs of the reduced operational scale of the enterprise. We see such certification systems as organic labeling of foods, forest and marine products.<sup>23</sup> The Fair Trade movement requires members to commit to a specific set of values considered fair to workers. These include fair wages, a strong preference for cooperative and producer association-based workplaces, consumer education, environmental sustainability, financial and technical support, respect for cultural identity, and public accountability or being willing to have a company’s records transparent to allow examination for compliance with the Fair Trade or certification commitments.<sup>24</sup>

One problem with certification systems is that as soon as a standard is created offering a competitive premium, “free riders” attempt to gain the benefits without having accepted the responsibility of actually conforming to the standards. The USDA’s certification standards on the labeling of organic food offer an example. The Consumers Union, in its *Guide to Environmental Products*, reports that:

It took 12 years of hearings, hundreds of thousands of comments from the public, and the drafting of 600 pages of proposed standards to create the “USDA Organic” label. Issued last October, it was a major achievement. Even its toughest critics agree that any food bearing the organic label must be produced far more naturally, with far less impact on the environment, than conventional food. Among the requirements: No synthetic fertilizers, few chemical pesticides, no antibiotics or hormones, no irradiation or genetic engineering, no animal byproducts in animal feed, and access to the outdoors for all livestock.

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<sup>23</sup> See, e.g., the Marine Stewardship Council, <http://www.msc.org/>. Visited 12/14/05. The MSC’s site notes that: “The MSC is an independent, global, non-profit organisation whose role is to recognise, via a certification programme, well-managed fisheries and to harness consumer preference for seafood products bearing the MSC label of approval.” This may well be true but people I work with in Malaysia, Bangladesh and other areas of South Asia consider the MSC to have been co-opted by industry. I do not work directly with the MSC but in limited dealings they do seem closer to the industry perspective than the environmental. The Forest Stewardship Council is similar to the MSC in its intent. Its proclaimed mission is: “The Forest Stewardship Council (FSC) shall promote environmentally appropriate, socially beneficial, and economically viable management of the world’s forests. Environmentally appropriate forest management ensures that the harvest of timber and non-timber products maintains the forest’s biodiversity, productivity and ecological processes. Socially beneficial forest management helps both local people and society at large to enjoy long term benefits and also provides strong incentives to local people to sustain the forest resources and adhere to long-term management plans. Economically viable forest management means that forest operations are structured and managed so as to be sufficiently profitable, without generating financial profit at the expense of the forest resources, the ecosystem or affected communities. The tension between the need to generate adequate financial returns and the principles of responsible forest operations can be reduced through efforts to market forest products for their best value.” FSC website, [http://www.fsc.org/en/about/about\\_fsc/mission](http://www.fsc.org/en/about/about_fsc/mission). Visited 12/14/05.

<sup>24</sup> “FTF Principles and Practices,” Fair Trade Federation, [http://www.fairtradefederation.org/ab\\_princ.html](http://www.fairtradefederation.org/ab_princ.html), visited 12/14/05.

No sooner did those tough standards go into effect, however, than various enterprises began to look for ways to cash in on the USDA Organic label without having to adhere to all the demanding rules. In October, The Country Hen, a Massachusetts egg producer, applied to its local organic certifier for permission to use the organic label. But to meet the rule that its chickens would be able to go outside, the producer indicated that it planned to put a few porches on its henhouses, which held thousands of layers. Did this promise fulfill the requirement for access to the outdoors? The local certifier said no. But on appeal, the USDA overruled the certifier and said The Country Hen could use the USDA's and the certifier's organic labels.<sup>25</sup>

Another positive but also inherently limited approach is Socially Responsible Investment (SRI). This involves the pooling of funds and the use of value-based investment screens that allow concerned investors to direct their funds to areas where the processes, products and participants fit into the investors' social agendas. The Social Investment Forum describes Socially Responsible Investing as: "Integrating personal values and societal concerns with investment decisions.... SRI considers both the investor's financial needs and an investment's impact on society. With SRI, you can put your money to work to build a better tomorrow while earning competitive returns today. Social investors include individuals and institutions such as corporations, universities, hospitals, foundations, insurance companies, pension funds, nonprofit organizations, churches and synagogues."<sup>26</sup>

Such approaches will never be enough, but they represent practical strategies that contribute to improvements. Other productive strategies can be developed but none of them will result from voluntary codes promulgated by the United Nations, the International Labor Organization, or the Organization for Economic Cooperation and Development. Voluntary business codes created by trade associations or mission statements such as offered by Halliburton's "commitment" to follow exceptional levels of ethics in all its activities are propaganda hoaxes, not solutions. Nor will much of anything positive emerge from empty platitudes such as *Agenda 21* and the "ideal" of sustainable development. It is time to get specific, realistic, concrete and strategic.

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<sup>25</sup> "The Consumers Union Guide to Environmental Labels: "Assault on organic standards," <http://www.eco-labels.org/feature.cfm?FeatureID=5>. Visited 12/14/05.

<sup>26</sup> See, Social Investment Forum, <http://www.socialinvest.org/>. Visited 12/14/05.