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2009 International Law Review Symposium Keynote Speech

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EarthJustice

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2009 INTERNATIONAL LAW REVIEW SYMPOSIUM
KEYNOTE SPEECH

Trip Van Noppen[†]

MR. VAN NOPPEN:

Thank you all for putting on this timely and interesting symposium and for inviting me to join you. I hope to give you some reflections on sustainability from the point of view of an environmental public interest law organization. During the symposium, we've heard from many organizations and perspectives, but not from the environmental advocacy perspective. Earthjustice is an advocacy organization, and we work on some of the sustainability issues that we've been talking about for quite some time.

First, I'd like to describe some of Earthjustice's work in the U.S. and internationally to set the stage for this talk and then describe what I think are some essential elements of actually implementing sustainability that we haven't addressed in much detail during the symposium, elements that go beyond the usual definitions. Then, I will turn to examples in the realm of toxics or chemicals policy, which has been mentioned briefly, and in the realm of climate change, which has been talked about quite a bit.

Earthjustice is an environmental litigation organization. It has ten offices around the country and 65 lawyers. We represent clients in environmental cases in a wide range of issues: climate change and energy, air and water pollution, toxics and environmental health, wildlife and public lands protection. The basic function of our organization is that we are citizen enforcers of the environmental laws. We'll talk about what that means and how important it is, as well as the overall importance of enforcement in achieving sustainability goals.

Here are some of the typical cases that we bring and typical kinds of things that we do. First, because we've talked a lot about climate law, I should mention that Earthjustice was involved in the Supreme Court's decision in April of 2007, which was the Supreme Court case that touched upon climate. The Court ruled that carbon dioxide is a pollutant under the Clean Air Act because of the detrimental effects of climate change on our health and welfare, and, therefore, that CO² is subject to regulation by the EPA. We also bring many cases challenging the permitting of new coal-burning power plants, because they are about the worst thing that we can do for the climate today. We're also suing the U.S.

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Department of Energy for its failure to adopt meaningful, strong energy efficiency standards for a wide range of appliances and equipment.

In the international realm regarding climate, Natasha Affolder talked about the interactions between corporations and treaty law. Earthjustice looks at the other side of that coin, which is the interaction with the advocacy groups and treaty law, trying to push the envelope on climate. We have represented the Inuit Circumpolar Conference, which is the organization of people who live around the top of the globe, in a human-rights complaint against the United States for failure to take adequate action to control climate pollution that was detrimental to the Inuit peoples' basic human rights to sustenance and culture.

Natasha also spoke about the World Heritage Convention. We have recently worked with colleagues in Australia to submit a petition to the World Heritage Convention regarding damage to the World Heritage sites that's caused by climate change. We heard Natasha speak this morning about the site-specific damage of a potential mine in the World Heritage site. That's a tangible problem that people can understand. We are also seeing damage from climate change from World Heritage sites to coral reefs and glaciers and other iconic landscapes and species, where you don't have a particular company taking site-specific action causing the damage, but where a remedy is needed. An inquiry by the World Heritage body can help draw international attention to an issue. These are examples of some of the things that Earthjustice does.

Our international program is quite small compared to our U.S. program. Internationally, we work principally with organizations throughout the Americas — in Canada and Latin America — that are trying to develop the capacity to use their domestic courts to enforce environmental laws and to improve citizens' rights to participate in environmental decision-making. Outside of the U.S., very few countries recognize citizen rights to go to court to enforce their country's environmental laws. That's something that is almost unique to United States environmental law, and it's a particularly powerful feature of our law. Our international program also takes on cases involving the environmental impacts of U.S. activities abroad and the impacts of foreign activity on the U.S., and we work to strengthen international recognition of a human right to a healthy environment.

During the symposium, we have engaged in a lot of conversation about sustainable development and corporate social responsibility in the environmental realm. We've heard stories of progress; we've heard stories of the frustratingly slow pace of progress. We haven't exactly stopped to focus on why we are talking about this, so I will take a moment to do that. We're talking about this issue because we are in the midst of an enormous wave of environmental damage. We are living in a century in which perhaps a third of the species that live on this planet will go extinct. We're facing epidemics of disease and the loss of resources that are essential for life. That's why we're talking about sustainability.

There are many forces involved in these trends that we see. I will mention three of the main drivers. The first is climate change. We're losing water resources because of climate change. Much of the world population's drinking water comes from snow melt. Snow packs are shrinking. Sea-level rise is pro-

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jected to wipe out many, many millions of people's homes. Climate change will cause food shortages from land becoming inarable, and it will accelerate the spread of disease. Another major driver is the impact of toxic chemical pollution. We are finding in the United States that women's breast milk is too contaminated to meet the safety standards required of milk sold in the grocery store. We see many species of wildlife experiencing profound genetic and developmental changes from toxic-chemical exposures. The third driver is habitat destruction. We're destroying forests and other critical habitat around the world.

Now, I'm describing these trends as drivers. In fact, they're symptoms. They're symptoms that tell us something about how well our web of international agreements, domestic environmental laws, and environmental standards is working to protect our health and our environment. They're symptoms of the fact that the web of laws, regulations, and international agreements isn't working well. We see unsustainable wealth and rates of consumption in some places for some people; profound poverty for most people. We see market failures not corrected by law, not corrected by voluntary corporate activity — failures of allowing pollution and not incorporating its cost into the price of goods, and failures of information. Globally, there are very low levels of opportunity for public participation in environmental decision-making; very low levels of democratic control over the issues that we're talking about.

So when we talk about sustainable development and whether we can successfully implement principles of sustainability, I believe we need to focus on the power of a few tools that are essential to progress. The first is the importance of the precautionary principle. I'll talk about that in the realm of toxic and chemical exposure. Without the precautionary principle in play, we are our own guinea pigs, and that's not a very sustainable situation.

The second tool is the importance of monitoring pollution, gathering information, reporting on adverse effects, and making that sort of information publicly available. Some of the U.S. environmental laws are good at that, but globally, we're not good at that. José Zapata, earlier today, addressed that shortcoming in Latin America, for example.

The third tool is opportunity for public participation and for citizen enforcement of the laws. No matter where we are, whether we're here in the United States with Region 5 of the EPA having a pretty aggressive enforcement docket, or whether we're in a country with very little legal infrastructure, the government is never going to be able to enforce environmental laws fully. The government will always have scant resources to enforce environmental laws compared to the scale of activity that's going on. It will never be politically popular to enforce environmental laws. There will always be political pressures in the opposite direction as well as conflicting demands for agency staff.

The European Union is dramatically changing how chemicals will be evaluated for safety, how they will be controlled and restricted in terms of what can be put into commerce and for what purposes, and what kind of information is available. REACH is the name of this European law. It stands for Registration Evaluation Authorization and Restriction of Chemicals and was adopted by the E.U. in 2007. It's often called the most complex law in E.U. history. It's interesting that

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one of the big motivations for Europe to get involved in a much more aggressive way in chemicals policy and in regulating toxics is because in Europe, the health system is paid for publicly. Because of this, the government has a much closer policy link between what's causing disease and the cost of providing health care. When people were showing up with cancers, with developmental problems, and with birth defects due to toxic chemical exposures, the governments began to pay attention. The governments were spending money on treating those health problems and have been motivated to take more aggressive action than has been taken elsewhere on removing toxics from the stream of commerce.

REACH adopts the precautionary principle. That's the most fundamental thing it does. For chemicals that are proposed for use in commerce, that are going into products such as carpets, paints, or laminated wood, REACH will require an up-front safety evaluation. The E.U. is going to identify the kinds of chemicals that are most likely to cause harm and evaluate them first, assess whether to allow the chemical's use in products and with what restrictions, if any, and determine what kind of information needs to be provided to users of those chemicals. REACH will then require the phase-out of the most harmful chemicals.

Another breakthrough aspect of REACH is that in evaluating a particular chemical, a company will have to evaluate less harmful alternatives to meet the same commercial need. Finally, the testing and reporting information will be largely publicly available. REACH will retain a provision for protecting truly confidential business information, but compared to what's presently in practice in the E.U. and in the U.S., the key information will be publicly available and the public will have the right to participate in the process and to appeal decisions of the environmental agency as it implements REACH.

Why am I calling this a dramatic change? I want to contrast it with our system in the United States. The U.S. counterpart to REACH, the law we use to regulate toxic chemicals going into commerce, is the Toxic Substances Control Act ("TSCA"). It's the most broken of our environmental laws. It is the least effective. It has almost no impact. No test data or advance safety check is required before a chemical is put into the marketplace in the United States. There is, therefore, no precautionary principle at work. There's a register, but there's no approval and no requirement to look at a less harmful alternative.

The EPA, which holds the information regarding the health effects of the chemicals in commerce, allows companies to submit such information entirely in confidence. So the public, and even medical providers, first responders like firefighters, don't have access to the health risks the chemicals may present, which is known by the company.

Today major reform efforts are underway in the United States to fix the broken TSCA system with a 21st century replacement, with REACH as the inspiration. Citizens are working to reduce toxics in health-care products that you would encounter in a hospital, to get toxics out of cosmetics, and toxics out of toys. Earthjustice is bringing some cases that are along those lines. Legislation has also been introduced in the United States Congress called the Kid Safe Chemical Act, which is basically meant to be a U.S. version of REACH. We're a long way

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from having such a law passed, but the momentum for that is building. We're also working to dissuade the U.S. trade representative from challenging the implementation of REACH under international trade agreements.

Comparing the European and U.S. examples of toxics regulation, I want to posit that sustainability - sustainable development in the chemicals and toxics realm - requires that governments and companies adopt the precautionary principle. It requires that we make adverse health effect information known, usable by the public, usable by the medical community, by researchers, by states, and that we allow for public participation in enforcement of those laws.

Now let's turn to the challenge of climate change. Climate is the area where international agreements and domestic laws are going to be the most transformational. Over the next several decades the U.S. and the world must completely change how we produce our electricity, how we transport ourselves and our goods, and how we heat and cool our homes. This transformation is going to affect every nation, it's going to affect every company, and it's going to affect every person.

What will be the significance of the sustainability principles that I have mentioned, particularly of information and reporting, public participation, and enforcement in the new energy system? The symposium has heard about the Clean Development Mechanism lacking an opportunity for public participation or enforcement and lacking important information on gathering and reporting safeguards. Any carbon-trading system, and any system of using carbon offsets, is going to have built-in potential for failure if we do not aggressively monitor the actual emission results of the offset transactions and trades, and unless we allow citizens to participate in the decisions and enforce the obligations.

What opportunity is there today for you or me to understand whether promised carbon reductions are actually occurring as promised in a Clean Development Mechanism transaction? What are the avenues for recovering the credits if the project isn't working? Basically, today, there is no opportunity to do so. The model for dispute resolution under these agreements is trade agreements with private arbitrations, as opposed to an environmental law enforcement model. There's no public role. Very significant policy decisions can be made in those arbitrations, and the public has no role.

At Earthjustice we have worked to open trade dispute arbitrations to citizen participation, to let some daylight in, to enable organizations that don't have the investment commitment at stake but have a stake in the natural resources, and to give communities that might be affected by the outcome of the dispute an opportunity to be heard. I'll give you an example. A Canadian gold-mining company filed a claim under the NAFTA dispute resolution process against the State of California for \$50 million. The claim was based on the fact that the company had applied for a permit to mine in a southern California desert on a piece of land that had natural values and Native American cultural values and that was declared not suitable for mining under state law in California. The investors brought a claim against the State of California for this permit denial, challenging the state's enforcement of its environmental laws. Those laws would have been applicable to you or me or a California company or an Illinois company. But a

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Canadian company under NAFTA can assert this claim. The resolution of that claim, being decided in a confidential proceeding by an arbitrator, would be a monetary award, but a settlement of that claim could yield a decision by the state not to enforce its law.

California happens to have a rigorous environmental law structure and the capacity to defend that claim. But when those claims are brought against Ecuador, say, Ecuador's not necessarily going to have the capacity or the interest to pay several million dollars to lawyers to defend that claim when all they have to do is say, "Okay, we won't enforce our laws." So non-public international trade agreement proceedings can undermine the enforcement of the law. Earthjustice's interest in this has been to petition the arbitrators for the right to intervene, to present a public interest perspective, or the right to file an amicus brief, in order to assist groups in Ecuador and other countries that want their environmental laws enforced.

International climate negotiations present the same problem. How do we create legally binding compliance mechanisms that have consequences? The future of the planet depends on whether we succeed in this. The history tells us that, without rigorous monitoring of performance and public availability of the results, the provisions are not likely to be effective and enforceable.

The global climate negotiations are extremely complex. The tasks of developing an international framework, setting emissions reduction targets, and allocating costs and benefits, are more than the nations of the world have yet been able to accomplish. It should be no surprise, therefore, that negotiators have a strong tendency to put off compliance issues. Earthjustice is urging that negotiations not postpone the compliance and enforcement questions and make compliance provisions effective at the time that the obligations arise. We seek a strong link between international compliance mechanisms and the national laws of the parties so that a climate agreement can become the law of Canada and the law of the United States, and that domestic reporting and enforcement tools can be used. We cannot expect a climate framework to succeed without such measures.

The consequences of non-compliance have to be sufficient to deter non-compliance. Since much of the globe's carbon reduction strategy is likely to be market-based, built around trade and credits, then the consequences for non-compliance need to include exclusion from that marketplace. If a country is not enforcing its climate laws and meeting its obligations, we submit that the country shouldn't be allowed to remain in the carbon market. Without such firm sanctions, we have a very low likelihood of achieving the carbon reductions that we have to achieve.

In closing, I suggest that chemicals policy and climate policy both present fertile ground for students, for scholars, and for practitioners to study and to take part. These are the places where sustainability concepts are actually going to be tested; where we really try to figure out what is needed to implement sustainable development principles. Without a vigorous use of precautionary principle, without rigorous monitoring and reporting and publicly available information, and without opportunities for public enforcement, we stand a poor chance of achieving our sustainability goals. We need those tools to be able to separate the wheat

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from the chaff, and separate the green from the greenwashing. So each of you will have opportunities with your clients, with your governments, and in the academy to help make a difference and help make these principles real. We owe it to our children, our grandchildren, and to the planet. Thank you.¹

¹ This speech has been edited for publication.