

## Trade and the Environment: Charting a New Course

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## Trade and the Environment: Charting a New Course

In the 1992 presidential election the American people woke up and spoke up. Confronted with a choice between a regressive status quo and a bold new course of change, Americans opted for the latter and rejected the former. We opted for an innovative program of health care that will provide every American, young or old, robust or infirm, health care as a right without stigma or shame, and the Congress is now working diligently to craft this program. We opted for a national commitment to rebuilding our economy and creating new jobs through dynamic industries and new technologies. We opted for a new approach to international trade that embraces, not disadvantages, social needs, particularly the environment—a challenge to which President Clinton responded with the North American Free Trade Agreement's side agreements on labor<sup>1</sup> and the environment.<sup>2</sup>

The American public's 1992 vote for socially sound trade policies is testimony to a simple but, in its own way, profoundly revolutionary, message: a message that draws on our historical experience of mobilizing as a nation to respond to dramatic threats, and a message that at the same time confounds the conventional wisdom that environmental protection is somehow the enemy of economic growth rather than—as I believe—an essential prerequisite to growth and the creation of new jobs.

During the second world war, America responded to the rise of Hitler with the greatest mobilization of people and resources in human history. During the Cold War, we invested trillions of dollars to ensure our security and created, by will of government and national commitment, dynamic new industries in space technology and weapons manufacturing. We took the dreams—and yes, some of the nightmares—of scientists, engineers, and inventors and made them a reality, creating millions of jobs for American workers.

Today, we face a different kind of threat, less obvious, more dispersed, but no less deadly—a threat that is eating away at our ability to

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1. Can.-Mex.-U.S.: North American Agreement on Labor Cooperation, 32 I.L.M. 1499 (1993).

2. Can.-Mex.-U.S.: North American Agreement on Environmental Cooperation, 32 I.L.M. 1480 (1993).

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sustain life. It is not as spectacular as the mushroom cloud of nuclear annihilation; but it is a kind of ongoing, slow-motion annihilation.

In our own country we have thousands of toxic waste dumps, multi-billion dollar messes at our nuclear arms facilities, polluted harbors and closed shellfish beds, and a sad legacy of acid rain. Beyond our borders, in the former Soviet empire, there is environmental degradation the likes of which has never been seen anywhere else on the face of this planet. Around powerplants in the Czech Republic, the ash is thick enough to pick up by hand, and there may not be a live bush or tree within 50 miles. Half of Poland's water is too polluted even for industrial use, and one-quarter of its soil is too contaminated for safe farming. By the year 2000, in the absence of new environmental technology, the Polish people may have no potable water at all.

In China, the extensive deforestation around the Yellow River is evident, as is the flooding that takes place as a consequence. In the islands of the Philippines, the mountains of Laos and Thailand, and the barren hills of Honduras, loggers and desperate peasants have destroyed what were once double and triple canopy forests. They have clearcut the forests as far as the eye can see, resulting in uncontrolled erosion that destroys farmland and degrades water. Even the area around the Panama Canal is filling up with silt. No place on earth is immune from these kinds of problems.

So the questions loom. How long can we continue losing forest land each year equal in size to the state of Washington? How long can we continue watching wetlands dry up, farm land become desert, coral reefs die, and fresh water transform itself from the source of life to the carrier of disease? How long can we continue pumping billions of tons annually of CFCs and greenhouse gases into the atmosphere, destroying the ozone and playing havoc with the global climate, before our present concerns about *standard of life* give way to doubts about *survival of life*?

The answers are plain. We cannot continue on our current course, and we cannot survive if others follow our path and develop as we have. If the developing world adopts the same energy and general consumption habits of the developed world—if, for example, a billion Chinese were to become users of CFC-generating refrigerators powered by a coal-fired utility grid—it would not be long before we would face a crisis more severe and unyielding than any yet known to man.

At the same time, however, we cannot condemn those who live in less developed regions of the world to their current plight. Who among us is willing to look into the eyes of a child born of the Mexican Colonias and tell her that she will never have more than the destitute conditions that surround her? The statistics are alarming.

Each year, roughly ninety-eight percent of all childhood deaths occur

in the developing world.<sup>3</sup> Malnutrition causes up to forty percent of these deaths.<sup>4</sup> The pictures of bloated, starving toddlers that once shocked our conscience are now so commonplace that they fail to make the evening news. By the year 2000, more than 300 million Africans—approximately one-third of the continent's population—will live in a constant state of water scarcity.<sup>5</sup>

The scarcity of essential resources, like food and water, is a major contributor to the dramatic worldwide increase in the number of displaced persons. The number of refugees around the world reached 18 million in 1992—an inauspicious all-time-high.<sup>6</sup> As violence becomes more virulent, opportunities grow scarcer, and the earth becomes more barren, we see modern-day nomadic tribes of the vacant-eyed near-dead forming around the globe.

The minimum wage for a skilled factory worker in most of Thailand is a mere 135 Baht *per day*<sup>7</sup>—about \$5.40 U.S., which is relatively high compared to the \$1.80 U.S. *daily gross minimum wage* paid to Indonesian workers.<sup>8</sup> When your search is for today's bread, the promise of tomorrow's future is worlds away.

In the thirty countries with the lowest Gross Domestic Product in 1990, the total lifetime schooling per person averaged one year or less.<sup>9</sup> It is hard to break out of poverty if you cannot read or write your own name.

Absent a change in the course of development, the situation will only deteriorate. The world's population, now roughly 5.7 billion people, is expected to increase to more than 10 billion by the year 2100.<sup>10</sup> By 2025, scientists predict that there will be sixteen countries with populations in excess of 100 million people.<sup>11</sup> On a percentage basis, the greatest growths in population will occur in developing countries.<sup>12</sup> Each of these individuals will seek out, and have an innate right to, food in her stomach, clothes on her back, a roof over her head, and hope in her heart, but who will provide for them and from what wellspring?

3. Hal Kane, *Child Mortality Continues to Fall*, in VITAL SIGNS: THE TRENDS THAT ARE SHAPING OUR FUTURE [hereinafter VITAL SIGNS 1993] 96, 96 (Lester R. Brown et al. eds., 1993).

4. *Id.*

5. Sandra Postel, *Water Scarcity Spreading*, in VITAL SIGNS 1993, *supra* note 3, at 124, 124.

6. Hal Kane, *Refugees Reach All-Time Record*, in VITAL SIGNS 1993, *supra* note 3, at 100, 100.

7. *Thai Minimum Wage to Rise on October 1*, REUTERS, Sept. 28, 1994, available in LEXIS, News Library, CURNWS File.

8. *Indonesian to Increase Minimum Wages Next Year*, REUTERS, Oct. 20, 1994, available in LEXIS, News Library, CURNWS File.

9. Ed Ayres, *Literacy Gaining Slowly*, in VITAL SIGNS 1993, *supra* note 3, at 122, 123.

10. Aaron Sachs, *Population Increase Drops Slightly*, in VITAL SIGNS: THE TRENDS THAT ARE SHAPING OUR FUTURE 98, 98 (Lester R. Brown et al. eds., 1994).

11. *Id.*

12. Lifetime fertility rates in developing nations average 4.4 births per woman versus an average of only 1.8 births per woman in developed nations. Linda Starke, *Fertility Rate Decline Stalls*, in VITAL SIGNS 1993, *supra* note 3, at 124, 124.

Even in these unsteady economic times, it would be imprudent and immoral for us to turn a blind eye to the plight of the developing world. The environmental and economic health of the United States is, to a great degree, inseparable from the plight of these countries—we all share the same oceans and breathe the same air. Additionally, the long-term stability of vast regions of the world, in particular Africa, turns largely upon our ability to find the right balance between environmental and developmental concerns—essentially, the trade and environment debate writ large. While we must dedicate ourselves to rectifying the plight of the American family and worker, we must remember that every time the United States has turned its focus too much inward, the results have been devastating.<sup>13</sup>

Our failure to face these challenges at the international level will only make it more difficult for us to deal with similar domestic challenges. While the national economy has shown substantial progress since President Clinton took office, we still have a long way to go. I am frightened by the statistics that show that this generation of Americans, the so called X-generation, is the first generation of Americans that on average may not do as well as its parents'. It would be utter lunacy for any of us to look at the current fragile economic recovery, breathe a sigh of relief, and return to the snake oil economic policies and patterns of the past.

Nor do we have unlimited domestic resources to fuel a change in our own economic circumstances. Gone are the days when simply throwing more steel in the oven or gas in the engine could spur economic recovery. The United States has drastically depleted its natural resource base. Our primary forests now cover less than five percent of the area they once did. The fishing industry in Massachusetts, my home state, is reeling from the depletion of many of its stocks. The loss of rangeland has caused serious overgrazing problems even on federal lands. In addition, health care costs resulting from pollution take their toll in a growing roll of cancer, anencephaly, hepatitis, and cataract victims—to name but four in a long list of environmentally-related causes of human maladies.

The challenge we *all* now face is to build global economic prosperity hand-in-hand with environmental rejuvenation. We have to break through the old assumptions about environmental regulation and the bottom line. We must commit ourselves to development and growth that is sustainable—a kind of Enlightened Capitalism—where jobs and profits are linked to new technologies and practices, and where we are able to meet present needs without compromising the ability of our children to meet future needs. Environmentalists call this sustainable development.

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13. In 1930, the United States, in an effort to cope with the economic crisis that became the Great Depression, raised import tariffs to their highest levels in history. Smoot-Hawley Tariff Act, ch. 497, 46 Stat. 590 (1930). The Smoot-Hawley Tariff Act, as the measure was called, stifled trade and prolonged and intensified the Depression. I. M. DESTLER, *AMERICAN TRADE POLITICS* 11 (1992). This sad episode of American history provides us with one tragic example of what can happen when we constrict our world vision.

Economists and business people merely call it smart, long-term, comprehensive planning.

We must squeeze more out of each bit of the resources we use, and I believe that an expanded system of liberalized trade must play a significant role in this process. While the comparative advantage theory is not without its flaws and faulty assumptions, liberalized trade does encourage each nation to use its resources as efficiently as possible. Here environmentalists and free trade proponents share a similar goal.

Liberalized trade also builds mutual interdependence, and mutual interdependence has helped us enjoy nearly fifty years of global peace, albeit not tranquility. Here again, free trade proponents and environmentalists share a similar agenda.

If, for the most part, free trade proponents and environmentalists share similar, if not identical, overall agendas, why then do we now face a debate between trade and the environment? If trade and environmental policies are natural allies, why are some proponents of environmental protection calling free trade the Great Destroyer? And why are some proponents of freer trade calling this new attention to the environmental effects of liberalized trade the birth of Green Protectionism?

The answer is that we have yet to develop a system of trade and environmental rules that puts the system at equilibrium. Heretofore, we have allowed trade and environmental policies to develop on separate tracks, with willful blindness to each other. Like the three monkeys of folk tale fame—see no evil, speak no evil, and hear no evil—whenever a clash between trade and the environment developed, we wished it away without dealing with it.

When the parties negotiating the Montreal Protocol<sup>14</sup> asked the GATT Secretariat whether the provisions contemplated were GATT consistent, the GATT answered that they were.<sup>15</sup> Only now—roughly a decade later—do we hear grumblings that this may not be the case. Similarly, two GATT panels have failed to find that the Marine Mammal Protection Act<sup>16</sup> qualifies under the GATT article XX exceptions as the authors of the Act had thought it did.<sup>17</sup> As these examples show, unfortunately, we may have been too naive in our assumptions, for our best wishes have not come true.

We now have a system of trade rules, in the form of the GATT, which suggests that a legitimate environmental interest of a nation is somehow a restraint of trade or an unfair trade practice and is therefore illegal under the GATT. This clash places both the environmental and trade systems at

14. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989).

15. *Ad Hoc Working Group of Legal and Technical Experts for the Preparation of a Protocol on Chlorofluorocarbons to the Vienna Convention for the Protection of the Ozone Layer (Vienna Group): Report of the Ad Hoc Working Group on the Work of Its 3rd Session*, at 18, U.N. Doc. UNEP/WG.172/2 (1987).

16. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1988).

17. *United States—Restrictions on Imports of Tuna: Report of the Panel*, GATT Doc. DS21/R (Sept. 3, 1991), 30 I.L.M. 1594 (1991); *United States—Restriction on Imports of Tuna (II): Report of the Panel*, GATT Doc. DS29/R (May 20, 1994), 33 I.L.M. 839 (1994).

risk. As the chaos theory tells us, when a system is not at equilibrium, the chances of the entire system collapsing increase dramatically.

If higher standards of environmental protection can be challenged as trade barriers, the real or even perceived competitive disadvantages of these protections will undermine the ability of environmental front runners, like the United States, to provide leadership. Instead, those in the back of the pack will stand a good chance of leading us on a competitive race to the social bottom. In such a misguided race to a mirage of economic prosperity, environmental protections will be lost, workers' health and safety rules compromised, and wages will plummet. This is a race we cannot sanction.

Similarly, if individuals who do not benefit directly from free trade believe that it has the effect of depriving them of their democratic rights, undermining their health and safety, destroying their environment, or depriving them of their economic well-being, our trade agreements will be short lived. Such a confidence deficit will lead us directly into the economic and political dangers of past protectionist eras.

We must develop a system of trade rules and policies that allow free trade to help drive economic growth without undermining our environment or the social protections we now enjoy. Similarly, we must work to ensure that our environmental laws do not needlessly inhibit economic prosperity or undermine progress. We must chart a new course for trade and the environment.

Obviously, this is not a simple task. Not since the Bretton Woods Conference have we entertained such a searching examination of how our international economy succeeds and fails. Fortunately, it is a task that we are at least beginning to face in earnest. As part of the Final Agreement of the Uruguay Round, the Contracting Parties have agreed to form a standing committee to review the trade and environment intersection and to formulate reforms to the trading system designed to set us on the right track. Moreover, in the NAFTA we have a model for mutually reinforcing trade and environmental policies that we can expand upon globally.

We have a tremendous opportunity to develop a consensus on trade and the environment that can then be brought forward at the global level. The original GATT itself is the product of a similar process of incremental progress driven by U.S. leadership. APEC and the upcoming Summit of the Americas meetings provide us with opportunities to begin this new process of laying the groundwork for Enlightened Capitalism.

Clearly, forging mutually reinforcing trade and environmental policies will meet with resistance. However, there are a host of other initiatives that can make the process of integrating environment and trade a little less difficult.

For example, we must stop looking at environmental protections as economic constraints and begin to see them as business opportunities in the making. Every new environmental protection the world over is not just a safeguard against some threat; it also signals a new market for those who are technologically advanced and internationally savvy. In our search

for high paying, high technology jobs, we in the United States have not sufficiently focused on the environmental technology industry, or envirotech.

Envirotech is a \$200 billion a year industry headed for \$400 billion or more by the end of the decade. It is an industry in which the United States begins with a forty percent market share and has enormous capacity to expand. Environmental needs and environmental awareness are growing around the globe, as evidenced in everything from trade negotiations that emphasize environmental standards to new consumer publications that highlight environment-friendly goods. The demand is there. There are hundreds of thousands of jobs waiting to be created in recycling technologies, in energy conservation and alternative sources of power, in new manufacturing designs, in pollution cleanup, and in environmental services. These are the jobs and the business opportunities of the future, and we had better understand that because our competitors certainly do.

At the Earth summit in Rio, I was shocked to see a delegation of 700 businessmen from Japan, fully backed by their government, compared to less than fifty from the United States, many from Massachusetts, basically out on their own. Our President arrived in Rio on virtually the last day of the summit for a *photo* opportunity; our competitors worked that summit from day one in search of *economic* opportunity.

American business people are aware of the new realities and are moving hard to take advantage of them. But our government can help by encouraging the export of environmental technologies and services. As part of this effort, I have sponsored the National Environmental Trade Development Act of 1993,<sup>18</sup> to expand the U.S. export promotion services available to envirotech companies.

Another way we can help our emerging envirotech industry to become a global economic and environmental leader is by making international and foreign environmental laws available to U.S. citizens, government officials, and exporters, and information on U.S. laws available to those overseas with an interest. To this end, the Global Legislators Organized for a Balanced Environment—US, of which I am president, is working with the Center for International Environmental Law, the Reference Point Foundation, Sprint, Minnesota Super Computers, along with a host of others, to develop an international online service that will carry environmental laws and other information to legislators, citizens, businesses, and governments the world over.

In addition, we can develop better information to help us track the envirotech industry's progress. Currently there are no separate standard industrial codes that track envirotech exports and imports—they are lumped in and lost under various miscellaneous or general categories. Without these codes it is far more difficult to gauge the industry's per-

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18. S. 1074, 103d Cong., 1st Sess. (1993).



formance and promise.<sup>19</sup> Further, many of our best environmental technologies are cleaner production designs, as opposed to end-of-pipe clean-up or control technologies. However, these cleaner production technologies are tracked by their use, not by their advantage—a cleaner smelter is simply a smelter. With a little bit of effort, the Department of Commerce can rectify these problems by providing us with more detailed and accurate information on envirotech exports and imports.

Although it is a good place to start, our efforts need not, and should not, focus only on promoting our industries. We have at our disposal a host of tools for encouraging other nations to adopt more economically and socially sound development paradigms. Because we are all in this together, the effective use of these tools is not just a moral imperative: it is a survival imperative.

For example, a great deal of attention is now focused on the upcoming reauthorization of the Generalized System of Preferences, or GSP.<sup>20</sup> The GSP program provides preferential duty-free treatment to approximately 4,284 products from 134 designated developing countries and territories.<sup>21</sup> Among the suggestions put forward for GSP reauthorization is the establishment of a Social System of Preferences (SSP) within the GSP, which would provide duty-free treatment for goods manufactured in designated developing countries under exemplary workers' health and safety, equal employment opportunity, human rights, and environmental conditions. Other GSP goods would receive preferential but not duty-free treatment. The SSP would provide developing country industries an incentive to adopt the most responsible means of production.<sup>22</sup>

Although critics of such a program have argued that this is another obstacle for developing countries, they overlook the fact that the GSP program as a whole is an added benefit to these nations over and above the already substantially open markets of the United States. I find it disconcerting that the GSP program is now seen as some sort of international entitlement. In providing added assistance, the United States has both the right and the responsibility to advance its own policies and programs. For example, no one complained when, in order to encourage the spread of democracy, the GSP program did not provide benefits to communist countries. A reauthorized GSP should take a wider view of U.S. interests in the post-Cold War era.

In addition to these efforts on the homefront, the United States must also exercise leadership abroad in reforming the rules of international

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19. See ENVIRONMENTAL PROTECTION AGENCY, INTERNATIONAL TRADE IN ENVIRONMENTAL PROTECTION EQUIPMENT: AN ASSESSMENT OF EXISTING DATA 7 EPA No. 230-R-93-006 (July 1993).

20. See Trade Act of 1974, §§ 501-506 (codified at 19 U.S.C. §§ 2461-2466 (1988)).

21. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, A GUIDE TO THE U.S. GENERALIZED SYSTEM OF PREFERENCES (GSP) i (1991).

22. There are currently approximately 26 other countries that operate GSP programs of some type. *Id.* at iv. If the SSP program outlined here were to be adopted by a number of these other countries as well, that incentive would be exponentially stronger.

trade. In order to exercise this leadership we must be part of the process, not outside the door. While many environmentalists are unhappy with the provisions of the Final Agreement of the Uruguay Round of the GATT that place environmental protections at risk, the reality is that if we want to correct these flaws, we must participate in the post-Uruguay Round agenda. Absent the United States endorsement, the rest of the world will continue on a path to potential global demise, pulling us along with them, and all we will be able to do is complain to and nag our alienated trading partners.

The United States must lead the call for all our trading partners to set aside our narrow, short-term self-interests and resolve these issues in concert. However, in doing so we must be certain that the U.S. legislation implementing the Uruguay Round provides appropriate safeguards to ensure that no U.S. environmental, health, or safety protection shall be sacrificed at the free trade altar. Similarly, we must endeavor to ensure that trade rules not compromise existing and future multilateral environmental agreements.

Part of ensuring that the somewhat flawed provisions of the Final Agreement do not jeopardize environmental, health, and safety protections will require that the workings of both domestic and international trade decision-making be open to greater citizen access and participation. No one is more vigilant of an environmental threat than the mother or father whose child stands to be poisoned.

Citizens currently have virtually no access to or ability to participate in the workings of trade dispute resolution panels. Bearing in mind that the effective pursuit of international affairs generally requires some degree of confidentiality, these procedures must be made more widely known and more democratic. Greater democracy is an essential step towards GATT reform. After all, sunshine is the best disinfectant.

The United States, recognizing this fact, has begun to make strides domestically toward providing greater access and transparency in trade policy making. For example, President Clinton recently ordered the formation of an environmental advisory committee within the private sector trade policy advisory committee. Similarly, President Clinton has also signed an executive order calling for the United States to adopt the most open procedures possible in implementing the NAFTA environmental side agreement.

We are also seeking to bring democracy to trade decision-making at the international level. The United States insistence on including nongovernmental representatives as part of its official delegation to the Organization for Economic Cooperation and Development (OECD) trade and environment meetings is spurring a gradual opening of these OECD efforts. The United States also recently became the first GATT party to object to a panel decision on the procedural grounds that the panel did

not provide access to interested nongovernmental organizations.<sup>23</sup>

Our efforts in this area are laudable, but there is still more that we can do. For example, our practice of including nongovernmental representatives in the U.S. delegation to OECD trade and environment meetings should be carried over into the U.S. participation in the newly formed GATT Trade and Environment Committee. While the United States has a long way to go, we are still far ahead of the rest of the world, just the place we want to be when it comes to democracy.

Another area where United States leadership can make a difference is on "domestically prohibited goods," more commonly known as "the circle of poison." In the circle of poison we allow goods that are banned for use in the United States to be produced here and exported, typically to developing countries. This practice not only threatens the lives of people and the well-being of the environment in recipient countries, but these toxins return to our shores in the form of pesticide residues and other chemical contaminants to poison us here in the United States.

Developing countries have for years been pushing for trade rules that would ban this practice, and the United States has, under past administrations, been one of the single largest obstacles to their efforts. This must change. It is immoral to expose citizens of other nations to risks from products that we are unwilling to bear at home and irrational to allow trade in these circle of poison products to expose our citizens to products that we have otherwise banned for domestic use. Let us borrow from the trade world and establish a national treatment principle for environmental protection. Let us extend to the citizens of other nations the same environmental benefits we extend to our citizens. To this end, I am a cosponsor of the "Circle of Poison Bill," which would bring an end to this practice.

Around the world people are looking for leadership on these issues and, despite what happened at Rio, most people are still looking to the United States to provide it. We are the people who led the free world to survival in the Cold War. We are the people who rebuilt Europe from the ashes of World War II. And we are, perhaps, the only people with the capacity to lead now—to modify our own practices at home, lend a helping hand, show the way in international negotiations, and harness the energies and skills of all sectors of society to meet the environment and development challenges we all face. The task is difficult, but "[a]ny one can hold the helm, when the sea is calm."<sup>24</sup>

The ideas contained in this essay are just a few examples of the types of reforms that are necessary if we are to develop mutually reinforcing trade and environmental policies. Fortunately for those trying to under-

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23. *The World Trade Organization: Hearing of the House Ways and Means Comm.* (June 10, 1994) (testimony of Mickey Kantor, United States Trade Representative), available in LEXIS, News Library, FEDNEW File.

24. Publilius Syrus, *Sententiae*, reprinted in CHARLES G. SMITH, *SHAKESPEARE'S PROVERB LORE: HIS USE OF THE SENTENTIAE OF LEONARD CULMAN AND PUBLILIUS SYRUS* 107 (1963).

stand what reforms are necessary and to bring about these reforms, the *Cornell International Law Journal* has brought together some of the most distinguished individuals working in the field of trade and the environment to help us develop a reform agenda. The Journal's staff, especially Kathy Togni, its faculty advisers, Professors John Barceló and David Wippman, and Dean Russell Osgood are to be commended for bringing these individuals together and stirring the intellectual pot.

Each of the authors in this volume brings to these issues a different perspective, and each of these perspectives bears serious consideration as we develop mutually reinforcing trade and environmental policies. As these authors are among the navigators who must help us chart a new course, I heartily commend all of these articles to your attention.

