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TESTIMONY OF DURWOOD ZAEKE, PRESIDENT,
CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW,

PROMOTING ENVIRONMENTAL STANDARDS
THROUGH TRADE AND OTHER LEGAL MECHANISMS

Before the Subcommittee on International Development,
Finance, Trade and Monetary Policy

March 23, 1994

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Chairman Frank, members of the Subcommittee, thank you for the opportunity to testify today on the issue of environmental standards and trade.

My name is Durwood Zaelke. I am the President of the Center for International Environmental Law (CIEL), as well as an Adjunct Law Professor at the American University, Washington College of Law, where I also co-direct the joint CIEL/American University Research Program on International and Comparative Environmental Law. A list of CIEL's recent research publications on trade and the environment is attached, as is an announcement for a workshop we are hosting March 25 at American University on Chile and NAFTA.

I am particularly pleased to be able to testify at your opening hearing, where you have asked that we keep the big picture in mind. I am afraid that too much of the debate recently has focused on efforts to reconcile the technical rules of trade and the environment, at the expense of the more fundamental question, which I would pose as how to use law, including trade law, to promote environmental standards to achieve ecologically sustainable development.

I would like to begin with some comments on market failures and the untenable environmental status quo, as well as the efforts to date of environmental law to address these failures and protect the environment. And then offer suggestions for change, focusing on the opportunity to develop a model of economic development CIEL is calling "competitive sustainability." A more complete treatment is provided in the attached article.

Market Failures and the Untenable Environmental Status Quo

Our market-based economic system performs many wonders, and has long been emulated throughout the world. But here and elsewhere the market fails the environment. This is the basic lesson of environmental economics; most environmental costs are external to the market.

The services the environment provides, for example, assimilating pollution, are either free or grossly underpriced; and natural resources also are often free or grossly underpriced, for example our fish stocks. And because the environment is not properly priced, it is overused and abused.

Environmental law and regulation, and the standards they impose, basically are efforts to internalize these external environmental costs. We do this, or rather I should say Congress and other lawmakers do this, sometimes through command-and-control mechanisms, and other times through market-based economic mechanisms, including taxes and pollution charges, which in some circumstances can be more efficient.

The result is a regulated market. We often refer to it as a free market, meaning unregulated, but in fact the market is heavily regulated. Over the past 25 or 30 years in the US we have developed a detailed and complex set of environmental laws to regulate the market. For a good deal of this time environmentalists believed the market and industry were truly the enemy, and fought tooth and nail for strong command-and-control laws.

Not too many years ago, there seemed to be the beginning of an accommodation between environmental protection and industrial development, with some leaders of industry recognizing that environmental protection was necessary and good, and some environmentalists recognizing that we might begin to look for more efficient ways to achieve environmental protection that would give industry greater flexibility, at least regarding conventional pollution where there are no irreversibilities.

This looked to be a happy period; we environmentalists had won a good deal of the environmental protection we wanted, and now we could begin to consider efficiency and flexibility. Only we were wrong. We were winning many battles, but we were losing the war. We were nowhere near the real goal of ecological sustainability. Nor was the environmental law system we had helped develop designed to get us there. And we had barely begun to consider the global picture, including international trade.

What we see today, if we look clearly at the state of the environment, is truly frightening. (Here I would refer you to Robert Kaplan's article on the coming environmental anarchy in last month's *Atlantic* magazine. Also Lester Brown's *Vital Signs* and *The State of the World*, describing how the world is running out of food.)

Current growth trends in population and economic development cannot be sustained within the limits of our ecosystem, even with the most optimistic projections of technology advancement. Still more troubling is the fact that the scale of today's development already appears to be overwhelming the ecosystem that sustains us all.

"Further growth beyond the present scale," according to former World Bank economist Herman Daly, "is overwhelmingly likely to increase costs more rapidly than it increases benefits, thus ushering in a new era of uneconomic growth that impoverishes rather than enriches."¹

Daly believes that "this is the fundamental wild fact that so far has not found expression in words sufficiently feral to assault successfully the civil stupor of economic discourse."

(As an aside, this might be contrasted with the recent remarks of Secretary Bentsen, who was telling U.S. investors last week in California about the need for foreign capital to build the infrastructure in the dynamic markets of the APEC countries; he described the demand for new roads as the equivalent of building a new Century City Freeway every week, a rather dangerous road to take, for environmental and other reasons.)

When we look at the big picture, we must inevitably conclude that we do not have a sustainable system of development. Our legal system for regulating the market is simply not designed to achieve sustainability, and it should come as no surprise that it is not achieving sustainability. This is true even in countries where we have the strongest environmental standards, including the United States.

Yet environmental standards implemented through transparent laws are the key to redirecting industry and the market towards sustainability (along with environmental education and a renewed sense of environmental ethics, for individuals, firms, and governments).

Environmental laws and regulations and the standards they impose are the tools for governing the market. Unless and until lawmakers throughout the world fundamentally redesign our environmental legal system for regulating the market, we will not ever achieve sustainability.

¹Herman Daly & John Cobb, FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARDS COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE 2 (1989).

Redesigning Law to Promote Competitive Sustainability

Law and Ecology. Economic activity both domestically and internationally must be redirected, through environmental legal standards, towards ecological sustainability. We must go back to the basics: the fundamental principles of ecology. As lawmakers you can change the rules of the market, by changing the way you design laws to regulate it. But you cannot change the rules of ecology. They must be the touchstone.

We must take a new look at environmental law through the prism of ecological principles, to make sure that law ultimately becomes consistent with ecology, starting with environmental law, but other fields of law as well, including corporate law, antitrust law, securities law, and of course trade law. Indeed, we need to develop "law and ecology" as a school of thought in the same way the University of Chicago economists developed "law and economics"; in fact, we need to develop law and ecology as the antidote to law and economics, to provide the true bedrock for environmental law and sustainability.

Harnessing the Market. Once we get back to the bedrock of ecology, we'll be able to identify dependable guideposts for sustainability. But to get us to sustainability, we'll also need an engine, and that engine may well be the market. Not alone, as education and a renewed sense of environmental ethics also will be essential, and not where environmental irreversibilities are involved, such as threats to human health and the extinction of species and loss of biodiversity.

To quote Paul Hawken, of the environmentally conscious Smith & Hawken company: "Business is the only mechanism on the planet today powerful enough to produce the changes necessary to reverse global environmental and social degradation." Hawken describes industrialization as the economy of degradation, but he adds that there is a nascent restorative economy that is as large as the entire world economy, if we chose to make it so. And we can, through a redesigned legal system for harnessing the market.

Competitive Sustainability. The principles of ecology provide the destination, the market provides one of the most powerful engines, and "competitive sustainability" provides the steering mechanism. "Competitive sustainability" is designed to promote environmental standards as an element of competition, using competitive forces to reward firms and countries at the higher end of the environmental spectrum. It is a mechanism for realizing sustainability through the upward harmonization of domestic and international environmental standards, using competitive forces to create a level playing field for commerce at consistently higher levels of environmental and social protections that reward the cleanest and most efficient economic actors for their efforts.

We saw elements of this mechanism at the international level in relation to NAFTA. Largely because of Congress's concern, the US demanded that Mexico improve its environmental law system. Many in US industry also saw this as advantageous, recognizing that US environmental laws would remain strong, and that they could gain a competitive

advantage by ensuring that Mexico also imposed comparable environmental standards. The US standards thus were the fulcrum and trade expansion the lever for improving Mexico's environmental standards.

We also see elements at the firm level, where one competitor encourages EPA and DOJ to enforce environmental laws against another competitor. This happens domestically; I saw it when I was at DOJ during the Carter years; once I'd make a case against one polluter, he or she would tell me exactly how their key competitors were doing the same thing, and help me develop the case. It also happens internationally; Sun Oil is currently encouraging US regulators to enforce environmental laws against their Venezuelan competitors in the oil business. (I've often wondered why we don't provide the same environmental enforcement options to firms harmed by competitors that fail to follow environmental standards as we provide for private antitrust enforcement, including treble damages.)

But these are the tip of the iceberg, in terms of potential. A deliberate effort to promote competitive sustainability, by redesigning environmental law domestically and internationally could reap tremendous rewards, without any unbearable burden on industry (because the environmental playing field would continue to be leveled upward).

Specific Steps Toward Competitive Sustainability

More Complete Cost Internalization. A central tenant of competitive sustainability, recognized by both free traders and environmentalists, is the need to internalize environmental costs into product costs, through such mechanisms as taxes, fees, charges, permits, and command-and-control systems requiring, for example, a scrubber on a smoke stack.

Current environmental legal standards often do a poor job of cost internalization. Products produced under substandard environmental laws or laws that are not enforced are nevertheless freely traded on international markets at a competitive cost advantage over products from nations with strong environmental laws that are enforced, including in particular the United States.

Products produced without adequate environmental legal standards receive a subsidy by passing their environmental costs to the general public and downstream producers. This leaves the incentives working backwards, penalizing the good environmental actors and rewarding the bad.

Cost internalization might be facilitated through greater use of economic instruments, such as taxes and charges, which also can be more easily harmonized. An international framework convention for environmental cost internalization also may be needed.

Countervailing Duties. One way to eliminate the competitive disadvantage held by companies producing products in nations not enforcing strict environmental legal standards is to allow nations to apply a countervailing duty on these products equal to the environmental subsidy the products receive, when the products enter the importing nation's market.

Countervailing duties would go a long way towards leveling the environmental playing field for international trade, and would give the companies at the high end of the environmental spectrum the incentive to assist in the prosecution of such actions. While developing countries are generally against such actions, and there are dangers of protectionism, there are carrots that might be coupled with countervailing duties, including rebates, as provided in the earlier Boren bill (the International Pollution Deterrence Act of 1991). We also should consider redesigning the Generalized System of Preferences to give developing countries trade preferences for green or greener products.

Other funding and technical assistance could be provided to assist developing countries improve their environmental capabilities. This would seem like a very good investment of US bilateral assistance through AID and other US agencies and multilateral assistance through the GEF and the MDBs. I would suggest that any such assistance go not only to official government environmental institutions, but also to the NGO community.

Measurement and Disclosure. Even where we are not able to have all cost internalized through environmental standards, it would be very useful to begin identifying, quantifying, and disclosing such costs, to remind us just how far we have to go, and to learn the techniques we will need for more complete cost internalization.

Life cycle analysis offers considerable promise for measuring and quantifying environmental costs. But to reach its potential, trade law will have to be redesigned to allow production and process methods as legitimate environmental standards, and not merely environmental product standards. Sophisticated environmental labelling schemes also offer great promise, by allowing the greener producers to show their products in a better light vis a vis the products of their competitors. (Green Seal and Scientific Certification Systems are the two US labelling groups currently competing for the growing US labelling business.)

Another method to measure and disclose environmental costs is to redesign our system of national accounts, clearly an idea that should be pursued vigorously.

And then there is environmental law, which of course already internalizes some environmental costs — often crudely sometimes more elegantly — , and which should be carefully measured and made transparent. When the US began negotiating NAFTA, EPA had to acquire, translate, and analyze the state of Mexican environmental law. Only then could we see how far Mexico had to change to reach US environmental standards.

In this connection, and working with GLOBE USA, CIEL is embarking on a project to prepare country-by-country reports on the state of environmental law, with special emphasis on our key trading partners. But our effort is not sufficient, and Congress may well want to direct the EPA, AID, and Commerce to cooperate on an effort to monitor the state of environmental law, especially of our trading partners. (This information on the state of environmental law also would greatly assist our exporters, including the strong US environmental goods and services industry.)

I would like to make a final comment about information disclosure, deliberately provocative. We should consider that we spend over \$130 billion a year in the US alone on advertising², to encourage consumers to consume more. We regulate advertising sparingly — alcohol and tobacco, and of course false and misleading claims. But creative regulation perhaps could be explored to give a preference to green products, or to discourage misleading claims of greenness. In a very real sense, much of our advertising may be misleading consumers about the environmental consequences of buying specific products.

(I'll quote another interesting statistic from Paul Hawken: kids today can identify 1,000 brand names, and virtually no flora or fauna. So much for the power of advertising.)

In sum, measurement, quantification, and disclosure provide a feedback loop to promote competitive sustainability, by providing critical information for regulators, consumers, and firms themselves.

Vigorous Environmental Enforcement. Strong environmental laws carefully measured and made transparent, is only the first step. And it will be for naught without strong enforcement. In this respect, Congress might consider how to make our federal court jurisdiction more hospitable to those who would assist in the enforcement of environmental laws. Facilitating cross-border plaintiffs also would be important, as in the Nordic Environmental Protection Convention.

Expanded NGO Participation. This should be obvious, but I will repeat it here. The role of NGOs must be expanded, as they so often have the incentive and the expertise to monitor and enforce environmental laws.

Environmental Law Education. Another strategy for competitive sustainability relates to the need to train and re-train environmental lawyers and regulators throughout the world. CIEL directs an international environmental law program at the American University, where we have 150 foreign lawyers every year from 50 to 60 countries studying for an advanced LLM law degree. Perhaps 30 concentrate on environmental law.

²Ekins, *The Sustainable Consumer Society: A Contradiction in Terms?*, INTERNATIONAL ENVIRONMENTAL AFFAIRS 243 (1990).

Through this and other experience, it has become clear that there are not enough well trained lawyers outside of the US and perhaps western Europe, especially lawyers with a public interest spirit.

Yet if the US were to take the lead in training the next generation of environmental legislators and regulators throughout the world, as we have done with economists, and if we could teach the fundamentals of law and ecology, we would have a leading role in redesigning law throughout the globe to achieve ecological sustainability.

Multilateral Mechanisms. Much of what I have discussed focuses on domestic regulation of the market, in the US and in the jurisdictions of our trading partners. Much of trade law, of course, is multilateral, and it is worth considering other multilateral measures for international environmental protection, especially to guide the development of strong domestic environmental laws. In addition to implementation of the UNCED agreements, I would recommend an international APA. The US Administrative Procedures Act would make a terrific international model, both for our international institutions and for redesigned national legal systems. An international APA would greatly assist enforcement and NGO participation. (We could use it ~~right now~~, as we draft the administrative rules for the new NAFTA institutions, and for the World Bank Inspection Panel.)

Finally, it may be worth considering a framework convention to guide environmental cost internalization, a principle honored largely in the breach, especially at the international level. Soft law guidelines would be one way to begin.

Conclusion

We need to redesign our environmental legal standards until there are consistent with the basic principles of ecology, including the US legal system.

We must use trade law as the lever and the high US environmental standards as the fulcrum for raising the standards of the other nations of the world, as we have done with some success with NAFTA, with due regard for the need for technical assistance, technology transfer, and funding assistance in many cases.

But we cannot stop with trade law. We must use all available legal mechanisms to promote ecological sustainability, including bilateral and multilateral aid. We must redirect our incentives and disincentives in all fields of law, in order to promote ecologically sustainable development.

Nor can we stop with law, as education and a renewed sense of ethics must be part of the social change for guiding us to sustainability.

Finally, I am nervous to rely on corporations so heavily as the engine for change, and disappointed that the self interest that drives the market may be our strongest force. But with careful redesign of law, beginning with the efforts of the US, I believe that this is one of the paths we must take.

Thank you.



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Trade and the Environment

TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY (Island Press, 1993) (Eds. Zaelke, Orbuch, Housman)

The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment, UNEP (1994) (Housman)

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Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement, 5 GEO. INT'L ENVTL. L. REV. 593 (1993) (Housman & Orbuch)

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Frictions Between International Trade Agreements and Environmental Protections, in United States Environmental Protection Agency, THE GREENING OF WORLD TRADE (1993) (Housman & Zaelke)

Trade, Environment, and Sustainable Development: A Primer, 15 HASTINGS INT'L & COMP. L. REV. 535 (1992) (Housman & Zaelke)

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A Kantian Approach to Trade and the Environment, 49 WASH. & LEE L. REV. 1373 (1992) (Housman)

Provisions of the Montreal Protocol Affecting Trade (1992) (Goldberg)

A Survey of U.S. Laws Restricting the Export of Controlled and Hazardous Substances (1993) (Goldberg/Greenpeace)

Interbasin Water Transfers After NAFTA (1993) (Hunter & Orbuch)

Sustainable Development (Patent Pending): International Issues in Intellectual Property Rights and Their Environmental Impact (1992) (Heller)

OECD Bibliography on Trade and Environment Literature (September 1993) (Prepared by CIEL)

NAAFTA CHILE and the environment

9:00 am to 5:30 pm, Friday, March 25, 1994

Butler Board Room 6th Floor, Butler Pavilion
The American University
4400 Massachusetts Avenue, N.W.

Four panels of experts will discuss the implementation of the North American Free Trade Agreement

Speakers include:

Mario Aguilar
Mexican Embassy
Frederick R. Anderson
Cadwalder, Wickersham and Taft
Rafael Asenjo
Comision Nacional del Medio Ambiente
de Chile
Dan Esty
Institute for International Economics
Janine Ferretti
Pollution Probe Canada
Claudio Grossman
Washington College of Law
Paul Hagen
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Jennifer Havercamp
Office of the U.S. Trade Representative

Robert Housman
Center for International Environmental
Law
Stewart Hudson
National Wildlife Federation
Mary Kelley
Texas Policy Center
Sara Larrain
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