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BODY:

TESTIMONY OF ROBERT F. HOUSMAN SENIOR ATTORNEY

THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW ON CHILEAN ACCESSION TO THE NORTH AMERICAN FREE TRADE AGREEMENT

BEFORE THE TRADE SUBCOMMITTEE OF THE HOUSE OF REPRESENTATIVES

COMMITTEE ON WAYS AND MEANS

JUNE 21, 1995

Chairman Crane, members of the Subcommittee, thank you for the opportunity to appear before you today on Chilean accession to the North American Free Trade Agreement (NAFTA). My name is Robert Housman, I am a Senior Attorney with the Center for International Environmental Law (CIEL) in Washington, D.C. 1 1 Brennan Van Dyke and David Hunter, both also of CIEL, aided in the preparation of this testimony.

My testimony will focus on two issues: 1) the inclusion of environmental protection in the grant of fast track authority to negotiate with Chile their accession to the NAFTA; 2) how environmental issues regarding Chile's accession to the NAFTA might be handled most effectively.

I. The Inclusion of Environmental Language in Fast Track

Perhaps, the single most contentious issue with regard to Chilean accession to the NAFTA-one which seriously threatens the ability of the NAFTA parties to bring Chile into the NAFTA fold-has little at all to do with Chile. Instead, the deal-breaking issue of the day appears to be whether the fast track authority provided to the president to negotiate with Chile, and possibly beyond, should include environmental protection within the list of goals that should be advanced by trade liberalization efforts.

I know that many of the members of this Committee have expressed the belief that such environmental matters should not be included in the fast track authority. I want to begin by respectfully disagreeing with this view, and by offering evidence as to why such environmental goals should be included in the fast track authority.

Many opponents of environmental fast track language have argued that the environmental provisions of the NAFTA package are not applicable to Chile, because Chile and the United States do not share a common border. I believe that this argument reflects a minor, but nonetheless important, misunderstanding of

how the NAFTA package of agreements deals with the environment.

Thus, bearing in mind the advice of Robert Frost who once said "never take down a fence until you know why it was put up," it is important to first explain what is in the NAFTA package. The NAFTA package-the NAFTA agreement and the side agreements-simply does not focus on transborder issues. The reality is that such issues are rarely even mentioned in the NAFTA package's provisions on the environment. The main thrust of the NAFTA package, in particular the side agreement, is to control the potential distortions to trade flows that can be caused by disparate levels of environmental law enforcement.

Once one understands that the NAFTA package's environmental provisions focus on trade distortions, the theory that the NAFTA environmental provisions only apply where a common border exists falls apart. Trade distortions-environmental and other-do not require a common border. Let me prove my point by applying the border theory of environmental trade distortions more broadly. For example, if one extended this theory to U.S./Japanese trade the lack of a border would preclude any trade distortions between the United States and Japan. Imagine no trade distortions could exist in say auto or auto parts trade simply because we share no border with Japan. However, we all know this is not true. While we share no border, Japanese governmental and nongovernmental practices create substantial trade distortions in these sectors.

Similarly, whether or not two trading partners share a border has little effect on whether trade distortions exist based on different levels of environmental protection or enforcement. Therefore, because the NAFTA environmental side agreement deals with trade distortions that span noncontiguous territories, the fact that Chile has no border with the United States has simply no bearing on the applicability of the NAFTA package's environmental provisions to Chilean accession. For example, the U.S. farmed salmon industry has already raised specific concerns in testimony provided to both the Congress and the Clinton administration that the lack of environmental regulations on Chilean salmon farmers puts U.S. farmers at a disadvantage. In other words, the extension of the NAFTA side agreement is no less important in regard to Chilean accession as it was for Mexico and Canada.

Dealing with environmental issues, in particular environmental trade distortions, in the Chilean accession process is also of vital importance because we are not just talking about Chile here. Chilean accession to the NAFTA will cut the template for hemispheric integration that as currently envisioned will extend to all the nations of the Americas by the year 2005. Therefore, for those who wonder why all the fuss over Chile, my simple answer is Brazil, Argentina, Columbia, Bolivia, Paraguay, Uruguay, Peru, and so on.

If one examines this list of other potential NAFTA partners, environmental issues will loom still far larger down the road. U.S. textile manufacturers already are complaining about the disparities in competitive position caused by the failure of other Western Hemisphere nations to require basic level of environmental protection. Venezuela and Brazil, both NAFTA hopefuls, have recently gone to the WTO to challenge a U.S. environmental law requiring gasolines to become less toxic and smog causing-a law that the Congress, domestic refiners and environmental groups all agree is vital to our citizens' health and safety.

Unfortunately, our ability to deal with these issues in the future will depend largely upon how well we lay the groundwork now- that is why builders

work so hard to lay a strong foundation for a home, even though the foundation itself will never be occupied.

Finally, those who would prefer not to extend the NAFTA environmental side agreement further are likely to face one other major obstacle to their approach, namely the views of our NAFTA trading partners. Recently, at the Miami Congressional Workshop on Latin America, a senior member of the Canadian government provided emphatically that Canada believes the extension of the side agreement is a sine qua non to the expansion of the NAFTA proper to any other party. While I have not heard a recent opinion on the topic from Mexico, one must wonder why Mexico would ever consent to giving Chile a deal better than the one it was given. Thus, realizing that the expansion of the NAFTA is not a sole U.S. prerogative, opponents of the extension of the NAFTA environmental agreement may find that if their opposition carries the day, the expansion of the NAFTA proper may be lost-biting off one's nose to spite his face so to speak.

II. Handling Environmental Issues in NAFTA Accession

Given that the factors laid out above clearly argue in favor of, at minimum, applying the environmental provisions of the NAFTA to Chile and beyond, the next question is how best to apply them. The environmental provisions of the NAFTA and its supplemental environmental agreement, the North American Agreement on Environmental Cooperation, the NAAEC, only ensure that parties enforce their environmental laws, not that parties have adequate, or any, environmental laws to enforce. Because not all nations in the hemisphere are at the same level, a set of criteria is needed to guide NAFTA accession. In policy circles these criteria have come to be called "readiness criteria."

Readiness criteria provide guidance to determine both when a country's domestic house is sufficiently in order to begin NAFTA accession negotiations and what order of priority should be assigned to each country in the NAFTA accession "on deck" circle. Efforts to develop such criteria have focused largely on traditional economic and trade considerations. Less attention has been paid to the environmental aspects of readiness, but the question of ' what environmental policies need to be in place before a country is ready to become a NAFTA party remains a major issue in the NAFTA accession process.

CIEL considers the most sensible approach to readiness criteria to be a phased-in approach. Some criteria would constitute the starting line, the point before which trade negotiations should not begin. Other criteria would serve as environmental milestones that must be met in order for the process of liberalization to continue. There are countless ways to divide up what should be starting line criteria and what should be milestones, as well as to what should not be included at all. CIEL advocates the following three-tiered approach to environmental readiness criteria. 2 2 A parallel approach could also ensure that accession agreements adequately address trade-related labor concerns.

Tier 1: the Starting Line

Liberalizing trade between countries at unequal stages of industrialization and with vastly disparate environmental protection policies, without furnishing adequate environmental safeguards is just not responsible policy. Among the environmental harms that can result are transfers of dangerous chemicals and other goods, which less industrialized countries are ill-equipped to regulate; subsidization by less regulated countries of the over consumption

practices of wealthier countries; and localization of the growth of highly polluting industries in less regulated countries. on the other hand, with basic legal and institutional structures in place, and the intent to place safeguards in the agreement to ensure continued progress on environmental protection, the environmental harms of trade liberalization could be minimized.

1. Democratic Rights: The most critical starting line criteria for environmental readiness focuses on civil and political democratic rights. Citizens must have the right to obtain access to government information and to participate in government decisions affecting their interests. For example, a country must have laws that, at a minimum, ensure that citizens receive available information, and are consulted, about projects that will significantly affect the quality of their environment. Chile has taken some important steps in providing these types of rights. For example, Articles 26-31 of Chile's new Framework Environmental Law assures the informed participation of the community in the process of reviewing Studies of Environmental Impact.

Moreover, democratic rights must be extend into areas broader than just narrow "environmental" concerns; they must pervade the entire system of government. Other democratic rights necessary to secure adequate environmental policies include the rights of association and free speech, and to be free from persecution or abuse for engaging in political advocacy. In order to enforce these rights, as well as others, a country must have an independent and impartial judiciary that is free of corruption and open to citizen participation. Again, Chile appears to meet many of these conditions.

2. Party to the Relevant International Agreements: Another starting line marker for NAFTA accession should be to require, at minimum, that an accessant be a party to, or otherwise generally in compliance with, multilateral environmental agreements, such as: the Montreal Protocol; the Basel Convention on Transboundary Shipment of Hazardous Wastes; the Convention on International Trade in Endangered Species; the Framework Convention on Climate Change; the London Convention of 1972; the Convention on the Law of the Sea; the Western Hemisphere Convention; and the Biodiversity Convention. Moreover, the present NAFTA parties should all be in full compliance with their obligations under the NAAEC whenever accession negotiations begin. As an aside, our NAFTA partners would be right to raise the United States failures to meet these international obligations.

On this count, Chile should push the U.S., Mexico, and Canada for assurances in the NAFTA accession agreement that the rich biodiversity of its native forests will be protected in accordance with the standards established in the Biodiversity Convention. Similarly, given Chile's special vulnerability to the effects of stratospheric ozone depletion, Chile should demand that the NAFTA parties remain in compliance with, and preferably strengthen, obligations, including those related to trade, under the Montreal Protocol. The United States should readily accede to, if not promote, these requests.

3. Environmental Reviews of the Liberalization Process: Building upon the environmental reviews of the NAFTA that were conducted by all three original NAFTA parties, all accessants, as well as current NAFTA parties, must be required to conduct a two-phase environmental review of the likely impacts of NAFTA accession on their environment. The first phase should occur at the earliest possible stage in the process-prior to the commencement of actual negotiations. This review must subsequently be revised once the negotiations are completed. A two-phase process is necessary because phase one is intended to enable the negotiators to identify and deal with issues that must be addressed

in the negotiating process, while the second phase can identify areas where trade liberalization will require legal or regulatory protections to be addressed outside of the trade agreement. The second phase is also necessary for judging any accession agreement on its environmental merits.

Working with its current NAFTA partners, the U.S. should require Chile to undertake such a study and, unquestionably, should undertake an environmental impact assessment, itself. Negotiations should not proceed before all parties have completed reliable environmental impact assessments, with opportunity for public comment and review.

4. Capacity to Institute and Implement an Environmental Regulatory Agenda: Finally, an accessant must already have in place the legal and institutional capacity to institute and begin implementing comprehensive environmental policies. For example, an accessant must have an adequately staffed agency or agencies charged with environmental protection.

Again, Chile has recently taken significant steps in meeting this first-tier criteria. Chile's Framework Environmental Law of 1994 established both legal and institutional structures. CIEL is heartened to see that since 1994, CONAMA, the newly-established Chilean environmental agency, has finished drafting the regulations necessary to implement the environmental impact studies provisions of this law and has formulated the procedures for generating the primary and secondary environmental standards.

However, capacity for implementation and enforcement, even of the environmental impact studies, is still lacking. Presently, the various regional offices of CONAMA, the COREMAs, which are responsible for reviewing all of the environmental impact studies for projects within their area, are staffed only by two representatives and a secretary. Even if reviewing environmental impact studies were the COREMA's only task, which it is not, the workload would be impossibly high for a staff of two. Yet, if a COREMA fails to approve or reject a particular environmental impact study in a certain amount of time, the project is deemed to have been approved. As a result, the benefit of having established an environmental impact assessment process could be substantially wasted. Progress on meeting environmental professional staffing needs in CONAMA should be a first order priority in the early stages of accession discussions.

Chile and the present NAFTA countries should be able to meet the criteria to bring them to the starting line for NAFTA accession negotiations with minimal difficulty. The environmental issues associated with the expansion of the NAFTA presumably will be identified in the various environmental impact assessments conducted by the countries and private parties, and CIEL would expect that the negotiators will work in good faith to design acceptable resolutions to any environmental concerns identified.

In this regard, the negotiators must be committed to addressing environmental problems, even if doing so requires altering the contours of the agreement. Here, I am specifically referring to the debate over whether

accession should be to the NAFTA and its supplemental agreements as they are; that is to say unchanged (CIEL calls this the NAFTA Package Approach), or whether provisions specifically suited to the issues raised by the unique factors of a Chilean accession should be included in the accession agreement (the NAFTA Plus Approach). If further study indicates that environmental issues associated with Chilean accession cannot adequately be addressed by the NAFTA and its supplemental environmental agreement, the NAAEC, the parties must be

open to tailoring the NAFTA package to protect fully the environments of every country. If this need to reopen the agreement becomes apparent, CIEL would commend to your review the forward-thinking, and well-reasoned proposals for NAFTA Plus accession that Minority Leader Richard Gephardt and his staff have developed.

The primary reason that it is necessary to remain open-minded about the NAFTA Plus Approach is that the NAFTA package may be inadequate to respond to the natural resource issues likely to arise in the context of increased economic activity in Chile. For example, the citizen enforcement petition provision of NAAEC article 14, which directs the Secretariat of the North American Commission on Environmental Cooperation, the NACEC, to review petitions "asserting that a Party is failing to effectively enforce its environmental laws," may exclude laws governing natural resource exploitation. Article 45.2(b) excludes from the definition of "environmental law" any statute or regulation "the primary purpose of which is managing the commercial harvest or exploitation ... of natural resources," although "primary purpose" is defined in article 45.2(c) as relating to the particular provision in (rather than the entire) statute. Nonetheless, these articles may prevent citizens from submitting article 14 petitions to challenge a failure to enforce laws regulating natural resource exploitation. These provisions raise uncertainties with regard to the breadth of resource protection laws that are covered under the NAFTA packages environmental provisions.

A simple Understanding of the parties (in the GATT tradition) regarding article 45.2 might suffice to clarify that natural resource protection falls within the scope of the NACEC's mandate and article 14. In other contexts, and in light of the many issues concerning natural resource. exploitation that relate to Chilean accession, it may be necessary to tailor the NAFTA to ensure adequate natural resource protection.

What should be avoided here is a fixation on form over substance. It is irrelevant how the environmental problems identified in the environmental impact assessments are addressed; it is only important that they be resolved through the NAFTA process. The same need to focus on substance over form also arises with regard to issues of timing. While many environmental issues will need to be addressed at the outset of NAFTA accession negotiations, some can appropriately be address during the process of liberalization. The second and third tiers of CIEL's readiness criteria provide a mechanism for continuing progress on environmental protection along side trade liberalization.

Tier 2: The First Five Year Milestone

Five years after an accession agreement has been reached and implementation of the NAFTA by and with the accessant has begun, the accessant must have met the following criteria. First, the accessant country must have passed legislation to address substantially all, if not all, the environmental priorities identified in the environmental reviews conducted during the

first-tier of the accession process. Furthermore, the accessant must have fully put in place a regulatory framework, consisting of the necessary institutions, personnel, laws, rules and regulations, needed to implement the environmental laws developed during this first five year period. Lastly, environmental laws that were already in place prior to the commencement of the accession process must now be being substantially, if not completely enforced.

Chile has already made some progress in meeting the requirements of

tier-two. For example, in 1991, Chile established an Environmental Unit in the Ministry of Mining, which instituted two new policies for environmental protection in the mining sector. One policy mandated the completion of an environmental impact assessment for new mining and smelting operations. The second policy established ambient air quality standards for SO2 and particulate matter and ordered the creation of decontamination plans for air pollution emanating from existing mines and smelters in areas that exceeded those standards. The decontamination plans require mines and smelters to meet ambient air quality standards for SO2 by the year 2000.

According to recent data, two out of the five mines and smelters that are presently located in saturated areas have approved decontamination plans. Another has submitted a plan, but it has yet to be approved, and another is expected to submit its plan very soon. One mine and smelter, however, seems to have been officially allowed to evade the environmental ambient air quality requirements simply by resettling its workers, and therefore, the only local human inhabitants, away from the site; although the workers obviously still spend hours each day working at the site and breathing in the highly contaminated air. Such policies and others like them in Chile constitute advancement toward meeting the tier-two requirements, provided they are properly implemented.

Other indications give cause for concern that Chile may not be on the road to meeting the second-tier requirements. As this testimony has already noted, CONAMA is presently severely understaffed. What is most alarming about CONAMA's lack of resources is what the situation may suggest about the level of real political support for an effective environmental protection regime in Chile. While it is true that CONAMA has enjoyed a dramatic increase in the number of its staff, a significant chunk of its financing has come from outside financial support. It is fine to have the extraordinary expenses of building an environmental regime underwritten by outside sources, but the day-to-day operational and enforcement functions of CONAMA must become part of the budget of Chile. The NAFTA accession agreement should provide built-in assurances that the Chilean government will put some of its own muscle behind creating an effective CONAMA.

Moreover, Chile has not yet resolved outstanding land claims that have been brought forward by its many indigenous populations. If we have learned any lesson from the NAFTA process, it is that we cannot ignore the social costs of the sometimes painful process of economic reform-this is the lesson of Chiapas. We raise this issue because it is universally understood that poverty and social injustice are two of the greatest macro threats to the environment. A fair resolution of the issues raised by the indigenous populations of Chile and throughout South America is a necessary requirement both for meeting certain human rights standards and for the ultimate achievement of sustainable development.

Tier 3: The Second Five Year Milestone

With the necessary laws and institutions put in place, tier-three focuses on enforcement of the environmental laws developed. Ten years after the agreement of NAFTA accession the acceding party must be effectively enforcing its own comprehensive system of domestic environmental laws. Once this determination has been made, the NAFTA oversight of each parties' law enforcement can transition entirely over to the mechanisms provided for under the NAAEC.

Ensuring Progress and Preventing Harms

It will not be enough simply to require of NAFTA parties that they meet the milestones laid out above. In order to implement greater hemispheric trade integration without fearing for the environmental health of the region, the accession agreement must include some mechanism to oversee and enforce the parties' compliance. one option would be to instruct the NACEC or the Joint Public Advisory Committees, the JPAC, to monitor compliance. Another option would be to create a new oversight mechanism.

A more complicated issue is choosing the appropriate response to failures to meet second- or third-tier criteria. In order for the tiered approach to be credible, some form of sanction mechanism must be part of the accession agreement. The most logical and potent sanction method is to link compliance with the trade liberalization process. There is, however, tension between the desire for a strong sanction mechanism, and the desire to avoid a sanction mechanism that is too strong to ever be used. The best sanction mechanism is one that draws distinctions between significant and minor breaches-just as criminal law has felonies and misdemeanors.

Because NAFTA will not eliminate tariffs overnight, such an enforcement mechanism could easily be constructed. One option would be to impose a deceleration or freeze in the tariff phase-outs for parties that are in minor breach of the accession agreement. The number of sectors affected and the length of the deceleration or freeze should be proportional to the violation. More substantial breaches could first provoke tariff snapbacks, and, second, expulsion from the NAFTA.

Punitive mechanisms are neither the only nor necessarily the best means by which to achieve environmental advances within the NAFTA nations. Presently, the NAFTA includes an environmental funding mechanism, made up of the Border Environmental Cooperation Commission and the North American Development Bank. However, their environmental mandates extend only to the border area between the United States and Mexico. Further, their efficacy has been seriously diminished by both funding shortages and political stresses. An expanded and improved version of the NADBank should be a part of the Chilean accession package. Nobel Laureate James Tobin has proposed a small tax on short-term international capital flows in order to prevent speculation of the kind that led to the downfall of the Mexican economy. The revenues from Tobin's tax could be disbursed for environmental restoration and protection projects, especially at the community level, through low cost loans and grants. These funds could then be used to assist new NAFTA parties to meet the requirements imposed by the second and third tiers of NAFTA accession and all NAFTA parties to develop programs to address environmental problems that result from increased international trade.

CONCLUSION

Debating whether or not the environment should be a part of Chilean NAFTA accession, or more broadly Western Hemispheric trade integration, is a lot like debating whether or not to include the foundation in the sale of a house. As hard as naysayers may try, ultimately it is impossible to separate environment from trade concerns. Why? Because you can't build a chair without wood, and you can't make wood without trees. Because you can't power the tools of industry without the-fuel of the environment. Because we all breath the air and drink the water of the Earth.

The issue then is not whether we should include the environment in our trade liberalization efforts, but rather whether we will deal with these issues through blind and reckless indifference or through intelligent and coherent long-term policies.

Dealing with the environmental issues raised by Chilean NAFTA accession in an intelligent manner will require us, at minimum, to apply the NAFTA 'package to Chile and all other NAFTA accessants. Further, hemispheric integration will require us, in some way, to deal with the host of individual and particularized environmental issues raised by the special and unique circumstances of each NAFTA accessant.

CIEL believes that many, if not all, of these particularized environmental concerns can be dealt with through the creation and implementation of environmental readiness criteria. We further believe that the best approach to environmental readiness criteria is a tiered approach as described above.

The benefits of a tiered approach to NAFTA accession are substantial. First, a tiered approach provides environmental protection, while respecting the needs of developing countries to provide economic opportunities for their citizens. Second, the tiered approach allows each accessant to develop its own regulatory system, thus recognizing that there is no cookie-cutter approach to environmental protection and that all countries need not adopt one model set of laws. Third, tiering also recognizes that the process of developing environmental laws, and then enforcing them, takes time; thus, tiering provides for a transition period. Fourth, a tiered approach neatly parallels the tiered approach to trade liberalization embodied in the NAFTA itself; NAFTA does not immediately liberalize trade-the majority of its tariff reductions and other obligations are phased in. Fifth, this approach would ensure that progress is make on environmental protection over the relatively near term without hamstringing the trade liberalization process that countries are committed to advancing.

Thank you, once again, for this opportunity to appear before you today.

LANGUAGE: ENGLISH

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