

The Campaigner

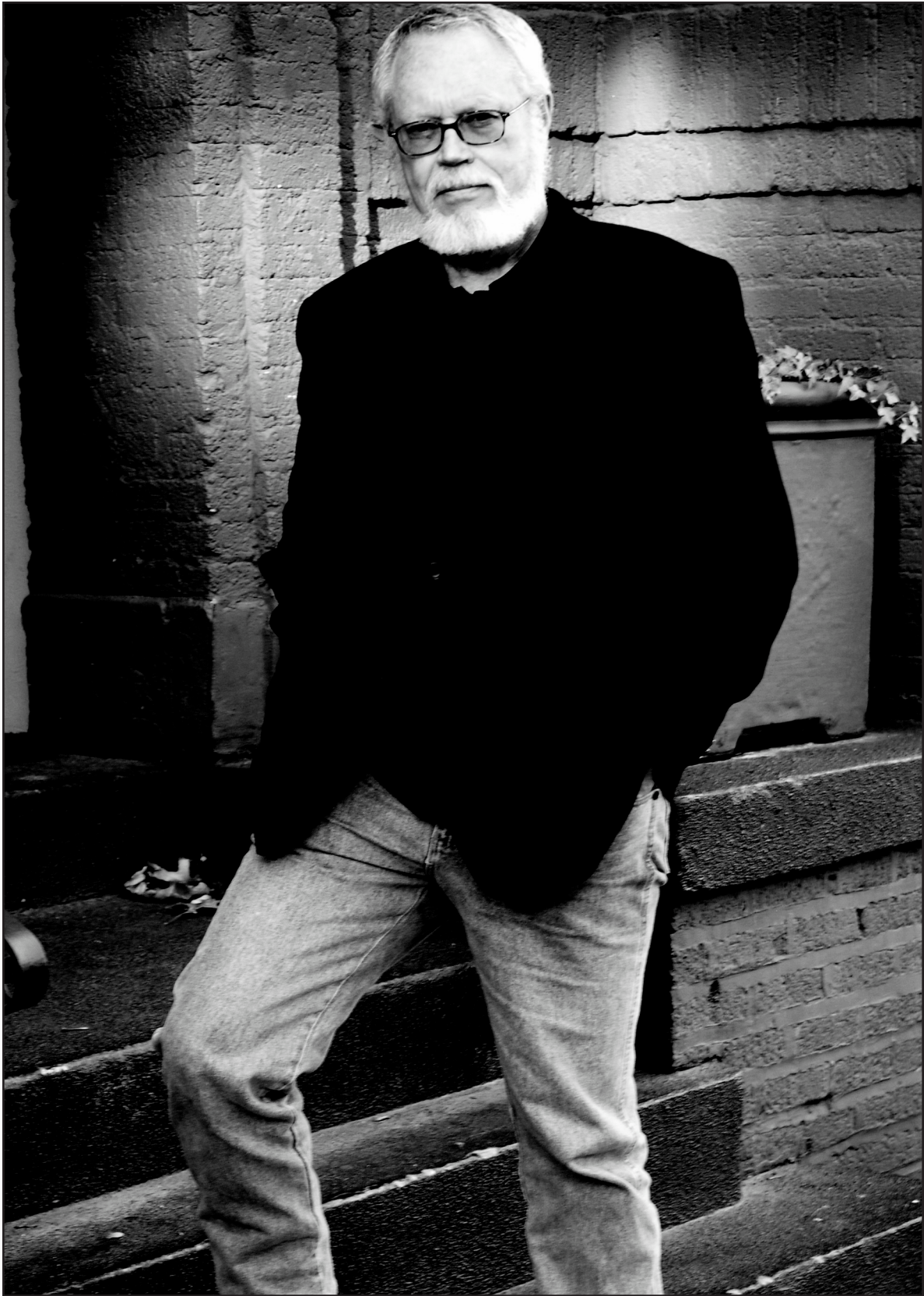
Durwood Zaelke, formerly an all-star litigator, is still winning the big ones. He formed a North-South coalition that recently succeeded in broadening the Montreal Protocol to explicitly address global warming. Next up: traveling the world to form a new alliance bringing together rich and poor countries in a truly global system of governance for climate change

The delegates who attended the 20th anniversary conference of the parties to the Montreal Protocol last September achieved a remarkable agreement. The 1987 treaty phased out chlorofluorocarbons and other compounds that were destroying the ozone layer, but the substitutes turned out to be just like CFCs in one respect — molecule for molecule, as much as 1,000 times more powerful than carbon dioxide as a greenhouse gas. The new accord, making the protocol the first enforceable climate treaty with mandatory measures for both North and South, will replace the substitutes with more benign chemicals. The result is astonishing: the September accord alone will do several times more to mitigate climate change than the Kyoto Protocol.

Officials singled out one person as responsible for the conference's singular success. "Durwood Zaelke played a key role in mobilizing diverse support and serving as the glue that helped enable the global community to come together," a member of the treaty secretariat said. "This is a big boost for the post-2012 climate negotiations and it would not have happened without the tremendous effort by Zaelke and his team," according to Nobel Laureate Mario Molina, co-discoverer of the role of CFCs in ozone depletion. Romina Picolotti, Argentina's secretary of the environment and a key player on the "team," said, "Professor Zaelke's relentless international drive on this issue was crucial to our efforts to reach this historic agreement."

Remarkably, the members of Zaelke's 18-month-long campaign, which brought together NGO and governmental activists from developed and developing countries, were mostly either his former law students — a group including Picolotti — or former colleagues at environmental organizations he has founded. But really it was the result of an 18-year-long campaign by Zaelke, the president of the Institute for Governance and Sustainable Development, based in Washington and Geneva, to create an international environmental law as powerful as the domestic laws in the United States and other advanced countries, most importantly including a robust role for civil society. That the team was working in a legal setting that permitted engagement by public interest groups was in no small part the result of Zaelke's long crusade to change the governance and social norms surrounding international efforts to protect the planet's ecosystems.

A member of the first generation of environmental lawyers, Zaelke has had a profound influence on the field both domestically and internationally. He was the lead investigator of the Love Canal hazardous waste site.



Barbara Lee Shaw

He was the lead investigator of the Three Mile Island near-meltdown. He was a key architect of the federal government's first hazardous waste enforcement strategy and helped to found several of the Department of Justice's specialized environmental and energy sections. He is the co-author of the leading textbook on international environmental law and founded the top-rated international environmental law program at American University. And now he is a diplomat too.

Zaelke started his career at the brand new Environmental Law Institute after graduating from Duke Law School in 1972. "Our mission was to pioneer the information resources for a new field of law," he says today. He was inspired by the litigation primer James Moorman was writing. Back then, opportunities for the public to use the law were limited. "We were building prototypes," he says. In the days before the Clean Air Act and Clean Water Act had been fully implemented and the hazardous substances laws were not even enacted, opportunities to intervene were limited. ELI's first president, Fred Anderson, encouraged them "to look through old law cases and see opportunities to apply their causes of action to the new sets of facts presented by environmental problems. We found we could litigate using the common law, nuisance and trespass, and causes of action contained in obscure statutes like the Rivers and Harbors Act and the Refuse Act. There was a very high premium on being creative."

"Our mission was to pioneer the information resources for a new field of law. We were building prototypes."

Zaelke left ELI a year later but came back twice, first for a brief stint as editor of the *Environmental Law Reporter*, then during the 1973–74 OPEC oil embargo to research the role of the law in reducing energy use. "We concluded that the economics of energy conservation and efficiency were favorable," he says. "But it was a problem to get people to do what economic theory predicted — they weren't picking up the free hundred-dollar bills lying on the ground. We found that monetary savings alone are not sufficient. Unlike the economic models, people need help to be able to capture those returns. That provided important lessons on how laws need to be written and what kinds of financial and technical assistance need to be provided to get people to use alternatives like solar power. The same work is relevant today for climate change."

A main lesson was the importance of social norms, which during the energy crisis spurred people to conserve but then changed again when the crisis passed. Today Zaelke finds inspiration in the later campaigns

against smoking and drunk driving, which have achieved profound and permanent change. "We have spent 30 years greening social norms but it hasn't been enough. And changing norms is essential: norms move us ahead and law locks us in at the higher level and then is used as a justification for further improvement in social norms."

Zaelke next joined Moorman, by then assistant attorney general in what is now the Environment and Natural Resources Division, at the Justice Department, where they built the foundation of federal enforcement of environmental law. They relied on the same strategies developed at ELI, creatively inventing the tools to do the job. "This was before we had regulations implementing RCRA, FIFRA, and TSCA," Zaelke says of the hazardous waste, pesticide, and toxic substances statutes that were passed in the mid 1970s. "We had to rely on common law and the imminent and substantial endangerment provisions in 11 federal statutes. We brought more than 50 cases, almost all successful. We built a very strong body of law." He also helped develop an energy conservation and litigation section. "We wrote a memo that laid out a whole series of options for using litigation to ensure energy efficiency and conservation using common law, oil and gas statutes — a whole set of tools." Unfortunately, President Reagan dismantled the energy litigation section a few months later.

Zaelke left the Justice Department as the result of a bet with Rick Sutherland, head of the Sierra Club Legal Defense Fund (now Earthjustice). Sutherland challenged Zaelke to go to Alaska, where the organization had never won a case while managing litigation from San Francisco — and either start winning or shut down the office in six months. Zaelke started filing "mining cases, timber cases, fisheries cases, federal, state, administrative, the whole range," he says. "I used the approach that we had developed, which was blending common law and statutory law, and the rigor we had developed at ELI and DOJ to investigate facts and law and present compelling cases." Zaelke ended up winning the first 30 times he went to court.

His first victory was among his most impressive, stopping a molybdenum mine in Misty Fjords National Monument that would have been the largest open pit mine in the world, dumping 60,000 tons a day of toxic tailings into the pristine waters of the fjord. Zaelke filed for a temporary restraining order in federal court in Anchorage. "Of course a TRO only lasts five days, but it gave me the leverage I needed to get the company, Rio Tinto Zinc, to provide all of their documents as well as to make the mine manager available for deposition. They gave us 11 boxes of materials, which they hadn't had time to sort out. We went through them one by one, with the mining company

lawyers reading them at the same time I was reading them. I still remember how the jaw muscles clenched on my opposing counsel when I found the smoking gun that showed that the mining company had lied to the federal permitting agency and the court.” The mine was never built.

Serendipity caused Zaelke to change jobs again. He was at a softball game on the Mall when a colleague from Greenpeace asked if he would help her investigate what she believed was illegal taking of Minke whales by Japanese ships. “Little did I know I was entering the twilight zone of international law, where a country had to consent to be bound by the law and then consent again to let the World Court adjudicate a case against it. After an extensive investigation we concluded that we couldn’t bring the case. It became clear that it was time to change international environmental law so citizens can use the law in a proactive way to protect the environment.”

The result was the creation of the Center for International Environmental Law in Washington in 1989, with an office in London. “CIEL was founded on the principle that law should serve the same function in international society as it does nationally in the U.S.,” Zaelke says today. “Our idea was to reform international law by opening it up to participation by citizens and public interest groups and by using it to represent countries that didn’t have their own team of lawyers.” The atmosphere was conducive: negotiations for what became the 1992 Framework Convention on Climate Change were just about to begin.

Zaelke emphasized working in coalitions. CIEL started with low-lying states, providing free legal assistance to help them negotiate the climate treaty. “We recognized they were the most vulnerable and would make a compelling negotiating bloc. We were able to provide pro bono support to make them more effective. They were an important force in making the climate treaty.”

CIEL was also successful in opening up international organizations to public interest involvement. The group wanted to use the administrative tribunal at the World Bank but found it was only open to internal disputes. “The development banks all have environmental policies that they are supposed to follow in giving loans and grants for development projects. These grants and loans have the opportunity to harm the environment. Our proposal was designed so that if you are threatened by the failure of the bank to follow its own policies, you could bring a claim.” They worked with Representative Barney Frank to condition U.S. funds on the cre-

ation of an independent inspection panel. “The World Bank agreed and it became the prototype for the others — now they all have them.” CIEL similarly was able to help open the World Trade Organization’s dispute resolution panel to amicus briefs from NGOs.

In 2000, Zaelke broadened his work of forging an international law with a vital role for the NGO sector to address the ability of public officials to implement the laws on the books. While remaining head of CIEL, he accepted an appointment as director of the International Network for Environmental Compliance and Enforcement, a web of 4,000 environmental enforcement practitioners in more than 150 countries. “I find it surprising that law schools don’t spend more time teaching students about compliance and enforcement,” he says. “We just assume the law will be followed. INECE lets me work at the most practical level — making law work from the bottom up.”

Zaelke left CIEL four years ago to found the Institute for Governance and Sustainable Development. (He continues his role with INECE.) “The purpose of this organization is to find out what works for sustainable development and to do more of it.” Motivated by a key science paper co-authored by a former ELI colleague, Stephen O. Andersen, calculating the tremendous climate benefits from the Montreal Protocol, he helped form the coalition of governments and NGOs from developed and developing countries that was so successful at the recently concluded negotiations. “We wanted to make Montreal an explicit climate treaty, as well as an ozone treaty, and we wanted it to do even more for climate.”

The final negotiations were difficult. Argentina, along with the United States and several low-lying countries, pushed hard to change the treaty. The Europeans went along. Eventually, the South African’s dropped their opposition, as did Russia. This left China, the world’s largest producer of CFC substitutes, which wanted concessions. It was only at the last hour on the last day that its delegation announced: “We believe in the spirit of cooperation of Montreal, and we will join the consensus.” The room burst into applause.

Now the action moves to the new climate treaty. “We have a model in Montreal that has delayed global warming by up to 12 years, and kept us from the tipping point for abrupt and irreversible climate change, which may be only 10 years away,” Zaelke says. “We need to consider what it can do for other parts of the climate problem, such as energy efficiency.” Another coalition to form, another campaign to make the law work. — **S.R.D.**

“We need to consider what else Montreal can do for other parts of the climate problem.”