

VII. For What It's Worth

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The closest thing to a state religion we have in the US is neoliberal economics, with self-interest the mainstay of its dogma, *laissez-faire* its principal tenet, *I believe in the market almighty* the first item of its credo, and infinite growth its mystical body. Out of which belief comes deregulation, cost-benefit analysis, risk assessment, opposition to public lands, and an host of like measures, all echoing the basic American test of virtue, *For what it's worth*.

This faith has not been without its dissenters and heretics. Murray Bookchin, for example, has said: “the most basic precepts of ecology, such as concern for balance, a harmonious development toward greater differentiation, and ultimately, the evolution of greater subjectivity and consciousness, stand *radically* at odds with an economy that homogenizes society, nature, and the individual. . . . [that] embodies every social disease—from patriarchal values, class exploitation and statism, to avarice, militarism, and now, growth for the sake of growth.” Similarly, Herman Daly and John Cobb have written, “Free trade is an invitation to the tragedy of the commons.”

But it is apparently true, despite such warnings, and despite the obvious ransacking of the world's natural and social resources and squandering of our natural capital by corporate globalism's melding of technology and accountancy, that for perhaps a majority of people in the US the terms *economic liberalism*, *liberty* and *freedom* have become amalgamated (*capitalism* has become synonymous with *democracy*, *patriotism* and *nationalism* are indistinguishable, as are *socialism* and *communism*, both of which are commonly equated with Stalinism, Nazism, Satanism, or worse. It is probably not just a matter of coincidence that the term *political economy*, in common usage a century ago and still common in most of the world, is almost unknown in the US today.

Our notions of *free trade*, like the concept of *liberalism*, were coined in the early days of European expansion (aka *colonialism*) and hark back to the waning days of mercantilism when capitalist backers of shipping began to break free (cf. Latin *liber*, ‘free from’) government competition and regulation (i.e., fees and taxes) in the new global market. They reached new levels of interest in the days of pre-WW I imperialism, were stongly challenged after the 1929 Crash, had a resurgence in the global economic “development” following WW II, and were born again when the US dollar was “floated on the international exchange” (1971) while corporate finance capitalism was displacing corporate industrial capitalism as the dominant economic sector, and total personal debt was surpassing government debt in what was sometimes called a “credit card economy.”

Bookchin, Daly and Cobb have not been alone in calling for alternative economics doctrines and catechisms (see, e.g., the work of Robert Costanza, Hazel Henderson, Wendell Berry, *et al*, and decades of international conferences and processes elaborating upon concepts of sustainable development), the most promising of which involve ideas like *steady state economics*, *ecological economics* and *economic democracy*, the down-home idea of living within our means, within the natural limits of resources, the “natural capital” of the living earth, recognizing that “we need,” as Kenneth Burke has said, “to replace the notion of *progress* with that of a *norm*.”

Like the ideas of *zero waste* and *zero exposure*, such an approach has been very difficult for mainstream economists and politicians to accept, let alone advocate, operating as they do within the neoliberal hegemony of our post-WW II global political economy and its endless-growth doctrine.

The UN “Conference on the Human Environment” (the 1972 Stockholm Conference) prompted a number of other conferences and documents over the next several decades, the best-known probably the 1983 *Brundtland Commission Report*, subtitled *Our Common Future*. During and after the 90s, the concepts and aspirational goals of these progressive publications, like the notion of sustainable development itself, suffered distortions, disfigurement, diminution and dismissal in the global marketplace, but have maintained vitality.

In 1991 I worked on-line with other US activists to draft the toxics section (Chapter 19) of *Agenda 21*, the environmental protection blueprint that was to come out of the Earth Summit being held in Rio de Janeiro in the following year, the 20th anniversary of the Stockholm Conference. In 1994 the Sierra Club covered my expenses so I could to meet in NYC with activists from the US and other countries who were drafting guidelines for the UN Commission on Sustainable Development (CSD), which had been created by the Rio Summit to implement *Agenda 21*. After we had met together for a couple of days, I volunteered to draft our paper, and the group agreed. The next day, that draft became our final document, *The Need for a Pollution Prevention Approach*, submitted to the CSD.

Words have a life of their own. More or less ill-defined (purposely so, it has been argued) by the 1987 *Brundtland Report* as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs,” *sustainable development* was but one of variety of terms coined to effect a compatible joining of *laissez-faire* economics and unlimited-growth industrial capitalism with the biological constraints of the natural world (as well as, to greater or lesser extent, the survival needs of people: one of the main purposes of the Stockholm process has been to address the problem of poverty, which has been the topic of several global conferences in recent decades).

The notion of sustainable development made little headway against the neoliberal putsch of free trade agreements and institutions (e.g., the GATT, the 1947 General Agreement on Tariffs and Trade and its 1995 successor, the WTO, the World Trade Organization which established a non-elected body of corporate financiers with authority over property rights as well as state and national health and environment laws), despite the heroic efforts of Lori Wallach at Public Citizen, Mark Ritchie at the Institute for Agriculture and Trade Policy, and other dedicated activists throughout the world. However, it did have some success in building ameliorating conditions into the two “environmental” offshoots (or consolation prizes) of NAFTA (the North American Free Trade Agreement adopted by the US, Mexico and Canada in 1994). The Commission on Economic Cooperation (the CEC, which addressed transnational environmental concerns of all three parties to the agreement), and the Border Environment Cooperation Commission (the BECC, which focused on infrastructure improvements on the US-Mexico border) both included provisions for extensive public input on sustainability issues, goals and practices.

A great deal of my time in those years was invested in working with other NGOs, especially the Border Ecology Project, Enlace Ecológico and Proyecto Fronterizo de Educación Ambiental, to try to shape the CEC and BECC so they would be more than the gutless wonders some of the NAFTA sponsors had intended and would instead seriously attempt to promote and implement sustainable development throughout North America as an integral component of the NAFTA.

For all its inexactness, the notion continues to have legs. It has, for instance been anathema to the neoliberal right. In this country, from the moment of their publication in *Our Common Future*, *Agenda 21* and the *Rio Declaration*, the principles of sustainable development and proposals to implement it were roundly condemned by Fox News and talk radio. In 2012, the Republican National Committee platform included a plank calling for rejection of *Agenda 21*. In

the same year, a motion in the Republican-controlled Arizona state legislature to ban “sustainable development” in the state was defeated only when a Republican legislator pointed out that passing the motion might keep businesses (of which there were many) that endorsed the idea from coming to Arizona.

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While undeniably related to 20th C post-colonial political turmoil, the global shift of populations from south to north, from so-called “undeveloped” to so-called “developed” nations, the ongoing immigration crises in the US (there have been several over the past two centuries) have some very clearly economic (as distinguished from political) causes (in backhanded recognition of which, the Reagan Administration, in denying asylum to thousands of migrants from Central America, called them not *political* but “*economic* refugees”—though, of course, many were both, as well as being what has since been recognized as “*climate* refugees”), economic causes which have been significantly aggravated since NAFTA (which, in typical neoliberal fashion, greatly contributed to the transfer of traditionally small-holder subsistence lands into the hands of magnates and corporations, driving people off the land and, understandably, north, toward the land of milk and money).

Current nationalist outcries against Latin American migrants loudly echo the nativist chauvinism proclaimed during similar influxes to the US in the 1920s, 1880s-1890s, and as far back as the Jacksonian Era preceding the Civil War. Slogans demanding “America for Americans” and warnings of “Brown Hordes” (or the “Jewish Tide,” etc.) smack of the Hitlerian “Germany for Germans,” “Nordic Purity,” “White Supremacy” and similar notions. They go hand-in-hand with home-grown fascism of the sort characterizing the speeches of the once-famous “Radio Priest” Father Coughlin and the worst Nazi sympathizers of the 30s and 40s, a mindset succinctly described by Nicos Poulantzos as nationalism and petty bourgeois ideology dominated by imperialistic big money.

Economic conditions fostered by neoliberal globalization underlying the NAFTA and similar trade agreements evoke such sentiments (which evidently are always latent in the populace) and provoke the very conditions that prompt them—for while the free traders advocate free movement of goods, services and capital, they at the same time want to prevent free movement of labor. In other words, while encouraging the flight of industries (capital) to weak regulation and cheap labor conditions in the south (thereby inevitably disrupting sustenance economies and creating widespread conditions of poverty), the freetraders want to prevent the inevitable migration of dispossessed workers (labor) to the rich lands to the north. Such an economy is inherently unsustainable.

Our inner cities a national disgrace
clogged with human waste and misery
occupied by armies of sadist police
our mentally ill and chronically poor turned out
with runaway kids and shellshocked vets
begging for food and shelter so we can play
Great White Father to captive markets,
brokering nations into client states
under threat of hostile takeover
forced by the terms of economic war

to privatize their countries' public resources,
put their people in permanent debt to the banks
turn their subsistence farms into factories
for chemical agribusiness export crops
until they raise so little food for themselves
they have to import high-priced staples from us,
precluded from even beginning to think in terms
of economic independence or freedom
to use their resources for their own needs
let alone global equity

from "Correspondence Theory"
Mr America Drives His Car

Some Semantics on Growth and Development (1979)

Michael Gregory, *Mule Mountain Observer* 2(14) (1979), p.16

Large corporations and government land management agencies indulge themselves and, by process of sheep psychology, involve millions of us in the self-perpetuating scheme we call Development. To the common mind, Development is not only clearly desirable, it is necessary and all but inevitable; it has long been accepted as the primary vehicle in our national quest for Progress.

The drive toward so-called production of our industrialized forest and range lands is often carried out though what is known in the trades as Vegetation Modification or Habitat Conversion. What the terms mean is the wholesale substitution of naturally occurring ecosystems for artificial, imbalanced systems, despite the directives of the many resource conservation laws enacted in the past 15 years.

The object of such substitutions is, in accord with the dominant fiscal system, the elimination of competition. Much as we might pull a weed from a tomato patch, today's developers wipe out millions of board feet of hardwood timber and an incomprehensibly large number of other living beings and replace them with monocultures of conifers and livestock. While the effect of such competitive behavior may seem insignificant in terms of a home garden or new driveway, on the scale of national and international Development the effect is quite impressive.

Labor-intensive methods of production are out of fashion, even though the world is plagued with unemployment. What we used to do by hand in the fields and forests and ranges is now done by gigantic cats and combines and planes. Every year, as millions of acres of prime farmland give way to concrete and ticky-tacky, millions of more acres of virgin forest and unspoiled range give way in turn to plow and saw and petrochemical inundation.

We cannot afford to destroy the last two or three percent of our public lands still in a relatively wild state. The *Wilderness Act* was written to protect us from that folly. Nor can we afford the medical and environmental costs of dousing our productive forests and ranges and croplands with toxic chemicals for the benefit of the same extractive timber, utility and cattle industries we are giving our wilderness away to. A host of laws administered by EPA, FDA, OSHA et al are supposed to protect us from that.

Yes, the US Forest Service has just issued its recommendation that Congress protect from Development only a fraction of our few remaining wilderness areas. Of a possible 2,000,000 undeveloped acres in Arizona the Forest Service could have tried to preserve (about 2.7% of the land in the state), only 400,000 have been recommended. Almost none of our grassland ranges or northern timberlands are included.

These excluded lands are scheduled for conversion to factory-style production if they are not protected. Take a few minutes to send a letter to Gov. Babbitt and our federal representatives telling them how you feel about this planned Development of these remaining wilderness areas. .

The Forest Service has, as usual, been intimidated by the vested interests, and must be overruled by public comments to Congress.

Now is also a good time to drop a few lines to the EPA and US Department of Agriculture telling them you want the spraying of herbicide 2,4,5-T and its relatives stopped. The EPA has

been reviewing the phenoxies and is due to issue its final decision on 2,4,5-T in two or three months.

In case you don't remember, the phenoxies are mainly used to "release" conifers from competition of other forest species, or to convert cattle ranges from shrubland to grassland. They are widely used in the west to wipe out mesquite communities in the lowlands, pinyon-juniper and rabbitbrush on the mesas, and a variety of shrubs on high subalpine sheep ranges. Their residues and the residues of their contaminant dioxins show up in beef fat, mother's milk, water supplies. They are known to cause cancer, birth defects, liver disease, nerve and genetic damage.

A word or two from you saying that you want the laws enforced that protect us from phenoxy poisoning will help EPA ban these herbicides. It would also be helpful for you to attend the USDA/USDI/CEQ (Council on Environmental Quality) Symposium on Rangeland Policies for the Future being held at the Tucson Marriott Hotel January 28-31. The chemical industry will be there in force giving their side of the picture; it is up to each of us to make sure the government hears our side, too.

Structuring Environmental Protection into a U.S.-Mexico Free Trade Agreement (1991)

Michael Gregory and Dick Kamp, for Arizona Toxics Information and Border Ecology Project, Bisbee, Arizona (27 March 1991)

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In early February, 1991, the Border Ecology Project and the Texas Center for Policy Studies released an issue and option discussion paper on environmental concerns raised by proposals for a U.S.-Mexico free trade agreement. Shortly after that paper was released, environmental agendas addressing many of those concerns were proposed in testimony before Congress by Mary Kelly of the Texas Center, Stewart Hudson of the National Wildlife Federation, Michael McCloskey of the Sierra Club, and others.

Similar concerns have been voiced by Members of Congress, several of whom have signed onto a "Dear Colleague" letter by Rep. Ron Wyden urging the President to address environmental concerns in the free trade agreement process. Congressional debate has increasingly placed the U.S.-Mexico talks in the broader contexts of the GATT negotiations which reopened in February and the President's request for extension of "fast track" authorization. A March 7th letter to the President from Sen. Lloyd Bentsen, Chairman of the Senate Finance Committee and Rep. Dan Rostenkowski, Chairman of the House Ways and Means Committee, for instance, references the "fast track" request and notes concerns about the "disparity between the two countries in the adequacy and enforcement of environmental standards, health and safety standards and worker rights."

In early March, the prestigious Pan American Health Organization (PAHO), also recommended that occupational and environmental health issues be included in free trade agreement negotiations, and U.S. Trade Representative Carla Hills has said that the U.S. negotiations will pursue a broad binational agenda including environmental and workplace safety issues."

Clearly, in the past few weeks, the question of whether or not U.S.-Mexico trade impacts on the environment should be negotiated as part of an agreement has advanced rapidly to a stage of not *if*, but *how*. It now appears to be politically feasible to include an environmental agenda within free trade agreement negotiations.

The present paper is an attempt to envision some answers to that question of *how*. Rather than a prescriptive list of concerns, we here propose nuts and bolts components for structuring a realistic program that can and should be part of an affirmative environmental program integrated with any agreement (under "fast track" or not) for lowering trade barriers between the U.S. and Mexico.

Our list is not intended to be exhaustive but, rather, includes points with demonstrated need to be carefully defined if the trading partners are to successfully implement a program protective of citizens and environment in both countries. These elements could, for the most part, be applied equally well to a U.S.-Mexico-Canada agreement but are most critical to U.S.-Mexico negotiations because they must address the economic differences between the two countries.

We offer these suggestions in the belief that our experience with real problems of public, occupational and environmental health in Mexico, and our contacts with individuals and organizations having similar experience, can bring some practical, bi-national perspective to the negotiating process. We focus on industrial pollution issues (because that is where we have had most experience), but do not intend thereby to suggest that natural resource issues are of less importance. They are, in fact, of equal concern and many of the guidelines we suggest are applicable to such issues.

Draft versions of the concepts presented here have been viewed and discussed, and in some cases revised as a result of critiques by several such persons, including an informal network of non-governmental and governmental professionals and advocates ("La Red") from the states of Baja California, Sonora and Arizona who met in Hermosillo in mid-March of this year. While the authors of the present paper are solely responsible for the concepts presented here, we are grateful to our colleagues and associates in the field who have found time to review earlier drafts of this paper and offer suggestions.

We begin with the assumption that a free trade agreement and the negotiations leading to it must include (1) principles, goals, definitions and conditions to be agreed upon and to be applicable whenever an action will impact the environment; (2) environmental protection standards and criteria for specific parameters; and (3) an implementation program, including procedural, institutional, legal and financial mechanisms.

Each of these areas is equally important. While discussion to date has tended to focus on broad principles and definitions such as those addressed below as "preliminary considerations," actual negotiations and implementation of a free trade agreement will require consideration of detailed, specific points such as those outlined below under "Standards and Technical Criteria," "Financial Mechanisms" and "Procedural Mechanisms."

Preliminary Considerations

A. Sustainable and Equitable Development

Democratic principles of sustainable and equitable development can and should underlie free trade negotiations. As the Independent Commission on International Development Issues (the

"Brandt Report," *North-South: A Program for Survival*, 1980) has pointed out, "it can no longer be argued that the protection of the environment is an obstacle to development. On the contrary, the care of the natural environment is an essential aspect of development."

We concur with the United Nations Commission on Environment and Development in defining sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs, and with the Commission's conclusion that "economics and ecology must be completely integrated in decision-making and lawmaking processes not just to protect the environment, but also to promote development."

B. Public Participation

Furthermore, again as noted by the Brundtland Commission, sustainability requires protection of "economic, social and cultural" rights as well as protection of the environment. To be successful, a free trade agreement must incorporate democratic principles of public disclosure and public participation.

In this regard, non-governmental organizations (NGOs) should be equal partners in all phases of free trade agreement negotiations and institutional provisions which follow. The US Trade Representative should carry out frequent and close consultation not only with Congress, but with NGOs. Due to their ability to participate in a variety of economic, social and environmental issues free from constraint of being identified with or bound by the policies of a particular country, NGOs have played an increasingly important role in development planning worldwide and have become generally accepted by the public as sources of unbiased information. EPA and SEDUE have both emphasized the importance of NGO participation in binational environmental policy-making.

C. Beyond the Border

U.S. concerns about a free trade agreement have tended to be about either (1) environmental impacts on the U.S., or (2) impacts on the border region of both countries, or (3) impacts on the sovereign territory of Mexico. Despite the belief expressed by some members of Congress that "it's better to examine only impacts on the border or within the U.S.," the administration must look at the practical questions of how to implement a program not just in the border area, but within the sovereign territory of both countries.

D. Reciprocal Conditions

With the exception of infrastructural development and phased implementation, most of the guidelines presented here address conditions for either a "host" or a "guest" nation, but it is imperative that environmental regulation and enforcement apply not just to U.S. corporations in Mexico but also to any future large Mexican-based corporation established in the U.S., which has its own pockets of poverty (many along the international border) and community infrastructures inadequate for coping with sudden increases in industrial development.

E. Phased Implementation of Standards and Regulation

A major concern of Mexicans about free trade is that their small and mid-size domestic industry may be decimated by foreign competition. On the other hand, large Mexican industries that sell to a global market (primary manufacturing, for instance), should be capable to comply within a limited time, as should U.S.-based companies already required to meet U.S. standards.

Of further concern to many Mexicans is the harmonizing of environmental standards and the probable requirement for Mexico to upgrade its regulatory mechanisms to ensure protection of public, occupational and environmental health. Binational implementation of an environmental program must consider the competitive and cost impact of an expanded program of environmental compliance in Mexico which may cause economic changes requiring binational mitigation strategy.

Clearly, time will be needed to develop an adequate regulatory program in Mexico as well as to identify those industries requiring an extended time for compliance due to genuine hardship. Taking into account these needs to plan for economic impacts of environmental control, particularly in smaller Mexican micro-industries, a phased-in implementation program over at least a decade will be required to establish concrete and stringent guidelines. Without such phasing, there will be an unending series of challenges to activities on both sides of the border as unfair subsidies or nontariff barriers to trade.

A free trade agreement should require all facilities in the U.S. and any U.S.-owned or -operated facilities in Mexico to meet the highest environmental standards of either country immediately, and provide a phase-in period for Mexican domestic industries. Such differential standards will to a great extent eliminate the grounds for many potential disputes and provide clear guidelines for resolution of such disputes as may arise.

F. Integration vs. Parallel Negotiations

A free trade agreement is by its very nature legally pre-emptive, that is, it can be used to effectively challenge any laws, regulations or norms as unfair trade barriers.

The principles of and procedures for public, occupational and environmental health protection must be an integral part of free trade agreement negotiations. Proponents of "parallel" rather than integrated processes have not offered any means to ensure that an environmental agenda could be negotiated during the same time as a separate but parallel free trade agreement nor that such a "parallel track" negotiation would provide the legal strength necessary to answer "unfair trade barrier" challenges to a stringent environmental program.

Administration and Congressional spokespersons have expressed fear that integrating environmental issues with economic concerns could sink a free trade agreement if the environmental program were inadequate. However, Congress might reject a free trade agreement whether the environmental concerns are poorly addressed on a parallel track or as part of an integrated agreement. To argue otherwise is to assume that parallel track negotiations would, in fact, not require the firm linkage of environment and economics.

If the necessity for negotiating environmental issues is accepted, it is less cumbersome to include an environmental working group as part of free trade agreement negotiations than to set up some separate legal structure that is committed to the same goals and dates.

G. Financial Responsibility

It is essential to establish financial mechanisms to fund the physical and regulatory infrastructures required by developments that will result from a free trade agreement. In general, financial responsibility lies with the industries that cause the increased needs and that benefit from free trade, not with the public. Similarly, the costs of cleaning up environmental contamination must be borne by the polluting industries.

Environmental Conditions of an Agreement

A. General Conditions

1. Institutional Conditions

(a) A working group shall be established, consisting of representatives from governments and non-governmental organizations of participating countries, to conduct negotiations and develop environmental conditions that shall be integral parts of a free trade agreement.

(b) A joint bilateral or trilateral commission shall be established, consisting of representatives from governments and non-governmental organizations of participating countries, to develop an effective regulatory program and to oversee its implementation.

2. Procedural Condition

The working group shall establish a timetable that shall allow negotiators to send to legislative bodies in both countries for approval, an effective environmental protection program.

3. Condition of Scope

Environmental laws or regulations deemed necessary by the federal government or by a political subdivision of a participating country to protect environment, human health or physical and biological resources from exploitation shall not be challenged as unfair trade barriers.

B. Standards and Technical Criteria

The setting and enforcement of environmental protection standards are essential components of a free trade agreement. Of particular concern is the need to institutionalize requirements for preventing pollution at the source, rather than depending on post-production controls and cleanups. The standards and technical criteria outlined below would, we believe, when combined with a phased-in implementation schedules, most equitably protect public, occupational and environmental health in participating countries.

1. General

a. Conditions for public, occupational and environmental health protection shall include:

(1) Health-based standards, technical criteria and effective implementation procedures.

(2) Full disclosure to workers and the public of environmental hazards from industry.

(3) Compliance of all facilities in the U.S. and any U.S.-owned or -operated facilities in Mexico with the highest environmental protection standards of either country, and phase-in of Mexican companies in Mexico to equivalent standards.

b. Compliance with the highest environmental protection standards and criteria of

any participating nation shall be an enforceable condition of a free trade agreement in dispute resolution proceedings and legal actions.

2. Pollution Prevention

a. Conditions for Pollution Prevention shall include:

- (1) Siting criteria for industrial facilities.
- (2) Environmental impact assessment.
- (3) Hazardous and toxic materials management.
- (4) Hazardous waste management.
- (5) Industrial air and radiation emissions limitations.
- (6) Water contamination limits.
- (7) Limits on pesticide residues on food and feed.
- (8) Limits on noise from industrial operations.
- (9) Contingency planning.

b. Conditions for siting criteria shall assure that siting of industrial facilities shall minimize potential adverse environmental impacts.

c. Construction and operations of a guest nation's industrial facilities or other guest nation actions that may significantly impact the environment shall require an environmental impact assessment to disclose potential adverse impacts of the proposed and alternative actions before construction and operation is initiated.

d. Conditions for hazardous and toxic materials management shall include:

- (1) Prohibition on export from and import to a host nation of substances banned or severely restricted in the guest nation.
- (2) Prohibition on export from and import to a host nation of hazardous or toxic substances that have not been tested for adverse health and environmental effects according to the most stringent testing protocols of either nation.
- (3) Required use of best available reduction technology to eliminate or reduce to the maximum extent feasible the use of hazardous and toxic materials.
- (4) Prohibition on the patenting of any production process that does not incorporate best available toxics reduction and waste minimization methodology.
- (5) Comprehensive tracking of hazardous and toxic materials production, storage, transport and other use.

e. Conditions for hazardous waste management shall include:

- (1) Use of best available reduction technology to eliminate or reduce generation of waste at its source.
- (2) Effective on-site waste minimization programs.
- (3) Use of best available waste treatment, storage and disposal technology.

(4) Comprehensive cradle-to-grave tracking.

(5) Return to the U.S. of wastes generated by U.S.-owned firms until Mexico has developed a waste infrastructure capable of best available treatment, storage and disposal technology.

f. Conditions for control of air and radiation pollution shall require that minimum standards be set at the most stringent emissions and ambient limits of either country.

g. Conditions for control of surface and groundwater contamination shall require that minimum standards be set at the most stringent discharge and ambient limits of either country.

h. Conditions for control of pesticide residues on and in food and feeds shall require that maximum tolerances be set at the most stringent limits of either country.

i. Conditions for control of industrial noise shall require that minimum standards be set at the most stringent level of either country.

j. Conditions for contingency planning shall include provisions by industry for effective emergency planning and response in facilities and communities, including:

- (1) Funding for training and equipment.
- (2) Emergency planning procedures.
- (3) Emergency response procedures.
- (4) Mitigation guidelines.
- (5) Remediation guidelines.
- (6) Guidelines for public disclosure of hazards.

3. Natural Resource Conservation

a. Conditions for resource conservation shall include:

- (1) Water conservation.
- (2) Timber conservation.
- (3) Petroleum reserves conservation.
- (4) Species diversity conservation.
- (5) Soil conservation.
- (6) Fisheries conservation.
- (7) Historical and cultural conservation.
- (8) Agricultural conservation.

b. Conditions on species diversity conservation shall include prohibition on the patenting of native seed stock or genes from indigenous species.

c. Agricultural conservation conditions shall include:

- (1) Recognition that sustainable agricultural development requires protection of indigenous and ecologically sound agricultural practices.
- (2) Prohibition on the patenting of native seed stock or genetic alterations that encourage increased use of pesticides.

C. Financial Mechanisms

The local application of funds to prevent or mitigate adverse environmental impacts will require extensive communication between state and federal governments and *municipios* as well as with *comités ecológicos* and other members of the community. Community development, not just economic growth, should be the goal of planning. It is conceivable, as trade develops, that community infrastructure support could be needed in the U.S., as well as in Mexico, for investment away from the border.

1. Conditions for financial mechanisms shall include:

a. Establishment of funding sources through:

- (1) User fees paid by industry.
- (2) Financial assurance bonds or trust accounts by industry.
- (3) Unilateral or bilateral governmental appropriations to assured unilateral and bilateral accounts.
- (4) Multilateral bank loans.
- (5) Debt retirement through cancellation, reallocation or other means.

b. Determination by the Joint Commission of a method or methods to assess need of communities and regulatory agencies for financial support.

c. Funding of:

- (1) Regulatory infrastructures.
- (2) Local communities on both sides of the border to reduce stress caused by increasing agricultural and industrial investment.

d. Assurance that adequate funding will be made available for environmental protection including but not limited to:

(1) Development of local community physical infrastructures including:

- (a) Sewage control and treatment.
- (b) Medical facility capability for handling increased population.
- (c) Medical personnel trained to diagnose occupational and other health problems related to industrialization.
- (d) Potable water.
- (e) Adequate roads and transportation.
- (f) Housing and urban planning.
- (g) Municipal waste management.
- (h) Emergency planning.
- (i) Adequate emergency response (police, ambulance, fire).

(2) Monitoring and sampling of environmental media.

(3) Enforcement.

(4) Training of local *Comités Ecológicos* and other oversight committees.

(5) In-plant training for workers who handle or are potentially exposed to hazardous or toxic materials.

(6) Environmental impact assessment.

- (7) Mitigation.
- (8) Remediation.
- (9) Capitalization options and financial incentives for industries in Mexico seeking to modernize pollution control processes.

D. Procedural Mechanisms

1. Conditions for administrative procedures shall include:
 - a. Provisions for clear and open exchange of information between governments.
 - b. Clearly defined guidelines and procedures for public access to information on potential adverse impacts caused by a free trade agreement.
 - c. A phase-in period for implementation for Mexican national industry to achieve more stringent environmental regulations. Guidelines shall be established for a phase-in based on such factors as type and size of business activity, proximity to existing industry, etc.
2. Conditions for legal action shall include:
 - a. Creation of bilateral or trilateral inspection teams to enhance enforcement through extension and broadening of the current EPA-SEDUE joint inspection program by providing access for joint inspection of all industry by regulators.
 - b. Establishment of private right of enforcement, including the right of citizens in either country to injunctive relief, in either Mexican or U.S. courts, to enforce provisions of U.S. and Mexican environmental laws violated by U.S. or Mexican citizens or corporations.
 - c. A dispute resolution mechanism for environmentally-related disagreements, accessible to public inquiry, providing for citizen participation through NGO representation or other mechanisms, and allowing litigation that will ensure effective enforcement in either country for settling citizen or corporate/governmental disputes relating to environmental issues.
 - d. A "bad actor" provision that lets the public and regulators know if and when any jurisdiction has taken action against an industry or its board members for violation of laws, regulations, or other norms.
 - e. Development of bilateral or trilateral guidelines to ensure that litigation and other enforcement proceedings in U.S. and Mexican courts are consistent with the body of law of either country.

Sustainable Development vs. Economic Growth: Environmental Protection as an Investment in the Future (1991)

Michael Gregory, before the International Trade Commission Hearing on Probable Economic Effect on U.S. Industries and Consumers of A Free Trade Agreement between the United States and Mexico, Scottsdale, Arizona (8 April 1991)

Mr. Chairman, my name is Michael Gregory and I am the director of Arizona Toxics Information, a non-profit environmental advocacy and policy organization based four miles north of the U.S.-Mexico border in Bisbee, Arizona. I am pleased to be able to speak to you this morning concerning environmental issues related to the potential U.S.-Mexico free trade agreement.

For the past 20 years—as an active member of various public interest organizations, as an individual, and for a time as the Hazardous Materials Coordinator for the County of Cochise, Arizona—I have been involved with toxics issues on both sides of the U.S.-Mexico border where I live—problems that include air pollution from copper smelters, pesticide residues on food, water contamination from sewage, mining and other industries, mismanagement of hazardous waste, emergency response to chemical spills, etc.

Many of these problems are directly related to the development of the *maquiladora* industries along the border, which have grown up with little to no concern for or control of pollution. These industries are a glaring example of what industrialization in Mexico means when there is no effective protection of public, occupational and environmental health.

It has been argued by some, including the U.S. Trade Representative, that a free trade agreement will alleviate environmental problems because it will raise the standard of living of people in Mexico. But if this is so, why has the *de facto* free trade of the *maquiladora* program and Mexico's deregulation process made living conditions worse for so many people? The answer, I think, is that without effective controls to protect public, occupational and environmental health, free trade means not improved quality of life but a return to the Dickensian squalor of the early Industrial Revolution—not only on the border, but throughout Mexico wherever industries choose to locate.

In order to prevent an increase in that degradation, a free trade agreement must be dedicated to more than economic growth; rather, it must incorporate principles and mechanisms of *sustainable* development as an integral part of the agreement.

The European Economic Community, for instance, has adopted three environmental action principles which address certain aspects of sustainability: prevention, rectification at the source, and polluter pays. Those would be a good start for a U.S.-Mexican agreement, which should also require industries to commit to something like the Valdez Principles of corporate responsibility.

In the next few minutes I would like to discuss some of the ramifications of sustainability in the context of the Mexican-U.S. free trade agreement. In doing so, I will touch on several other points discussed in more detail in the joint papers by Arizona Toxics Information, the Border Ecology Project, and Texas Center for Policy Studies that Mr. Kamp has submitted.

Sustainable Development vs. Economic Growth

Broadly stated, sustainable development requires (1) stewardship of non-renewable resources

like fossil fuels and minerals; (2) maintaining the productivity of renewable resources like fisheries, wildlife habitat, grasslands and forests; and (3) preventing destructive and irreversible effects like the loss of species, genetic, and cultural diversity.

Put in economic terms, sustainability means "living off nature's "income" and not dissipating its "capital"; that is, limiting our consumption to the amount that can be sustained indefinitely without degrading the environmental resources which comprise our capital stock.

"Economic growth" typically means an increase in quantity, which is obviously not sustainable in the long term on a finite planet. "Economic development," on the other hand, which means an increase in quality of life without necessarily causing an increase in the consumption of resources, may be possible, with proper planning.

But unfortunately, achieving ecologically sustainable development so that the interests of future generations are not compromised by today's decisions demands longer-term planning horizons than those currently employed by most businesses. Despite two decades of Earth Days, most industries still typically discount the future, undervaluing the costs of resource depletion and the benefits of conservation. The free trade agreement should not make this same mistake,

Diversity

Sustainability implies diversity, and sustainable development requires that corporations foster diversification. Not only must our economic activities preserve species and ecosystem diversity through conservation and efficiency in the use of natural resources, but we must take account of cultural diversity, the right of indigenous peoples and diverse cultural systems to exist.

In addition, a free trade agreement should encourage economically and environmentally sound diversification of production methods in order to assist Mexico in moving away from excess reliance on exports of non-renewable resources, over-reliance on agricultural and silvicultural monocultures, and other activities that make extreme demands on the environmental assimilative and carrying capacities of the region. Such diversification not only can ease concentrated environmental burdens, but at the same time can broaden the economic base by helping address the needs of local markets and diverse cultural sectors.

Sustainable Technology

In this regard, we must also speak of sustainable technology. As the United Nations Center on Transnational Corporations points out in a recent paper, sustainability "requires that corporate executives seek to develop, use and transfer technologies that are compatible with the needs, skills, training, finances and natural environment of the people in the region where they are used."

Sustainable technology is appropriate technology, and given the global pollution problems we face today, it is inappropriate to continue relying on the old-fashioned approaches to controlling our toxic products after they have found their way into our toxic waste dumps, our water and our lungs,

Instead, a free trade agreement should require industries that develop as a result of the agreement to use the best available techniques and equipment to prevent pollution at the front end of our industrial processes rather than outdated end-of-the-pipe pollution control technologies.

Sustainable and Equitable Development

Furthermore, as the International Labor Organization states in its 1989 "Convention Concerning Indigenous and Tribal Peoples in Independent Countries," sustainable development cannot be separated from equitable development.

Equitable development means in part that corporations must take responsibility for funding local communities where they locate so the communities can develop the infrastructures they need to cope with the social and environmental byproducts of an exploding economy. The extreme lack of resources in Mexico precludes the Mexican people from effectively addressing the most basic results of industrialization and urbanization—including potable water, sanitation systems, medical capability, adequate housing and emergency response.

A free trade agreement must establish guidelines and mechanisms to assure that basic problems like these are addressed by financial commitment from the industries that will benefit from the agreement.

By sustainable and equitable development we also mean in part that a free trade agreement must have built into it a process to require (a) assessment and disclosure of potential short- and long-term environmental risks from proposed actions and alternative actions before an action is taken; (b) disclosure of risks from operation of a facility (e.g., potential explosions or releases from chemical plants, as at Bhopal); (c) disclosure of hazards associated with products (e.g., pesticides); and (d) disclosure of hazards in the workplace (e.g., chemical fumes, radiation, asbestos). An economic system that does not provide for public access to information, that is, for worker and community right to know and the right to act on that knowledge, is not sustainable in the long run.

Public Participation

Similarly, a free trade agreement cannot guarantee sustainability without providing the public a voice in the decision-making process from negotiation through implementation. We recommend that in order to incorporate environmental concerns into a free trade agreement, non-governmental organizations representing the public be full members of one or more working groups of environmental specialists to identify potential environmental problems a free trade agreement might cause or exacerbate, to develop comprehensive assessments of those problems, and to work out ways to avoid or mitigate them.

Binational Enforcement

Sustainability also requires strong binational oversight of developing industries, but international agreements are typically very weak on enforcement and other aspects of implementation. The La Paz Agreement between the U.S. and Mexico, for instance, although it has been very useful in developing some aspects of binational cooperation, has no enforcement mechanism, no effective funding for response to environmental or public health emergencies, and no effective mechanism for strengthening regulatory and local community infrastructures.

The border plan being developing by EPA and SEDUE, although it will have some clear benefits, will suffer from many of the same problems as the La Paz agreement, including being limited to the border area when a free trade agreement will have ramifications throughout both countries.

As with development of community infrastructure, a free trade agreement will have to develop clear, equitable mechanisms for enforcement and for dispute resolution that recognize the sovereignty of each national and the dignity of individuals, as well as the needs of business.

This is especially true in regard to the question of standards. Whatever agreement is finally reached, it must not be allowed to pre-empt the rights of nations, states and local authorities to protect themselves and their environments. The European Economic Community and the GATT both provide protection against challenge of health and environmental protection standards as trade barriers. A Mexico-U.S. free trade agreement should do no less.

The concept of harmonization of standards has serious implications not only for national sovereignty, but for human and environmental health. It is essential that state and local authorities be protected in this manner. The states of Arizona and California, for instance, have fairly strict groundwater protection standards, but neither Mexico nor the U.S. has groundwater protection laws. Similarly, California has some of the strongest pesticide use standards in the world, much stronger than those of either nation. None of these standards should be pre-empted by free trade.

If there is to be any harmonization, standards should be "harmonized up," rather than to some lowest or median denominator. In matters of dispute, the strictest standard should be the one applied.

In closing, Mr. Chairman, I'd like to suggest a little historical perspective. Since we appear to be entering an era some have called a "Pax Americana," it may not be out of place to recall what Shakespeare had Antony say at the beginning of the Pax Romana about the evil that men do living after them. We are living in the third or fourth century of a late phase of a western civilization that has been around for a few thousand years at most, yet we have created in the past fifty years—and continue to create at an increasing pace—pollution that will last for longer than our civilization, perhaps longer than the human race, and certainly longer than any existing economic system.

If we are in fact to be leaders in what President Bush has called a "new world order," it is incumbent upon us to do everything in our power to prevent further degradation of our natural and social environments by our runaway technology and unchecked policies of economic growth. The proposed free trade agreement presents an excellent opportunity for practicing the self-restraint required of true leaders.

Mr. Chairman, Mr. Kamp has already submitted some of our papers. I would also like to submit for the record two other background documents: a copy of the Valdez Principles which I referred to earlier, and a copy of a paper of mine which is scheduled to be published later this month in *Environmental Carcinogenesis Reviews* dealing with pollution prevention in the context of the global environment.

Again, I thank you for the opportunity to comment, and would be glad to answer any questions.

On the Proposed U.S.-Mexico Free Trade Agreement (1991)

Michael Gregory, before the the Subcommittee on Labor of the Committee on Labor and Human Resources, Committee on Environment and Public Works, U.S. Senate, Joint Hearing on the Proposed U.S.-Mexico Free Trade Agreement, Washington, DC (23 April 1991)

My name is Michael Gregory and I am director of Arizona Toxics Information, a non-profit environmental advocacy and policy organization based in Bisbee, Arizona, four miles north of the U.S.-Mexico border. I have been involved with border environmental issues for the past twenty years—including problems of air pollution, water contamination, toxic substances in the workplace, pesticide residues on food, and emergency planning for hazardous materials accidents.

Many of these problems are directly related to the maquiladora industry which, because it has grown up during the same twenty years with little concern for pollution, serves as a bad example, maybe even a worst case example, of what industrialization in Mexico means when there is no effective protection of human health and the environment.

As a de facto free trade program, the maquiladora program provides a forecast in the border zone of what we might expect on a wider scale under a free trade agreement that promotes unfettered short-term economic growth rather than taking heed of the warning of the United Nations Commission on Environment and Development that in order to achieve long-term sustainable development, "economics and ecology must be completely integrated in decision-making and lawmaking processes not just to protect the environment, but also to promote development."

As I said in my comments to the International Trade Commission earlier this month, if public, occupational and environmental health protections aren't an integral part of the agreement, free trade doesn't mean a higher standard of living for Mexico but a return to the Dickensian squalor of the early Industrial Revolution.

Many of the environmental issues raised by the proposed free trade agreement are discussed in recent papers I have co-authored with the Texas Center for Policy Studies and the Border Ecology Project, and in my recent testimony before the International Trade Commission. I have submitted copies of these papers with my written testimony for inclusion in the record and would like to focus this morning on just a few of the issues discussed in more detail there. Although I will refer to some specific cases, the issues they raise are not isolated but indicate systemic problems with the industrialization of Mexico.

In particular, I would like to look at some issues related to hazardous waste management and the general lack of regulatory capability in Mexico, and then to suggest some positive approaches on how these and other issues might be addressed in free trade negotiations through attention to funding, public participation and setting of environmental standards.

First, it should be noted that environmental regulation in Mexico might better be called lack of regulation. Even with strongly worded statutes and the best of intentions, Mexico simply does not have the resources to adequately address its existing environmental problems, let alone those that might result from sharply increased industrialization and urbanization.

This lack of resources is particularly evident in the area of hazardous waste management. Annex

III to the 1983 La Paz Agreement requires U.S. companies to return to the United States any hazardous waste they generate in Mexico. Several loopholes in Mexican law allow U.S. wastes to become "nationalized" (e.g., by paying import fees on the waste or by minimally "treating" it in Mexico) and thereby escape the return clause, but in general, wastes are supposed to come back home. This clause was included in the agreement at the insistence of the Mexican negotiators who clearly recognized the shortcomings of their regulatory system.

In 1988, I co-authored a study of hazardous materials use by the maquilas in Agua Prieta, Sonora to document, among other things, how Annex III was working. What we found out was that it wasn't working, that in fact there was no record of any hazardous waste ever having come back to this country.

Since our study was presented to the U.S.-Mexico Working Groups on the La Paz Agreement a lot of attention has been paid to the hazardous waste issue and some wastes have started to come back, but as the head of Mexico's Secretariat of Urban Development and Ecology (SEDUE) recently said (according to an article last month in the Chicago Tribune), most of the waste generated in Mexico just goes down the sewers because the country simply does not have the resources to ensure that it is handled properly.

The country doesn't have the resources even to inspect the industry or to monitor water supplies to find out how much of the waste is ending up there. If you don't look, of course, you don't find it, and neither Mexico nor the U.S. EPA has spent much time looking. When we have looked, we have found more than we want to.

For instance, sampling done a few months ago by a coalition of governmental and non-governmental groups from both sides of the border has verified that there is a ten-mile long plume of contamination by industrial chemicals in the groundwater running under the border from the maquiladora complex in Nogales, Sonora into Nogales, Arizona.

This sampling is particularly interesting because it was not done by the governments of either country, despite SEDUE and the EPA having been alerted to the problem more than two years ago, but by private citizens working with local governments and universities. If we had waited for official action through the International Boundary and Water Commission or the environmental protection agencies, we would still be waiting. Hopefully the current attention to the problem will lead to more official monitoring throughout the border region.

But monitoring alone will not change the fact that Mexico has no rigorous regulation of hazardous waste equivalent to our regulation under the Resource Conservation and Recovery Act (RCRA). With all its shortcomings, regulation under RCRA is far better than Mexico's, and at least provides a direction and framework for cradle-to-grave tracking and secure disposal. Mexico has minimal tracking requirements at best, its disposal requirements are considerably weaker than ours, and its siting of hazardous waste facilities is utterly non-protective or, when strong on paper, are not followed in practice.

For instance, Mexico's only hazardous waste incinerator, which has recently been built to US specifications with a great deal of help from our EPA, is situated in the extreme northwest corner of Baja California south of Tijuana. A few months ago I took a tour of the site and was appalled to find that the incinerator was located on a steep bluff so that a spill would be likely to reach the Pacific Ocean within a few minutes where it would be carried by the prevailing tides up to San Diego along with the Tijuana sewage that already pollutes that coast.

Another example of a siting problem is the landfill connected to the Ford plant in Hermosillo,

the capitol of Sonora. This dump, which takes hazardous waste from the maquilas along the border, is located in a floodplain only half a mile from the city's main drinking water supply.

Inspections at these sites, like inspections at the facilities that generate the waste, are few and far between. Again, Mexico simply does not have the resources to make regular inspections. Joint inspections with EPA under Annex III of the La Paz Agreement, although a good idea and a good model for potential future binational enforcement, happen infrequently and cannot substitute for a vigorous Mexican enforcement program.

A similar situation prevails in regard to air pollution. Every border city is out of compliance with EPA standards for particulates. They very likely suffer from high levels of various toxics too, due to uncontrolled industrial emissions and burning dumps, but neither country has monitored for these.

Similarly, despite an impressive 1986 agreement to control copper smelter pollution (Annex IV of the La Paz Agreement), neither country has done any monitoring for emissions from the giant La Caridad copper smelter in Nacozari, Sonora, to see if it is in compliance with the agreement. Again, the only oversight has been done by the private sector and non-profit non-governmental public interest organizations.

Another example. Annex III of the La Paz Agreement established a joint contingency plan for response to hazardous materials emergencies and over the past few years several workshops and exercises have been carried out along the border as part of the emergency planning process. But last July when an explosion at the Quimica Organica plant in Mexicali blew a plume of hydrochloric and sulfuric acid into Mexicali forcing the evacuation of thousands of people and sending hundreds to the hospital, the much-touted binational plan didn't work at all. The sister city of Calexico, California wasn't notified according to plan and EPA didn't receive word of the event until three days later—and then was told not through the official channels set up through the plan, but by a member of a non-governmental environmental organization who happened to be in the area.

Several things become clear from these points I have mentioned. First, Mexico does not have the regulatory capability to deal adequately with the current situation, let alone the increased problems that will accompany increased industrialization and urbanization.

Second, no matter how good a model it provides for binational cooperation, there is no enforcement mechanism under the existing La Paz agreement, and even when there are binational plans, implementation tends to be haphazard and spotty.

Third, non-governmental organizations have been an essential part of pollution control in the border area. They, not EPA or SEDUE, have taken the lead. Official action does not seem to take place without public pressure and public involvement.

Given these situations, it seems obvious that if there is to be a free trade agreement, it should contain a very detailed set of implementation provisions and a guaranteed public presence to watchdog the process. In closing, I would like to suggest some of the more pressing conditions that should be part of a free trade agreement.

1. First, an agreement must guarantee that funding will be available to provide (a) education for the public, private and governmental sectors; (b) monitoring of air, water, soils and biological resources; (c) enforcement, not just in the border zone but throughout both countries; and (d) infrastructure development so that communities on both sides of the border where industries

locate can cope with the increased stress of industrialization, including the need for potable water, housing, medical care and emergency services. This funding should come not from taxpayers but from the corporations that benefit from deregulation. The principle of "polluter pays" should prevail.

2. Second, since an economic system that does not provide for public access to information is not sustainable in the long run, and Mexico does not have the equivalent of our *National Environmental Policy Act* (NEPA) or Community Right-to-Know Act, a free trade agreement must have built into it a process to require assessment and disclosure of potential short- and long-term environmental risks from proposed actions and alternative actions before an action is taken, including risks to the community from operation of a facility, hazards associated with toxic products like pesticides, and toxic hazards in the workplace.

3. Third, in order to guarantee that the public has a voice in decision-making throughout the process, non-governmental environmental organizations should be given full status on any negotiation teams and implementation bodies to identify and assess potential environmental problems a free trade agreement might cause or exacerbate, and to work out ways to avoid or mitigate them.

4. Fourth, whatever agreement is finally reached, it must not be allowed to pre-empt the rights of nations, states and local authorities to protect themselves and their environments. In no case should the U.S. or any political subdivision be forced to lower its standards of human health and environmental protection. Arizona and California, for instance, should not have to give up their groundwater protection standards just because there are no Mexican or U.S. groundwater laws. And California should not be forced through trade barrier arguments to lower its strict pesticide standards.

5. And finally, if a free trade agreement is undertaken, it should require that all facilities on the U.S. side of the border and U.S. companies on the Mexican side—as well Mexican or other foreign-owned facilities built in Mexico after the agreement is signed—comply with the highest environmental protection and pollution prevention standards of either country.

There is already a precedent for such binational compliance with the higher standard. Annex IV to the La Paz Agreement requires copper smelters on both sides of the border to meet the U.S. New Source Performance Standards. A similar requirement should be built into any free trade agreement. Some phase-in period might be necessary for existing Mexican industries, but eventually both nations should require industries to comply with the highest standard.

Meanwhile, the U.S. should act unilaterally to require U.S. companies in Mexico to meet the same standards for public, occupational and environmental health that they have to meet on the northern side of the border. Hazardous waste generators, for instance, should have to certify that their wastes are treated, stored and disposed of in Mexico at least as safely as they are treated, stored and disposed of in the United States. Until that kind of oversight is possible in Mexico, the wastes generated there by US companies should have to be brought back to the US, as they are supposed to be now under the La Paz Agreement, and the inspection systems of both countries should be greatly strengthened to ensure that companies comply with the rules.

Transparency, Local Control and Binational Cooperation: Adding Conditions of Sustainability to the Proposed North American Free Trade Agreement (1991)

Michael Gregory, presented to the Foro de Impacto Ambiental y Tratado de Libre Comercio, Universidad de Guadalajara, Encuentro Nacional el Tratado de Libre Comercio y Las Universidades Mexicanas, *La Feria Internacional del Libro*, Guadalajara, Jalisco, México (29 November 1991)

In the past few months, a great deal of discussion about the proposed North American Free Trade Agreement (NAFTA) has focused on the environmental horror stories resulting from rapid industrialization and concomitant urbanization of the Mexico-U.S. border area.

In one widely-circulated statement, for instance, the prestigious American Medical Association has described the border area as "a virtual cesspool and breeding ground for infectious disease," and the maquiladora program has been generally displayed as a worst-case scenario of what happens when unbridled industrialization occurs without proper regulation to protect public health and the environment.

All this is not without truth and as someone who lives in the border zone I welcome the increased attention SEDUE and the US-EPA are currently giving to border problems. But important as the border is, both as bad example and as a potential model for binational cooperation (a point I will return to shortly), a NAFTA will have effects far beyond the border region.

Increased energy development, increased use of internal combustion engines, increased spraying of toxic pesticides, increased smokestack emissions, increased generation of hazardous waste—in order to address the environmental implications of the proposed trade pact, we have to see it in terms not only of site-specific impacts caused by particular industries or particular regions, or even particular nations, but in terms of the larger global context.

Economics and Ecology

In a world rapidly shrinking due to the wonders of our late 20th C high technology, and faced with such obvious examples of bad management as global warming, smog, the growing hole in the ozone layer, residues of toxic chemicals in the blood of every person on earth, and the increasing international traffic in toxic waste, we cannot afford to ignore the primary law of ecology—which is that we live in a closed system where everything is connected to everything else.

Neither can we afford to ignore the deepening poverty and malnutrition that characterize the lives of so many people in our shrinking world; nor can we ignore the geometric increases in population and the inadequate distribution systems that so obviously aggravate the problems.

People and societies are part of the environment; we cannot morally or scientifically separate the biogeophysical realm from socio-politico-economic realities. We cannot sacrifice one to the other. As the living conditions of millions of people around the world deteriorate in tandem with the degradation of our natural environment, we must recognize that integration means more than simply lowering trade barriers between nations and expanding markets for entrepreneurs, industrialists and financiers. Even more fundamentally, it means that we must integrate economics itself with ecology.

The two sciences stem, after all, from the same Greek root: *ecology* means knowledge about the household or community or, in the larger sense, of the biosphere; *economics* means management of that household. Clearly, good economic management must take into account the ecological support system of which it is a subset.

The recognition of this intimate and unavoidable relationship between economics and ecology is, of course, nothing new. It is the basis of reports by several international study commissions over the past twenty years or so. As the Independent Commission on International Development Issues (the "Brandt Report") pointed out in 1980, for instance, "the care of the natural environment is an essential aspect of development." Again, as the World Commission on Environment and Development (the "Brundtland Commission") said in 1987, "economics and ecology must be completely integrated in decision-making and lawmaking processes not just to protect the environment, but also to promote development."

Despite such sound advice, many important economic decisions are still based on an out-of-date theory of classical liberalism which boils down to a belief that the world and its resources—and, ultimately, its people—are no more than mere commodities to be bought and sold.

Unfortunately, the proposed free trade agreement is in many respects based on such a shortsighted vision. Its primary goal is increased economic growth and the trade representatives of the U.S. and Mexico have refused to integrate environmental issues into the negotiations, even refusing to establish a working group on environment.

To see the world from such a purely market perspective is to rob people of their humanity and the natural world of its integrity, to destroy the ecological balance upon which depend human and non-human species alike, for pollution and depletion of our natural resources are to a great extent the result of the quests for short-term profits that derive from such a belief.

Sustainable Development vs. Economic Growth

The Bush Administration and other pro-free traders argue that the increased economic growth stimulated by a NAFTA will lead to a better quality of life as increased profits at the higher economic levels of investment trickle down to the man in the street. But economic growth, which is an increase in quantity of production, cannot be sustained indefinitely on a finite planet; instead, it leads inevitably to resource depletion and contamination and a lowering of the quality of life.

The results of trickle-down economics can be seen in the United States where for the past decade the nation's wealth has been rapidly accumulating in the hands of a smaller and smaller portion of the population while concurrently the number of homeless people on our streets has been growing. As Herman Daly, Senior Economist at the World Bank, says, economic growth makes us poorer, not richer.

What we need is not economic growth but sustainable development, an increase in the quality of life without necessarily causing an increase in quantity of resources consumed or of waste products generated.

In the past few years *sustainability* has become such a buzzword that its meanings have become blurred; even the most destructive projects are billed as "sustainable" by promoters of growth. But there are certain essential elements of true sustainability and these should be part of a free trade agreement if that agreement is to be successful in the long run.

Future Needs

For instance, as the 1987 World Commission on Environment and Development insisted, sustainable development is "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs"; that gives "overriding priority" to the essential needs of the world's poor; and that pays particular attention to the "limitations imposed by. . . technology and social organization on the environment's ability to meet present and future needs."

Equity and Environmental Justice

Also, as the International Labor Organization's Convention Concerning Indigenous and Tribal Peoples in Independent Countries noted in 1989, sustainable development is "equitable development." In other words, the success of economic ventures cannot be defined solely in terms of increased production and market expansion, but must be coupled with redistribution, environmental enhancement, and long-term community stability. As stated by the Brundtland Commission, sustainability requires protection of "economic, social and cultural" rights as well as protection of the environment.

Diversity

Another element of sustainability is diversity. Not only should a free trade agreement help preserve non-renewable resources like fossil fuels and minerals, and ensure the long-term productivity of renewable resources like fisheries, wildlife habitat, grasslands and forests; but it must help prevent irreversible loss of diversity in species and gene banks, as well as foster *cultural* diversity by recognizing the right of indigenous peoples and diverse cultural systems to exist.

Appropriate Technology

Similarly, as has been pointed out by the United Nations Centre on Transnational Corporations, sustainability "requires that corporate executives seek to develop, use and transfer technologies that are compatible with the needs, skills, training, finances and natural environment of the people in the region where they are used."

The NAFTA should, accordingly, encourage economically and environmentally sound diversification of production methods in order to prevent an excessive reliance on exports—a reliance that leads inevitably to over-exploitation of resources, chemical-dependent monocultures, exponential growth in pollution and other waste products, and other activities that make unsustainable demands on the environment. Sustainable technology is appropriate technology, a concept that is typically incompatible with an export economy.

Technical Criteria

In addition to these general components of sustainability, if a NAFTA is to be workable—and acceptable—even in the short run, it must be comprehensive in scope and must, in very specific terms, address such nuts and bolts issues as investment standards, transparency, enforcement, funding, and mechanisms for public participation and local implementation.

Scope

I have already mentioned that the current environmental focus of the trade representatives of both countries is largely limited to the border. It is further limited primarily to issues of industrialization, the maquiladoras and the major border cities.

But in order to be sustainable, the NAFTA must address sources and receptors of environmental impacts not just in the border cities but in rural areas as well, and throughout the sovereign territories of both nations. Furthermore, it must broaden its focus from industrial contamination to include issues of resource depletion as well as contamination, and to include the impacts of mining, agriculture, and forestry sectors.

Standards

The NAFTA should include mutually enforceable standards to ensure that industrial, agricultural or other growth resulting from the NAFTA does not occur as a result of lax environmental standards or enforcement. These standards should require (1) mitigation measures to prevent and reduce pollution and other waste products and to conserve natural resources; (2) a demonstration that companies are using the best available pollution prevention, waste minimization and pollution control technologies and that, whatever technology they use, they are not releasing unacceptable levels of pollutants into the environment.

Where environmental or health standards of the two nations differ, the higher standard of either nation should apply in both countries. Where a border state or local authority on the border has a more protective standard than a given national or binational standard, the more protective standard should apply on both sides of the border.

There is already a precedent for such binational compliance with the higher standard in Annex IV to the La Paz Agreement which requires copper smelters on both sides of the border to meet the US New Source Performance Standards.

Similarly, the La Paz Agreement requires that hazardous wastes generated in Mexico by US-owned maquilas must be returned to the US. This requirement, which was added to the La Paz Agreement at the insistence of Mexican negotiators, should continue to apply to all US firms in Mexico until a waste management capability has developed in Mexico that can guarantee detailed cradle-to-grave tracking and standards of treatment, storage and disposal technology at least as protective as those in the US.

Clearly, time will be needed for some existing domestic industries in Mexico to meet the highest standards, so the NAFTA should provide for a phase-in period of up to ten years for those businesses that can demonstrate hardship and that are not subsidiaries or otherwise part of larger production processes. Existing US industries and all new facilities in either country should be required to meet the standards without delay.

Whatever agreement is finally reached, it must not be allowed to pre-empt the rights of nations, states and local authorities to protect themselves and their environments. Environmental laws or regulations that a federal government or a political subdivision of a participating country deems necessary to protect environment, human health or physical and biological resources from exploitation or contamination should not be open to challenge as unfair trade barriers.

The states of Arizona and California, for instance, should not have to give up their groundwater protection standards just because there are no federal groundwater laws in the US or Mexico.

And California should not be forced through trade barrier arguments to lower its strict pesticide standards.

Enforcement and Dispute Settlement

The NAFTA should require mandatory compliance with standards and provide for strict enforcement. The enforcement provisions should include comprehensive baseline monitoring of all environmental receptors to establish existing public and environmental health conditions as well as ongoing monitoring to ensure compliance.

The existing binational investigation program developed by SEDUE and EPA should be expanded and should include provision for unannounced on-site inspections.

Citizens should have joint access to each nation's courts to obtain injunctive relief and to enforce compliance of nations and companies with the conditions of the trade agreement, or with the laws of either nation.

In addition, the agreement should include clear mechanisms for dispute resolution to ensure that *bona fide* public, occupational and environmental health measures are not subject to attack as non-tariff barriers to trade.

Funding and Financial Responsibility

The extreme environmental and human health problems caused by industrialization and urbanization in the maquiladora communities clearly indicate the need to couple economic growth with development of community infrastructures. The NAFTA should include provisions to ensure that part of the profits of industries that benefit from free trade should be shared with the communities where the industries are located so that the communities can provide for such basic needs as potable water, sewage systems, medical capability, adequate housing, management, emergency response and other infrastructural necessities resulting from increased growth.

Transparency and Public Participation

Finally, to be successful in the long run, a free trade agreement must incorporate democratic principles of public disclosure and public participation. The NAFTA should have built into it a process to require assessment and disclosure of potential short- and long-term environmental impacts resulting from increased trade, including (a) risks from operation of a facility (e.g., potential explosions, emissions or discharges); (b) hazards associated with products (e.g., pesticides); and (c) hazards in the workplace (e.g., chemical fumes, radiation, asbestos).

Information, however, is not enough. Besides a right-to-know, the public must also have the right to act on its knowledge. A free trade agreement cannot be sustainable unless it provides the public a voice in the decision-making process. The NAFTA should provide for public participation during all stages of negotiations and implementation of the agreement.

The recent hearings held by SEDUE and EPA on the draft Border Plan were a major step in the right direction. Another set of hearings should be held on the next draft (expected sometime in January or February) to ensure full public participation.

Another major step was taken by the US government in holding hearings on its draft Environmental Review. Never before have trade issues been subject to such public scrutiny. The

Mexican government should follow suit and open its environmental review process to public review and comment.

A Border Model

In closing, I would like to note that citizen right-to-know, local funding and authority, and binational cooperation are the keys to building an effective and sustainable free trade agreement. Perhaps the most significant of these is binational cooperation.

On the border, we have achieved some success in developing binational cooperative efforts to address mutual environmental concerns. Perhaps the most successful has been the Ambos Nogales Project, established to address water contamination issues in the sister cities of Nogales, Sonora and Nogales, Arizona.

Begun by non-governmental organizations, including non-profit environmental groups, public health professionals and universities on both sides of the border, the network has expanded to include local and state government officials. Without help from SEDUE or EPA, the network began testing local water supplies, found industrial contamination, and started a complex planning effort to identify the scope of the problem and develop solutions.

Recently, several proposals have been made for incorporating this kind of local cooperative structure into the Integrated Border Environmental Plan. One such proposal, for instance, suggests building upon the existing concepts of Ecological Committees under Mexico's 1988 Law of Equilibrium and Local Emergency Planning Committees under the 1986 U.S. Emergency Planning and Community Right to Know Act to establish local and regional binational environmental committees and a border-wide Binational Environmental Council (including representatives from all sectors of communities on both sides of the border) to implement the Border Plan.

Whatever the final outcome of these proposals for the border, it is clear that there must be some kind of institutional mechanism for environmental oversight of the NAFTA, and the border council concept may provide a model that is applicable beyond the border. However it is done, the NAFTA should give similar importance to local citizen participation by providing local communities with the capability to deal with problems that arise from increased investment in their areas. Specific mechanisms should be included in the agreement (1) to assure that financial and informational resources are available to and accessible to citizens at the local level; (2) to involve citizens of both countries in the prioritizing of local problems; and (3) to ensure effective local development and enforcement of measures for protecting human health and the environment.

Free Trade and Environment: A Border Perspective 1992)

Michael Gregory, presented to Rotary Club of Tucson, Tucson, Arizona, August 26, 1992

Environment and Trade In the Public Interest

It's always a pleasure to be able to meet with an organization dedicated to service—an organization that clearly recognizes the need to look beyond personal greed and self-service to guarantee that the public interest, the needs of society at large, will be served.

As you know, protecting the environment is very much in the public interest—so much so that the US, like other countries, has given clean air, clean water, safe food and other conditions of healthy environment the status of civil rights for its citizens.

There is a very close relation between environmental rights, civil rights and those basic human rights we have tried to enshrine in our Constitution and the public policies that derive from it.

Two of the most basic rights established in US environmental laws are the right not be poisoned, especially not for somebody else's profit, and the right to know—which encompasses a broad range of public disclosure, including the right to know if we're being poisoned, or have the potential to be poisoned through the environment, and if we are or have been, then by what, and what the poisoner is doing to stop or prevent the poisoning; and of course, the right to have the government step in and protect our health.

I'm emphasizing issues of pollution because that's my specialty, but we shouldn't forget that these same rights—at least in the US—apply to other environmental issues like resource conservation, land use, and the preservation of wildlife and ecosystem diversity.

Another basic right—the right of the public to participate in the decisions that affect our lives—is also an essential component of US environmental law.

It is these three rights—right to healthful and healthy environment, the right-to-know, and the right to participate—that are of major concern in our discussion of the proposed North American Free Trade Agreement (NAFTA).

Mexico has some of these same concepts written into its Constitution, but in many cases no laws or regulations to implement them or, if regulations exist, no money or no political will to enforce them.

Until recently, trade was not concerned with such matters and in many ways they are still ignored. Negotiations for the NAFTA and its global parent the General Agreement on Tariffs and Trade (GATT), for instance, have been carried out in complete secrecy. Instead of being developed in full public view—with what in trade circles is called full transparency—trade agreements are developed without public oversight and participation. In this regard, it's hardly surprising that two weeks after President Bush announced his OK of the NAFTA, the public still hasn't seen what he's trying to tie us into.

In general, environmental groups haven't opposed free trade *per se*, but have insisted that if the United States is to enter into an agreement, it must not be just a bonanza for high-rolling investors, consultants and lawyers, but must instead institutionalize measures for long-term protection of human health and the environment against the impacts of increased trade. Instead

of fantasies of unlimited economic growth and unending consumption, it must foster sustainable development. Rather than the quick buck, it must promote long-term local cultural and community stability. And it should focus on the needs of individuals and families rather than inflated impersonal statistics.

Unfortunately, the free trade agreement being pushed by the Bush and Salinas administrations fails on all these counts, but before getting into specifics, let's look at some of the contexts the NAFTA is being developed in.

Contexts 1: Five Easy Steps

First, we should be aware of four background documents behind the NAFTA. These are:

1. La Paz Agreement (1986) which with its four annexes is the basis for current environmental planning on the border between the US and Mexico

2. President Bush's *Action Plan* of May 1991, in which he promised that the NAFTA would address environmental concerns. It was on the basis of the Action plan promises that Congress passed Fast Track authorization, saying that Congress would only be able to say yes or no to a FTA, and would have to do so within 90 days, but would not be able to amend the language

3. The *Environmental Review* (ER) of February 1992, which presents a very generalized overview of environmental problems in the border area and air pollution problems in Mexico City. Public Citizen, Friends of the Earth and Sierra Club sued the Administration over the ER, claiming that it didn't satisfy the minimum requirements of the *National Environmental Policy Act* (NEPA). The federal court ruled that the groups did not have standing, so today there still is no thorough environmental analysis of the probable impacts of the free trade agreement.

4. The *Integrated Border Environmental Plan* (IBEP) issued on the same date as the ER and repeating a lot of the ER's description of the border problems. The IBEP's primary function appears to be the adding of details to the La Paz Agreement, and like La Paz has been roundly criticized as a short list of border problems with no concrete mechanisms or funding for addressing the problems—in short, little more than a plan to plan.

5. Finally, the NAFTA itself, which of course has not been seen in its final form but which was circulated last January in draft form leaked from the Dallas negotiating sessions, giving us a pretty good idea of the drift of the document.

Contexts 2: The Free Trade Putsch

In terms of economics, the NAFTA is not being developed in a vacuum, but is very much part of what I have come to think of as the Free Trade *putsch*—a global movement of transnational corporations to bring all countries and cultures under the control of a global market.

This movement is evident in a number of trade agreements being drawn up all around the world, with and without the US, including agreements in Asia, Africa, South and Central America and, of course, the one in Europe that worries the Bush administration so much.

The NAFTA must also be seen in relation to such bodies as the Organization for Economic Cooperation and Development (OECD) and the United Nations Conference on Economic Development (UNCED) which recently sponsored the Earth Summit in Rio.

And the parent of all trade agreements, the GATT—which has the distinction of being the only international treaty-type agreement specifically rejected by the US Senate but still observed by the United States government.

In all these arenas, the Reagan/Bush administrations have pushed the same agenda: trade takes precedence over all domestic environmental, social and economic standards, including those of local and state governments.

It is the same agenda in the NAFTA, which specifically references the GATT in matters relating to environmental standards.

As President Bush proved in disgracing the US in Rio, when it comes to talking about environmental protection against the impacts of trade, here in the US we are dealing with one of the most reactionary governments in the world.

It has become very clear to those of us concerned with protecting the public interest against the polluting and destructive practices of profit-driven special interests, that in the US we are fighting an uphill battle from within the belly of the dragon.

Historical Perspective: Mexico

Historically speaking, to get some perspective on probable effects of the free trade agreement in Mexico, we need some understanding of three parallel topics: (1) the Industrial Revolution of 18th- 19th C Europe; (2) the history of Reaganomics in the US; and (3) the economic development of the US-Mexico border area.

Industrialization First, we have to recognize that the basic economic condition of Mexico is extreme poverty and that the country has been trying to address this condition for the past 30 years by industrializing and urbanizing a basically agrarian society.

Mexico is still primarily agrarian, but it is in the throes of a changeover with the typical Industrial Revolution pattern of driving people off the land into the cities in search of jobs. In recent years millions of people have migrated from the farms so that today over 70% of Mexico's people live in cities. Economists predict that with or without free trade, over a million more will migrate in the next decade.

Free trade will only exacerbate this trend. Economists have estimated, for instance, that free trade in just one product—corn—will displace an additional 700,000 people off the land to the cities or to marginal lands.

And while—using our own high standard of living as an example—we may think industrialization and urbanization are good in the long run, we also have to recognize that the lesson of the Industrial Revolution is that the higher standard of living comes only after many decades of intense social disruption and suffering for millions of people. Hopefully, the free trade agreement can be used to alleviate some of that suffering.

Ultra-neo-liberalism For the past three years, Mexico's push toward industrialization has been greatly accelerated by President Carlos Salinas de Gotari, a Harvard-trained economist who has linked old-fashioned industrialization and urbanization to an ultra-liberal economic philosophy—the same brand of neo-liberalism espoused by Margaret Thatcher, Ronald Reagan and George Bush.

The three pillars of the Salinas program are Privatization, Deregulation and Decentralization, all of which have contributed to the country's demographic shift and will contribute even more as the Salinas policies move Mexico more and more away from self-reliance into an export economy dependent on supplying the world market.

Historical Perspective: Reaganomics

If the three points of the Salinas program sound familiar, it is because they are also the pillars of Reaganomics—that theory also known as supply side or trickle down economics or, as George Bush used to call it before he was elected, voodoo economics.

Roughly speaking, the theory says that if you make the rich richer, the poor will benefit because the rich will give them jobs to buy the goods they make for the rich to sell.

We don't have time to go into the details now, but it helps to understand something about the Reagan legacy and how the US economy got where it is today.

Briefly then, the Reaganistas started with a 4-point program to:

1. Give tax cuts and other investment incentives to the wealthy
2. Dismantle the regulatory infrastructure (esp. OSHA and EPA)
3. Privatize public property and services
4. Spend heavily on the military, not on social programs.

The results:

- An incredible national debt, for the first time in history putting the US far behind other nations on the economic ladder
- Again, for the first time in history, starting in 1982, a drop instead of a rise in the real personal income of the average US citizen (reaching the lowest point in history in 1990)
- Next, concentration of the nation's wealth in hands of the top 1-2% of population—people like Michael Milliken—so that now the top 1% control more than the bottom 90% combined—a condition not unlike that which led to the French Revolution
- Also resulting in high bankruptcy rates and high numbers of homeless people, including thousands of middle class unemployed
- And finally, a need for world markets since the US consumer is too broke to keep up with industrial overproduction.

Historical Perspective: Free Trade

Which brings us back to free trade which, in its simplest terms, can be seen as an attempt to spread Reaganomics into the Third World. Historically, free trade has meant the unchecked exploitation of people and the environment in the name of quick profits and short-term economic growth. Or, put another way, exploitation of the poor and undeveloped nations by the large rich nations; or, as it's usually put these days, domination of the South by the North. The classic example of free trade is the tri-cornered slave trade of the 18th and 19th C.

As expanding markets have shrunk the world, it has become clearer that infinite production

increases are impossible in a world of finite resources, so the impossible dream of unlimited growth has been getting tempered in the past few decades with attempts to *develop* markets, rather than just exploit them.

So since WW II, the old-fashioned rape and run capitalism has usually been coupled with foreign aid programs—euphemistically called "economic development" programs—in the hope that the Third World would eventually be able to provide continuous rather than short term supplies to the world market.

Some of the problems with the foreign aid concept are summed up in its definition as "taking from the poor of rich nations to aid the rich of poor nations," a definition that recognizes both the basic inequity of the distribution of benefits, and the false notion that free trade benefits everybody.

One of the basic failures with foreign aid is indicated by the massive foreign debt of countries like Mexico that have received such aid. Today, after years of foreign aid, Mexico has one of the highest debts of any nation.

Rather than helping countries become independent equal players in the world market—or, even better, helping them become prosperous and self-sufficient within their own boundaries regardless of what the world market may demand, economic development programs have been used as tools of modern imperialism to bind Third World countries into servitude to the rich North.

This has certainly been the history of US relations with Mexico—which is why so many Mexican citizens do not trust the US and do not agree with the ultra-liberalism of President Salinas.

Not just foreign aid but the concept of free trade itself has some problems. For instance, it is based on the 18th C nationalist theory of comparative advantage which in short says that all partners in free trade benefit because each does what he does most cheaply.

Most of the win-win rhetoric about the NAFTA is based on faith in this idea. But even if comparative advantage was a valid theory 200 years ago (and it probably wasn't), it has no applicability at all in a world like ours where capital and labor both flow freely across borders—something that wasn't true in Adam Smith's time.

Another problem with the win-win theory is that the free traders tend to describe its supposed benefits only in terms of statistics like Gross National Product (GNP)—which don't take into account real world problems like lousy living conditions, pollution and hazardous waste. Free trade economists even go so far as to count hazardous waste as a benefit because it is an item of commerce and some are even talking seriously about hazardous waste as a growth industry in Mexico.

In fact, in today's world, free trade does not necessarily benefit the citizens of nations or the nations at large; it benefits primarily, and arguably only, the traders themselves. This is especially true when trade is carried out by large transnational corporations that have no inherent loyalty to any one country but only to corporate profit.

And although trickle-down may work in the long run, the economic disaster of our own country in the past decade indicates that its effect in Mexico is not likely to help the average citizen for at least several generations.

The Border Environment: De Facto Free Trade

Nowhere are the historic exploitation of Mexico and the disaster of economic development more evident than on the US/Mexico border, where relations have been characterized by such sterling examples of US altruism as the US-Mexican War, the Alamo and Col. Greene's ruthless takeover of Cananea's copper mines—and, more recently, the maquiladora program.

If you want to see the effects of free trade without environmental controls, you only have to look at the environmental, workplace and infrastructural conditions of the border—in Nogales, Juarez, Tijuana, Matamoros and Nuevo Laredo.

Low wages, lack of regulation in the workplace and environment, low birth-weight babies and rampant disease: we have had *de facto* free trade in the maquiladora program since 1965 and the result is what the American Medical Association has aptly called a "cesspool."

The NAFTA, unless it contains explicit prevention measures, will only mean more of the same: more business as usual, more pollution, more low wages, more poor health, more substandard housing and medical services, etc.—and not only on the border, but throughout Mexico.

It doesn't have to be that way; but you can't stop it just by hype. You have to have concrete, workable mechanisms to clean up the existing mess and prevent them in the future.

In short, instead of neo-liberal rhetoric, free-trade boosterism and a push for short-term economic growth, we have to put in place a program for long-term sustainable development—to ensure not only that the world today is livable, but that the world we leave future generations will be better than the one past generations have screwed up for us.

The question should be, not just how can we stop increased trade from messing things up even more, but how can we use trade to improve the environment for us and for future generations?

Elements of Sustainable Development

There are certain basic elements of sustainability that have to be addressed if the free trade agreement is to succeed in the long run. They include issues of: Scope; Right-to-Know; Public Participation; Local Community Empowerment; Protection of cultural, biological, economic diversity; free exchange of information and transfer of technology; Equity; and Democratic Process.

And they require standards for products and processes; regular monitoring and consistent enforcement to assure compliance with those standards; and adequate funding to carry out the program.

The Bush and Salinas administrations have promised all this, but rather than containing clear mechanisms for protecting public health and the environment, the Administration's messages are mostly empty rhetoric and hype assuring us that free trade will mean wonderful benefits for everybody.

The news media, for instance, recently carried stories on a government report showing that the NAFTA would save US consumers money on their food bills; but when you looked at the fine print, you found out that the savings amounted to a whole \$50/year for a family of four!

This was bad enough, but a then few days later another story came out saying that in fact, rather than saving consumers money, the NAFTA is likely to raise everybody's food bills.

Obviously, the Administration has a credibility problem here. And it is made even worse by the fact that while the Administration says out of one side of its mouth that the NAFTA will address environmental problems, on the other side it is doing everything it can to make adequate environmental protection impossible.

- For instance, the Administration says the Border Plan will take care of the air pollution problem along the border while at the same time Vice President Quayle's Competitiveness Council is hamstringing Clean Air Act regulations so badly that EPA is being sued to enforce the law.
- Again, the Administration says under the NAFTA and the Border Plan pollution along the border will be cleaned up, but there is nothing in any of the plans to make existing industries install pollution controls, no schedule for locating toxic waste dumps, and no funding for any of it.
- The Administration pays lip service to pollution prevention, but neither the Border Plan or the NAFTA contain any requirements for industries to reduce—or even report—their use of toxic substances.
- The Administration says it will protect us from pesticide poisoning, but is lobbying Congress intensely to repeal existing law that bans cancer-causing pesticide residues in food.
- The Administration says it wants to take care of the hazardous waste problem on the border, but the Border Plan and NAFTA have no requirements for industries to minimize generation of the waste, the EPA is talking about dropping the existing requirement for US industries to return their hazardous waste to the US for proper handling, and meanwhile in Washington Quayle again is busily pushing EPA to de-list large numbers of substances so they won't be regulated as hazardous waste at all.
- And finally, President Bush assures us that the NAFTA protects standards, but his assurances are full of weasel words and loopholes, so that "sound science" becomes defined by slippery political concepts like acceptable risk, and standards have to meet impossible tests like proving that they are the least trade restrictive standards possible.

Free Trade and Sustainability

One of the nice things about living in Arizona is that you learn to recognize a scam when you see one, and the NAFTA fits the bill pretty well. Despite all the rhetoric, the Administration's promotion of the NAFTA boils down to the same old economic growth argument that whatever's good for business is good; full speed ahead, future generations and the environment be damned.

There are ways a free trade agreement might contribute to sustainable development, but the Bush and Salinas administrations don't seem to be interested in those. But just in case someone up there is listening, I'd like to share some of those with you.

First, if the United States is to enter into a free trade agreement with Mexico, it must prevent further destruction of the hemispheric environment—not just on the border—and provide for clean-up of existing problems. What good does it do the ozone layer for us just to push pollution south off the border?

To assure that the NAFTA promotes sustainable development rather than more of the unsustainable growth that has characterized past investment, it must include specific environmental and health safeguards. It must, for instance, guarantee that local, state and national laws developed under due process to protect human health and the environment will not be open to challenge as trade barriers and will not be pre-empted by international agreement.

It doesn't make sense for Arizona to enforce its strict groundwater protection standards in Nogales when a few feet away in Sonora the same companies have to meet a lower standard or none at all. Similarly, what good does it do the citizens of California to enforce the toughest air quality standards in the world, if the same companies they're regulating in San Diego can escape to a pollution haven a few miles south in Tijuana?

Rather than harmonizing standards down to the lowest common denominator, the agreement should require that all new and expanded investment meet the highest technical standards, including use of the best available technologies for preventing pollution, for minimizing resource destruction, for properly managing hazardous waste, for protecting worker and public health, and for assuring product safety.

It must require, for instance, that US companies producing hazardous waste in Mexico minimize generation of those wastes and, until Mexico can guarantee that the wastes will receive state-of-the-art management south of the border, require that the companies will comply with the existing La Paz Agreement requirement that the wastes are brought back to the US for proper treatment and disposal.

The agreement must incorporate the "precautionary polluter pays principle" by providing explicit financial incentives for sustainable development, including a bonding mechanism on potentially damaging products and processes and a provision for trade partners to discourage "pollution havens" by imposing countervailing duties on products to compensate for the lower production costs of companies that operate in an ecologically unsustainable manner.

The agreement must establish mechanisms for implementation of its own environmental and health provisions and include incentives for effective enforcement of member nations' laws and regulations. Equally, to be sustainable, the agreement must provide effective public participation, including citizen suit provisions that allow citizens of either nation to force companies to comply with either nation's laws and regulations.

To ensure that these protections are carried out, the NAFTA should establish a Commission on Trade, Health and the Environment composed of representatives from the trade parties having demonstrated expertise in health and environmental science and policy, having no vested economic interest arising from the NAFTA, and including multiple representatives of local, national and international non-governmental organizations dedicated to protection of public and occupational health and the environment.

The Commission should be empowered to oversee implementation of the NAFTA's provisions affecting health and environment; and to gather, prioritize and disseminate data on the effects of trade as well as on implementation and enforcement of relevant laws, regulations and norms; on regulatory compliance by industries; and on overall conditions of human and environmental health.

The Commission must be authorized to recommend remedies for problems and, in order to ensure that such problems are addressed effectively, should be specifically empowered to

develop sources of funding—including the setting and collection of such pollution prevention bonds and ecological tariffs as those mentioned above—and to direct distribution of technical and financial resources as required to best address the infrastructural and environmental impacts of trade-related investment.

In addition, the Commission should be empowered to arbitrate trade-related disputes concerning issues of health and environment and, when necessary, to enforce laws, regulations or other legal mechanisms when normal enforcement procedures have not been sufficient.

And finally, the Commission must its procedures, meetings, and records accessible to the public locally, regionally and trinationally.

It's still going to be hard to make a silk purse out of a sow's ear, but with safeguards like these in place, maybe the NAFTA would be a good idea.

Environment, Sustainable Development, Public Participation and the NAFTA: A Retrospective (1992)

Michael Gregory, Prepublication Draft, *Journal of Environmental Law and Litigation* 7:99-173 (1993) [which has significant substantive changes to footnotes from this original]

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The North American Free Trade Agreement (NAFTA) process has been characterized by a degree of public scrutiny and involvement unprecedented in the history of trade agreements, and by an unprecedented public insistence that potential environmental impacts of economic integration be openly discussed and satisfactorily answered in the trade negotiations. The public's concern has been echoed by Members of Congress and a general acknowledgement that Congressional approval of the NAFTA hinges upon satisfactory resolution of the environmental issues. House Concurrent Resolution 246, for example, introduced on 21 November 1991 by Reps. Henry Waxman, House Majority Leader Richard Gephardt and 20 other Members, states that "Congress will not approve legislation to implement any trade agreement (including the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) and the United States-Mexico Free Trade Agreement) if such agreement jeopardizes United States health, safety, labor, or environmental laws."¹

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¹ See, H. Con. Res. 246, 102d Congress, 1st Session. The Resolution specifically cites the *Federal Food Drug, and Cosmetic Act*, the *Clean Air Act* and the *Marine Mammal Protection Act*. The Resolution was marked up in Committee on 12 May 1992, at which time it had 173 co-

The nearly simultaneous release in February 1992 of two documents—the *Integrated Border Environment Plan* (IBEP)² by the U.S. Environmental Protection Agency (EPA) and Mexico's Secretaria de Desarrollo Urbano y Ecología (SEDUE) and the *Environmental Review of U.S.-Mexico Environmental Issues* (ER)³ by the U.S. Trade Representative (USTR)—marked a new plateau in the NAFTA process, allowing a retrospective assessment of the process to that point.

These two documents may be seen as the seventh in a series of milestones that mark the progress (or lack thereof) in getting environmental concerns addressed during the NAFTA process.⁴ The first five include, (1) the public forum "Opening the Debate" held January 15, 1991 on Capitol Hill;⁵ (2) the Bush administration's *Action Plan* released on May 1, 1991;⁶ (3) the Congressional fast-track votes on May 23-24, 1991;⁷ (4) the public roundtables held by the EPA and SEDUE on

sponsors.

S. Res. 109, introduced by Sen. Donald Riegle, would amend the 1988 Omnibus Trade and Competitiveness Act to allow Congress to make changes amend the NAFTA provisions relating to environmental, health and safety, and fair labor standards; the resolution would, therefore, significantly revise the President's authorities under "fast-track" (see below).

Introduction of the Waxman and Riegle resolutions was preceded by letters to U.S. Trade Representative Carla Hills from several Members of Congress indicating that environmental issues must be adequately addressed if the NAFTA were to be accepted by Congress. See, e.g., the letter of 29 July 1991 by Rep. Ron Wyden; the letter of 15 August 1991 by Sen. Dennis DeConcini; and the letter of 23 October 1991 by Rep. Richard Gephardt.

² U.S. Environmental Protection Agency and Secretaria de Desarrollo Urbano y Ecología, *Integrated Environmental Plan for the Mexican-U.S. Border Area (First Stage, 1992-1994)*, February 1992. Hereinafter, IBEP.

³[Office of the U.S. Trade Representative], *Review of U.S.-Mexico Environmental Issues*, 25 February 1992. Hereinafter, ER.

⁴ Although the three countries announced that the NAFTA would be trilateral, in fact the role of the Canadian government and how the Canadian-U.S. FTA would be changed to conform to a continental agreement has not been apparent. The administration has not responded to public calls for disclosure of NAFTA impacts from and on Canada.

⁵ U.S.-Mexico Free Trade—Opening the Debate: Agricultural, Environmental and Labor Dimensions of North American Integration (Washington DC, 15 January 1991).

⁶ Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement, transmitted to the Congress by the President, 1 May 1991. Hereinafter, Action Plan.

⁷ For early statements of the environmental concerns related to the fast track debate, see David E. Ortman, "Statement on Behalf of Friends of the Earth, National Wildlife Federation and the Texas Center for Policy Studies on a Comprehensive North American Free Trade Agreement, before the U.S. House of Representatives Subcommittee on Trade of the Committee on Ways and Means (22 February 1991); see also, the letter of 22 February 1991 signed by Congressman Ron Wyden and sixteen other House members to President Bush opposing fast track authority unless environmental protection is included in the NAFTA. Letters by Rep. Dan Rostenkowski and Sen. Lloyd Bentsen also indicated that Congress would expect environmental issues to be adequately addressed in the final agreement.

the working draft of the IBEP⁸ during September and October 1991; (5) the six public hearings on the NAFTA held during August and September 1991 by the USTR; (6) the USTR's draft ER⁹ issued in October 1991.

An eighth milestone was reached on 23 March 1992, when a copy of the draft NAFTA¹⁰ itself was leaked to environmental organizations and made public. Comprising over 400 pages, the document contained draft text that emerged from the February 1992 meeting of the trade negotiators in Dallas, Texas.¹¹

Opening the Debate

The environmental issues were laid out fairly early in the public debate about NAFTA,¹² at least in part because trade activists felt they had to respond quickly to the 25 September 1990 launching of the Bush administration's campaign for "fast-track" authorization and to the November 27, 1990 communique from Presidents Bush and Salinas committing the two nations to preparation of "a comprehensive plan" on border environment.¹³

In addition, a follow-up meeting by national coordinators of the La Paz Agreement was held in

On fast-track issues in general, see Lori Wallach, *The Consumer and Environmental Case Against Fast Track* (Washington, D.C.: Public Citizen's Congress Watch, 12 April 1991); Craig Merrilees, "The U.S./Mexico Trade Agreement: Impact on Consumer Protection and Environmental Quality and the Case Against 'Fast Track,'" Testimony of the National Toxics Campaign and the Fair Trade Campaign before the House of Representatives Subcommittee on Commerce, Consumer Protection and Competitiveness (8 May 1991).

⁸ U.S. Environmental Protection Agency and Secretaria de Desarrollo Urbano y Ecológia, *Integrated Environmental Plan for the Mexico-U.S. Border Area (First Stage, 1992-1994), Working Draft*, 1 August 1991.

⁹ Office of the U.S. Trade Representative, *Draft Review of U.S.-Mexico Environmental Issues*, October 1991.

¹⁰ *Dallas Composite*, NAFTA Confidential Draft (21 February 1992). Hereinafter, Dallas Draft.

¹¹ For preliminary analyses of the Dallas Draft, see, Linda Diebel, "Leaked Document Reveals Massive 3-Way Trade Plan" *Toronto Star* (24 March 1992) at A1; also, John Audley, *A Critique of the February 21, 1992 Draft of the "North American Free Trade Agreement"* (Washington, D.C.: Sierra Club, April 1992).

¹² See, Mary Kelly, *et al*, "U.S.-Mexico Free Trade Negotiations and the Environment: Exploring the Issues," Austin, TX and Naco, AZ: Texas Center for Policy Studies and Border Ecology Project, January 1991; reprinted, *Columbia Journal of World Business* (Summer 1991): 42-58; also Michael Gregory and Dick Kamp, *Structuring Environmental Protection into a U.S.-Mexico Free Trade Agreement* (Bisbee, Arizona: Arizona Toxics Information and Border Ecology Project, 27 March 1991).

¹³ See, Office of the President of the United States of America and Office of the President of the United States of Mexico, *Joint Press Statement at the Conclusion of President Bush's Visit to Mexico Held in Monterrey on November 27, 1990*, at 8.

Washington on 13 December 1990 "to establish guidelines, content and a time frame for preparation of an integrated master plan for bilateral cooperation on border environmental issues;" the press release from that meeting noted the coordinators had considered "new forms of cooperation" on pesticides and enforcement, and had agreed that "the master plan should establish a set of priorities which will better focus and integrate bilateral efforts to resolve border environmental problems in the areas of air pollution, water pollution, hazardous waste and response to accidental spills of chemical substances."¹⁴

Beginning with the Action Plan, the administration has insisted that any agreement must be consistent with GATT principles,¹⁵ and except for a few projects under the Border Plan,¹⁶ has also held to the U.S. position clearly enunciated in the UNCED Earth Summit talks—a position which can be summed up as "No new or additional resources, nothing mandatory, let's study the problem some more and exchange information."¹⁷ One of the main differences is that while the U.S. role in UNCED has traditionally been that of "the chronic naysayer,"¹⁸ the administration has had to play the role of promoter in the NAFTA, saying 'yes' to as many demands as possible while sticking as closely as possible to its basic tight-fisted policy. The result, as many critics of the NAFTA process have pointed out, tends to be booster rhetoric and positive assurances with no clear mechanisms for implementation—in short, empty promises.

Some of the earliest statements about the trade-environment nexus of the NAFTA emphasized cross-over issues from the debates over the GATT and the 1988 Canadian-U.S. Free Trade Agreement, including harmonization/pre-emption of standards, intellectual property

¹⁴ See, [La Paz Coordinators,] *U.S. and Mexican National Coordinators Meet to Initiate Development of Integrated Plan on Border Environmental Cooperation* (January 1991) at 1.

¹⁵ ER, *supra* note 3 at 57. The Dallas Draft has repeated references indicating intention of the parties to incorporate GATT into the NAFTA by reference; the bracketed U.S. language on Import and Export Restrictions is typical: "the Parties incorporate herein their respective rights and obligations under the General Agreement on Tariffs and Trade," Dallas Draft, Chapter 1 at 11. Cf. Audley, *supra* note 11 at 3.

¹⁶ The three-year budget provided in the IBEP is not clear, but many if not most of the funds to be spent on border projects appear to derive from allocations already made from a variety of state and federal programs; monies for projects that are not primarily informational are primarily for wastewater treatment plants; IBEP *supra* note 2 at V-53.

¹⁷ "The U.S. will not support. . . a legally binding instrument. . . establishment of an international mechanism to regulate and prohibit. . . trade in products. . . banned or severely restricted in their country of origin. . . new international regulatory procedures or requirements for certain chemical products. . . restriction of trade in domestically prohibited products"; [U.S. Department of State], "U.N. Conference on Environment and Development: U.S. Statement on Toxics Item, Prepcom III - Geneva - August 21, 1991," at 4. See also, Paul Lewis, "Talks on Environment Start; Europeans Push U.S. to Act," *New York Times* (3 March 1992) at A5. The U.S. vacillated somewhat on its "no new and additional resources" position following the third PrepCom in Geneva; see, Paul Lewis, "Balancing Industry with the Ecology," *New York Times* (2 March 1992).

¹⁸ Michael McCoy, "New York Dress Rehearsal for Rio," *Development Forum* (March-April 1992) at 9.

rights/bioengineering, and transparency/public participation.¹⁹ Once these initial concerns were brought to the attention of nongovernmental organizations and the public, however, environmental issues specific to a U.S.-Mexico free trade agreement became readily apparent and for several months the NAFTA eclipsed the GATT in the public eye.²⁰

The forum "U.S.-Mexico Free Trade—Opening the Debate" held on Capitol Hill on 15 January 1991, sponsored by a broad gathering of environmental, agricultural, labor and human rights

¹⁹ See, for instance, Steven Shrybman, "International Trade and the Environment: An Environmental Assessment of Present GATT Negotiations," *The Ecologist* (February 1990); Steven Shrybman, *Selling the Environment Short: An Environmental Assessment of the First Two Years of Free Trade between Canada and the United States* (Toronto: Canadian Environmental Law Association), January, 1990; Anon., "New World Trade Rules to Replace Health, Safety Standards in Federal Law," *Community Nutrition Institute Nutrition Week* 20(9)(1 March 1990), at 1; National Wildlife Federation, "Environmental Concerns Related to a United States-Mexico-Canada Free Trade Agreement" (Washington, DC., 17 November 1990); Mark Ritchie, *Environmental Implications of GATT* (Minneapolis: Institute for Agriculture and Trade Policy, 1990); Mark Ritchie, *Trading Away Our Environment* (Minneapolis and Boston: Institute for Agriculture and Trade Policy and National Toxics Campaign Fund, 1990). Cf. also Letter of 25 November 1990 to Kenneth Mason, Secretary of the International Trade Commission, signed by Friends of the Earth, Friends of the Earth-Canada, Border Ecology Project, Community Nutrition Institute, Development Group for Policy Alternatives, National Family Farm Coalition and National Wildlife Federation.

Broad GATT issues like Trade-Related Intellectual Property Rights (TRIPs) and Trade-Related Investment Measures (TRIMs) have not been raised as such by environmentalists in the NAFTA process to the degree that they have been in the GATT process, although specific aspects of TRIMs (e.g., investment criteria, infrastructure protection and other versions of polluter pays) have been matters of considerable attention in the NAFTA.

²⁰ In the U.S., the GATT process has had strong direct influence on the NAFTA process at four points: (1) at the beginning of the NAFTA process (as noted above); (2) in August 1991 following the GATT panel tuna/dolphin decision; (3) in early January 1992, following the 20 December 1991 release of the "Dunkel Draft of the 'final text' of the GATT on 20 December 1991; and (4) in the spring of 1992, following the 12 February 1992 release of the GATT Secretariat publication, *Environment and Trade*. In Mexico, the GATT is generally perceived as having a much more direct influence, relating to Mexico's 1986 entry into the GATT and subsequent economic deregulation in the country. The Dunkel Draft repeated or made even less acceptable most of the earlier GATT issues that had concerned environmentalists, including the harmonization/pre-emption and public participation issues; see, e.g., Lori Wallach, "Memorandum: The Dec. 20, 1991 Uruguay Round 'Final Text' Is Worse than Expected on Environmental, Health and Consumer Issues" (Washington: Public Citizen, 26 December 1991). The February *Trade and Environment* paper was directed at the UNCED Earth Summit PrepCom to be held in New York during March, and was primarily a reiteration of the argument that free trade benefits the environment by increasing incomes of all partners; while noting "that trade liberalization could worsen particular environmental problems in the absence of appropriate environmental policies," the paper insisted that in such cases the best remedy is not trade restrictions but efforts to introduce such policies "rather than trying to work around bad ones." See, Anon., "GATT Issues Report on Trade and the Environment, Centre for Our Common Future *Independent Sectors Network* '92 14 (February 1992) at 7.

organizations²¹ (representing the four areas of most vocal criticism of the NAFTA process), announced the major topics of grassroots concern, set the critical tone for much of the debate in ensuing months and helped lay the foundation for the intensive and remarkably successful coalition-building among NGOs that has continued throughout the NAFTA process.²²

While the groups, being from three countries and having a wide variety of goals and methods, as might be expected have not always agreed on details or strategies, the number and content of the issues have changed little since the initial formulations, having been acknowledged with such unanimity as to become almost a litany recited by NAFTA critics and proponents alike.²³

The purpose of the present article is not to reiterate the litany, but to reexamine from a U.S.-Mexico border area perspective some of the priority issues and to track the administration's response to them through the primary NAFTA documents—i.e, the IBEP, the ER and, in lesser

²¹ Environmental organizations sponsoring the forum included Arizona Toxics Information, Community Nutrition Institute, the Development Group for Alternative Policies, National Toxics Campaign, National Wildlife Federation, and others. Shrybman and Ritchie (see *supra*, note 19) were among featured speakers at the forum.

²² See, for instance, "Common Declaration by Environmental Groups in Mexico, the United States and Canada regarding the North American Free Trade Agreement," issued on 5 April 1991 by Grupo de los Cien and eleven other Mexican groups, National Wildlife Federation and seven other U.S. groups, and Pollution Probe and five other Canadian groups; see also, the October 1991 paper "Development and Trade Strategies for North America" compiled by the Mobilization on Development, Trade, Labor and the Environment (MODTLE), a Washington, DC-based coalition of more than 200 groups in the U.S. and scores in Mexico and Canada.

²³ For instance, Eric Christensen and Rodney E. Leonard, *Brief of Community Nutrition Institute concerning Negotiation of a North American Free Trade Agreement*, presented to the Trade Policy Staff Committee, Office of the United States Trade Representative (12 August 1991), the environmental agenda laid out in the October 1991 MODTLE paper, *supra* note 2 at 2-4, and the 23 October 1991 letter sent to USTR Carla Hills by House Majority Leader Richard Gephardt and other House members (*supra* note 1), share many common points and are variations on the themes of the litany.

For more recent recitations that post-date the Dallas Draft of the NAFTA and the Dunkel Draft of the GATT and which propose specific language for incorporating major points into the format and text of the NAFTA, see Canadian Environmental Law Association, Canadian Nature Federation, Community Nutrition Institute, Cultural Survival, Environmental Defense Fund, Friends of the Earth-Canada, National Audubon Society, National Wildlife Federation, Pollution Probe, Rawson Academy of Aquatic Sciences and Sierra Club-Canada, *Binational Statement on Environmental Safeguards that Should be Included in the North American Free Trade Agreement (NAFTA)* (Washington, D.C. and Toronto, Ontario, 28 May 1992); National Wildlife Federation and Pollution Probe, *Minimal Environmental Safeguards to be Included in the North American Free Trade Agreement* (Washington, D.C. and Toronto, Ontario, June 1992); Arizona Toxics Information, Border Ecology Project, Center for International Environmental Law-U.S., Community Nutrition Institute, Defenders of Wildlife, Environmental Defense Fund, Friends of the Earth, Institute for Agriculture and Trade Policy, National Audubon Society, Natural Resources Defense Council, Public Citizen, Sierra Club, Texas Center for Policy Studies, *Environmental Safeguards for the North American Free Trade Agreement: Priority Recommendations to Negotiators and Congress, with Model Language for Key Provisions* (Washington, D.C., June 1992).

detail, the Dallas Draft. The main topics discussed below, stated as policy polarities, include (1) Integration vs. Parallel Tracks, (2) Sustainable Development vs. Economic Growth, (3) Technical Criteria vs. Trade Barriers, and (4) Local Implementation vs. Federal Directive.

Integration vs. Parallel Tracks

A major element of the Bush administration's successful strategy to win fast-track reauthorization, was the President's "Action Plan" of May 1, 1991, which reacted to public and Congressional concerns about environmental protection by promising to "include environmental issues related to trade in the FTA" and to address several specific environmental concerns.²⁴

The Bush strategy succeeded in causing one of the more serious splits in the environmental front by prompting several major environmental organizations from inside the beltway to support the administration's bid for fast-track reauthorization. National Wildlife Federation's president Jay Hair, for instance, opened an op-ed piece in the *New York Times* a few days before the vote, by referring to what he called "President Bush's commitment linking the environment and free trade" and, based on the Action Plan promise that a precedent-setting "environmental review" would be part of the NAFTA, noted that Bush's word should be sufficient to satisfy environmentalists.²⁵

In reviewing the situation some months later, John Maggs reported that "the influence of that [labor-environmental] coalition was weakened in late April after the Bush administration released a detailed 'action plan' for the North American talks, containing specific promises on protecting the environment. Leading environmental groups, including the Natural Resources Defense Council and the National Wildlife Federation, came out in support of fast-track authority, causing a vitriolic split with other groups, such as Friends of the Earth and Public Citizen, which opposed such extension."²⁶

In addition to an environmental review, the Action Plan promised to add "a representative of the non-governmental environmental organizations" to the Advisory Committee on Trade Policy and Negotiations and invite "environmental representatives. . .to participate" in the NAFTA advisory committees on intergovernmental policy, services policy, investment policy, industry policy and agriculture policy.²⁷

Consequently, chief executives from four of the Washington-based environmental organizations who either supported or agreed in the crucial moments immediately before the Congressional votes not to oppose fast track, were shortly after the votes appointed by the President as "environmental representatives" on the advisory committees. They included Hair, appointed to

²⁴ Action Plan, *supra* note 6, Tab 4 at 8.

²⁵ Jay Hair, "Nature Can Live with Free Trade" (*New York Times*, 19 May 1991).

²⁶ John Maggs, "Environmental Groups Meet Today on Trade Negotiations," *Journal of Commerce* (16 September 1991) at 3A. The position of those groups supporting the fast-track was released as a two-page document titled, "Consensus Position by National Audubon Society, Environmental Defense Fund, National Wildlife Federation, and Natural Resources Defense Council Regarding President Bush's Action Plan for Addressing Environmental Issues Related to the North American Free Trade Agreement (10 May 1991).

²⁷ Action Plan, *supra* note 6, Tab 4 at 7.

the Investments committee; Peter Berle, President of the National Audubon Society, appointed to the Agriculture committee; John Sawhill, President and CEO of the Nature Conservancy, appointed to the Industry committee; and John Adams, Executive Director of the Natural Resources Defense Council, appointed to the Services committee. Fred Krupp of Environmental Defense Fund, the other major environmental organization supporting fast-track, was not appointed to an advisory committee.

Despite strong urging from the public, however, the President did not agree to add a working group on environment to the other eighteen working groups; nor did the administration acquiesce to repeated requests from the public that environmentalists be appointed to other advisory committees whose decisions had significant implications for the environment, including the committees on automobiles, energy, land transportation, intellectual property rights and dispute resolution.²⁸ Instead of thus assuring some degree of trade-environment integration in the negotiations, the Plan proposed to pursue trade and environment issues "in parallel with" the trade negotiations.²⁹ The decision to move along separate parallel tracks instead of integrating trade and environment has remained one of the most controversial aspects of the Bush Plan.

While the trade track has led more or less directly to the trade agreement *per se*, the environmental track has led to two administration documents: the ER and the IBEP, both of which have been criticized for being high in rhetoric and notably lacking in specifics. The ER especially, while being generally regarded as the first trade document in U.S. history to specifically recognize environmental protection as a trade issue, nonetheless has been heavily criticized for being devoid of substantive content. Critiques have ranged from polite dismay to disgust and castigation.³⁰

One of the most frequent criticisms has been that the scope of the draft ER was limited almost entirely to the U.S.-Mexico border zone covered by the IBEP, a constraint which had been set by the Bush-Salinas communique of the previous November, in which the two Presidents said little about continental environment in relation to the NAFTA and agreed only to develop "a comprehensive plan designed to periodically examine ways and means to reinforce border cooperation. . . based on the 1983 bilateral [La Paz] agreement. . . with a view to solving the

²⁸ See, Michael Gregory, Testimony before the U.S. Trade Representative (San Diego, 21 August 1991) at 6; Justin Ward, "Comments of the Natural Resources Defense Council on the Integrated Environmental Plan for the Mexico-U.S. Border Area (First Stage, 1992-1994)" (Washington: Natural Resources Defense Council, 30 Sept 91) at 3.

²⁹ Action Plan, *supra* note 6, Tab 4 at 10.

³⁰ See, Stewart Hudson, *Comments on the Draft Review of the U.S.-Mexico Environmental Issues* (Washington: National Wildlife Federation, no date); Justin Ward and Lynn M. Fischer, *Comments on the Draft Review of U.S.-Mexico Environmental Issues* (Washington: Natural Resources Defense Council, Grupo de los Cien, Instituto Autonomo de Investigaciones Ecológicas, December 1991); Michael McCloskey and John Audley, *Concerns Arising Out of the Environmental Review on NAFTA* (Washington: Sierra Club, 29 November 1991); Michael Gregory, *Comments to the United States Trade Representative on the Draft Review of U.S.-Mexico Environmental Issues* (Bisbee, Arizona: Arizona Toxics Information, 30 November 1991).

problems of air, soil, and water quality and of hazardous wastes" (emphasis added).³¹

Rep. Richard Gephardt echoed concerns of many environmental groups in a 23 October 1991 letter to U.S. Trade Representative Carla Hills, stating that "there cannot be a successful NAFTA until the Administration recognizes that international trade is not just about tariffs and prices anymore, and negotiates a treaty that addresses in a serious way the environmental and public health issues raised by the increased investment and trade between the countries, not just in the border zone but within the entire sovereign boundaries."³²

The final ER does not correct this problem, the only attempt to consider potential non-border impacts being discussions of air pollution in Mexico City and potential air pollution in the U.S. from increased traffic.³³ In noting public criticism of the draft's failure to address impacts in the interiors, the final ER, under the heading "Insufficient Attention to the Environmental Impact of Growth on Rural Mexico," explains that while impacts on the interior "is a relevant consideration, it was not feasible to make extensive revisions to the Review to analyze fully the environmental consequences of growth in the interior areas."³⁴

In refusing to address concerns about the interiors, the ER puts a greater burden on the IBEP than the document can bear, weighted as it is with its own shortcomings. The IBEP is narrow in scope, uneven in focus, silent on the issue of right-to-know on the Mexican side of the border, nearly devoid of reference to the issue of public and occupational health, replete with statements of need without proposing secure funding, and, except in a very few instances, so exceedingly non-specific as to be justifiably characterized by critics as an exercise in issue identification rather than problem solving and, at best, merely wishful thinking.³⁵ The IBEP clearly does not satisfy the Bush-Salinas promise to develop a "comprehensive plan."

The IBEP is rather apologetic in this regard, noting in the executive summary that the plan is not comprehensive in terms of scope or alternatives analysis or other senses ordinarily associated with the term when used in relation to environmental impact analysis, but only "in the sense that it seeks to protect water, air and land by marshaling the resources of both the public and the private sectors."³⁶ As the summary explains, "the single most noteworthy aspect of this plan is the spirit of cross-border cooperation that infuses it,"³⁷ not an insignificant achievement, but

³¹ See, Office of the President of the United States of America and Office of the President of the United States of Mexico, *supra* note 13 at 8.

³² Rep. Richard Gephardt, *supra* note 1 at 4.

³³ ER, *supra* note 2 at 93.

³⁴ See, ER *supra* note 2 at 4.

³⁵ The roundtables opened a flood of criticism carried in the press of both countries; cf. Jan Gilbreath Rich, *Planning the Border's Future: The Mexican-U.S. Integrated Border Environmental Plan* (Austin: University of Texas Lyndon B. Johnson School of Public Affairs, March 1992) at 4; Ward, *supra* note 28.

³⁶ US-EPA, *Summary: Environmental Plan for the Mexican-U.S. Border Area, First Stage (1992-1994)* (Washington, February 1992) at 3. Hereinafter, IBEP Summary.

³⁷ IBEP Summary, *supra* note 36 at 3.

hardly one that guarantees environmental protection.

Of seventeen "Environmental Policy Program Options" listed among the "Conclusions and Recommendations" of the final ER,³⁸ only five are not specifically limited to the border. Those that admit of broader application state that (1) "Environmental Round Table meetings will be established at the local, state and border area levels to provide a forum for the exchange of ideas and discussion of environmental problems;" (2) "EPA will be working to assist SEDUE in the development of environmental regulations under Mexico's 1988 environmental statute;" (3) "The Department of State and OPIC will work to complete an OPIC agreement with Mexico that will permit OPIC insurance, finance and advisory program to be offered to investors that meet OPIC's environmental standards"; (4) "EPA will be working with Mexican pesticide regulatory authorities to compare lists of registered pesticides and tolerance in each country, to identify Mexican pesticide applications that are not authorized in the U.S., and to determine whether alternative pesticides which have U.S. tolerances could be substituted, or whether approval of a tolerance in the U.S. could be pursued in such cases"; and (5) "AID will be continuing to fund a major study of small and mid-sized urban areas outside the Mexico City-Guadalajara-Monterrey areas that would offer the best prospects for economic growth and alternative destination for rural Mexican immigrants."

The last of these is also border-related, in that it refers to the Salinas administration's plan for decentralizing some of the stresses of urbanization and industrialization on the border and in Mexico City by directing new development away from those areas to less-polluted, less-populated areas in the interior.³⁹

Although the reference to state-level Round Tables might indicate that the first option points towards public participation in the interiors, the language is taken directly from the draft IBEP, indicating that the discussions are intended to occur primarily if not entirely along the border.⁴⁰

The fourth option responds to the La Paz coordinators' agreement to address cooperation on

³⁸ The "Policy and Program Options" (ER, *supra* note 3 at 227) correspond roughly to what might be called a "Preferred Alternative" in a more NEPA-like assessment.

³⁹ Cf. ER, *supra* note 3 at 4. Besides moving new pollution sources away from already-polluted areas, the decentralization program would move industry away from an area of high public scrutiny, especially scrutiny by U.S. observers.

⁴⁰ Draft IBEP, *supra* note 8 at VI-30. The final IBEP does not use the term "Round Tables," and assigns the "exchange of ideas" function of the Round Tables to the proposed "Public Advisory Committees." Significantly, most of the specific public participation functions of the Round Tables listed in the draft IBEP are deleted from the final version; the proposed "public meetings, conferences and workshops" which apparently have taken the place of the Round Tables (see IBEP *supra* note 2 at V-48), would function primarily to receive "educational and information programs about the Border Environmental Plan" and "focus on opportunities for the private sector and for technology transfer." The draft language was dropped which would have had the Round Tables serve specifically to "build a communications network among industry, non-governmental organizations (NGOs), and State and local governments; promote community relations and right-to-know policies; [and] provide a mechanism for participation in the environmental resource development and allocation process to fund solutions for environmental issues."

pesticides,⁴¹ but raises the controversial issue of harmonized standards.⁴²

The third extra-border option brings up the perennial question of opening Mexican petroleum to free trade, a possibility that the Salinas administration has persistently denied, since petroleum cannot be privatized under the current Mexican constitution, but a possibility which nonetheless continues to be brought up by the U.S. and which appears to be increasingly realized through the Salinas administration's efforts to deregulate the Mexican economy and otherwise dismantle portions of Mexico's revolutionary Constitution.⁴³

⁴¹ [La Paz Coordinators], *supra* note 14 at 1.

⁴² Through use of the term *approval*, the final clause of the option opens the possibility of lowering U.S. standards as well as creating new ones to match existing Mexican usage, and does not preclude the distinct possibility that in order to facilitate export from Mexico, tolerances might be created for pesticides whose tolerances had previously been dropped or denied in the U.S.

⁴³ The question of how free trade might affect Mexican petroleum reserves has vexed financial and industrial interests as well as environmentalists. The National Wildlife Federation, for instance, (*supra* note 19 at 8) indicated that continued addiction to fossil fuels was an issue—esp. during period of Desert Storm "when the US seems willing to go to war to protect petroleum supplies on one side of the world, while refusing to reduce dependence on these supplies at home." For U.S. interest in Mexican oil, see also, Action Plan, *supra* note 6 Tab 1 at 3: "Foreign investors are still excluded from or limited to minority shares in "strategic" sectors of the Mexican economy (e.g., petrochemicals, transportation, banking)"; U.S. International Trade Commission, *Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, Phase II: Summary of Views of Prospects for Future United States-Mexican Relations* (Washington: ITC, October 1990) at 2-10: "Several U.S. respondents noted, however, the apparent willingness of Mexico to modify the Constitution when it is in the country's perceived interest to do so. . . . Many U.S. interests suggested 'exploration of other ways to participate in the Mexican energy sector rather than requesting liberalization of Article 28 of the Mexican Constitution.' Specific mechanisms suggested included joint venture, leasing, and far-out arrangements for exploration. Mexican officials concurred, suggesting that 'Pemex will always be a state entity but there are ways to subcontract many services'". Those believing that the Mexican Constitution did not present an insurmountable barrier were encouraged in their belief by the deregulation of Mexico's foreign investment rules in May 1989, which reclassified to "secondary" status a number of petrochemicals previously classified as "basic", and thereafter allowing 100% foreign ownership of all those designated as secondary; see International Trade Commission, *op cit* at 2-16. See also, Eleanor Chute, "Oil Deal Can Bind Mexico, U.S. Ties," *Pittsburg Press* (December 1990) at B1; Anon., "Serra Puche Denies Persistent Rumors about Role of Oil in Free Trade Talks," *U.S.-Mexico Free Trade Reporter* (9 August 1991) at 1; U.S.-GAO, *Reforms in the Mexican Petrochemical Industry have not Increased U.S. Investment* (16 April 1991); cf. National Wildlife Federation *supra* note 19 at 8.

For other Article 27 issues, see Tim Golden, "Mexico Ending Church Restraints after 70 Years of Hostility," *New York Times* (20 December 1991). Eloy O. Aguilar, "Salinas Proposes Historic Changes on Religion, Communal Land," *Arizona Daily Star* (2 November 1991) at A1; Jorge Velazquez, "Acuerdo de PRI y Oposicion sobre Reformas al 27, en la Camara," *El Occidental* (28 November 1991) at A1; Gabriel Quadri de la Torre, "La Dimension Ecologica en la Reforma del Ejido," *Examen* (January 1992) at 43.

Border environmental groups, despite admonitions from several sources,⁴⁴ have also emphasized the border, finding in the NAFTA process an opportunity to draw attention and resources to longstanding problems that had been previously identified but not adequately addressed. But whereas the ER and IBEP are primarily concerned with data-gathering, information exchange, cooperative intentions and reiterating the provisions of existing federal laws and binational agreements,⁴⁵ other commentators on the NAFTA have tended to fixate on horror stories about public, occupational and environmental health conditions in that 200-kilometer strip the American Medical Association has called "a virtual cesspool and breeding ground for infectious disease."⁴⁶

Besides being limited to the border and to a narrow interpretation of economic growth, the environmental vision of the trade representatives of both countries is further limited within the border zone primarily to issues of industrialization in the major border cities. The IBEP, for instance, fails altogether to address the non-urban issues except for (1) noting that SEDUE considers impacts and risk to be caused by production of petroleum and its derivatives, basic chemicals and fertilizers;⁴⁷ (2) promising to "continue work on the design, implementation and evaluation of existing priority programs for conservation of wildlife and natural sites;"⁴⁸ (3) promising to provide states with information and "technology transfer assistance" on rural sanitation; and (4) providing training and information exchange on pesticides.⁴⁹

Furthermore, insofar as the IBEP addresses pollution issues at all, it addresses only *transboundary* problems, that is, pollution that crosses the international line.⁵⁰ It does not look, for instance, at groundwater contamination from waste dumps in Mexico if the flow of the water from the dumps is toward the interior of the country. The final IBEP is an improvement over early drafts of the document which were concerned almost exclusively with pollution that flowed from south to north, but it indicates that the EPA and SEDUE, despite use of the term *integration* in the Plan's title, do not yet perceive the border zone as an integrated system.

While environmental groups have been highly successful in using the border as an example of environmental impacts from *de facto* free trade, labor interests have used it successfully to illustrate how polluting U.S. industry escapes to low wages and low compliance costs in the

⁴⁴ Cf. Kelly *et al*, *supra* note 12 at 43; Gregory and Kamp, *supra* note 12 at 4; Christensen and Leonard, *supra* note 23 at 6.

⁴⁵ Cf. Mary Kelly, *A Response to the EPA/SEDUE Integrated Border Environment Plan* (Austin: Texas Center for Policy Studies, 1 March 1992) at 1.

⁴⁶ American Medical Association, Council on Scientific Affairs, "A Permanent U.S.-Mexico Border Environmental Health Commission," *JAMA* 263 (1990) at 3320.

⁴⁷ IBEP, *supra* note 2 at V-40.

⁴⁸ IBEP, *supra* note 2 at V-45.

⁴⁹ IBEP, *supra* note 2 at V-33-35; see also, Kelly, *supra* note 45.

⁵⁰ Cf., e.g., IBEP *supra* note 2 at V-3, V-12, V-13.

regulatory freedom of the maquila zone⁵¹—i.e., to illustrate the differences between free trade and fair trade.⁵² Critics have been particularly successful in getting the media to depict the maquiladora program as a worst-case scenario of what happens when unbridled industrialization occurs without proper regulation to protect public health and the environment.⁵³

The effectiveness of critics in belaboring the maquiladora issues, however, has made it easier for the administration to exclude non-urban, non-industrial and non-border problems from the NAFTA. Important as the border is, a NAFTA will have effects far beyond the border region. Increased energy development, increased use of internal combustion engines, increased spraying of toxic pesticides, increased smokestack emissions, increased generation of hazardous waste—in order to promote sustainability, critics have argued that the NAFTA must address

⁵¹ Despite some clearly overlapping concerns of labor and environmental groups, some citizens coalitions which remained after the fast-track division (see *supra*) have not coalesced as effectively as they might due in part to the concern of some that environment—being the new kid on the trade block—could be easily lost in the labor agenda, and all the more easily if perceived not as a significant issue in its own right but merely a tool used by organized labor to restate its long-standing strong opposition to free trade in general and to the maquiladora program in particular. In this regard, for instance, the list of organizations not included as members of the Maquila Coalition for Justice is as significant as the list of those who are; see, Coalition for Justice in the Maquiladoras, "Press Advisory," (6 February 1991) advising of a 12 February 1991 press conference to announce formation of the Coalition by "more than 50 environmental, religious, and labor groups"; the list of "Official Member Organizations as of 1/25/91" was released on 11 February 1991.

⁵² Fair trade advocates would generally hold to the precept that competing for price advantage at the expense of human, labor and environmental rights is unfair trade and unacceptable policy. See, e.g., Fair Trade Campaign, *The Great Trade Debate* (Minneapolis, no date); William R. Robertson and Ronald A. Di Nicola, "A Done Deal Won't Be a Fair Deal," *Los Angeles Times* (23 September 1991); Jaimie Martinez and Glenn Scott, *Fair Trade—Not Free Trade* (San Antonio: International Union of Electrical Workers and Amalgamated Clothing and Textile Workers Union, no date); Keith Rosenblum, "Fears Over Pact Straddle Border," *Arizona Republic* (10 April 1991) at A1; Larry Williams, "Free Trade Would Turn the Border into a Cesspool," *Arizona Daily Star* (30 December 1991).

⁵³ See Roberto A. Sanchez, "Health and Environmental Risks of the Maquiladora in Mexicali," *Transboundary Resources Report* 3(1) (Winter 1989); Sandy Tolan, "Don't Drink the Water," *Tucson Weekly* (24 October 1989) at 7 and "La Frontera: Land of Opportunity or Place of Broken Dreams?" *Tucson Weekly* (24 October 1989) at 2; Hector G. Garza-Trejo, "The Rio Nasty," *Brownsville Herald* (28 June 1990) at 1B; Julian Resendiz, "Juarez's Sewer Struggle," *El Paso Herald-Post* (24 January 1990) at 2-B; Sandy Tolan, "The Border Boom: Hope and Heartbreak," *New York Times Magazine* (1 July 1990) at 17; Mary Kelly, "Overview of Environmental Issues Associated with Maquiladora Development along the Texas/Mexico Border," presented to the American Bar Association Conference on Practical Applications of Mexican and U.S. Environmental Law (El Paso, Texas, October 1990); Patrick J. McConnell, "Foreign-owned Companies Add to Mexico's Pollution," *Los Angeles Times* (18 November 1991) at A1; Judy Pasternak, "Firms Find a Haven from U.S. Environmental Rules," *Los Angeles Times* (19 November 1991) at A1; Roberto Suro, "Border Boom's Dirty Residue Imperils U.S.-Mexico Trade," *New York Times* (31 March 1991) at A1; Jay Gonzales, "Trade-Pact Debaters Focus on Border Plants," *Arizona Daily Star* (14 April 1991) at A1; Ignacio Ibarra, "Maquiladora Impact," *Arizona Daily Star* (16 September 1991) at B1.

sources and receptors of environmental impacts not just in the border cities but in rural areas and throughout the sovereign territories of both nations (especially as Mexico succeeds in redirecting industry toward the interior). Furthermore, the border plan itself must broaden its focus from urban industry to include issues of resource depletion, contamination, and human health impacts of mining, agriculture, and forestry sectors.

In short, in order to address the environmental implications of the proposed trade pact adequately, the NAFTA must be seen in terms not only of site-specific impacts caused by particular industries or regions or even particular nations, but in terms of the larger continental and global contexts,⁵⁴—socio-political as well as biophysical.

Sustainable Development vs. Economic Growth

The NAFTA is not evolving in isolation but in relation to a worldwide movement towards economic integration which includes not only the GATT, the OECD, the Canadian-U.S. Free Trade Agreement and various Asian and African negotiations, but initiatives of the European Community,⁵⁵ Latin American free trade agreements being signed with and without the U.S.,⁵⁶ and negotiations on the United Nations Conference on Environment and Development (UNCED).

Although for the most part addressing trade issues only obliquely,⁵⁷ the UNCED process provides a particularly interesting parallel to the NAFTA process: it has been the subject of a

⁵⁴ For a synopsis of global pollution issues, see Michael Gregory, "Plugging the Leak: Emergency Response to Global Crisis," *Environmental Carcinogenesis Reviews, Journal of Environmental Science and Health* C8(2), 1991:229-243, and other articles in this special issue of the *Journal*.

⁵⁵ While the EC is generally regarded by the administration as a threat to US trading power, the European Community is generally further along in integration of trade-environment issues (harmonization, dispute mechanisms, clean technology, enforcement, etc.) and may provide useful models for NAFTA. See, Organization for Economic Co-operation and Development, *Joint Report on Trade and Environment* (Paris, 14 May 1991); Kaid Benfield, "Environmentalism in the New Europe," *Amicus Journal* (Fall 1991) at 8; Peter Reina, "Environmental Rules to Govern EC Nations," *Arizona Daily Star* (28 January 92).

⁵⁶ See, e.g., Juan Nieto Martinez, "Dialogo para Solucionar Problemas del Desarrollo," *La Prensa* (28 November 1991) at 3; Luciano Franco Sanchez, "Propone el Grupo de los 15 Eliminar Barreras Comerciales Internacionales," *Novedades* (30 November 1991) at A2; Anon., "Aspectos Economicos, Politicos y Ecológicos Tratara el Grupo de los 3," *Novedades* (30 November 1991); Anon., "Free Trade Pact with Chile is to Take Effect Next Year," *Arizona Daily Star* (24 August 1991); Anon., "Chile/Mexico Move on Free Trade," *Chemicalweek* (28 August-4 September 1992). at 45; Steven Greenhouse, "Trade Talks with Chile are Planned," *New York Times* (14 May 1992) at C-1.

⁵⁷ Due in part to the heat of debates over statements on trade included in the documents prepared for the final pre-Summit negotiations in New York in March 1992; see, United Nations General Assembly, Preparatory Committee for the United Nations Conference on Environment and Development, Third Session, Working Group III, Agenda Item 4, "Principles on General Rights and Obligations, Earth Charter: Rio de Janeiro Declaration on Environment and Development," Principle 9 (Geneva, 24 August 1991) at 12.

comparable degree of public interest, has proceeded along roughly comparable timelines, and, being similarly concerned with the relationship between environment and economics, has raised many of the same generic issues.

These include, *inter alia*, transboundary air pollution, fresh water quantity and quality, rational use of coastal and ocean life, desertification, deforestation, biological and cultural diversity, toxic and hazardous materials and waste, improvement of the living and working environment—especially of the urban and rural poor, and general protection of human health and the quality of life.⁵⁸

Similarly, while the U.S. negotiating agenda has pushed free trade as the ultimate solution to global environmental problems, other nations and NGOs have attempted to introduce language into the UNCED documents that is highly critical of the environmental effects of unchecked economic growth.⁵⁹

Economics and Ecology

In terms of biosystem protection, in a world rapidly shrinking due to the wonders of our late 20thC high technology, and faced with such obvious examples of bad management as global warming, smog, the growing hole in the ozone layer, residues of toxic chemicals in the blood of every person on earth, and the increasing international traffic in toxic waste, we cannot afford to ignore the primary law of ecology—which is that we live in a closed system where everything is connected to everything else.

Neither can we afford to ignore the deepening poverty and malnutrition that characterize the lives of so many people in our shrinking world, or the geometric increases in population and the inadequate distribution systems that so obviously aggravate the problems.

People and societies are part of the environment; we cannot morally or scientifically separate the biogeophysical realm from socio-politico-economic realities. We cannot sacrifice one to the other. As the living conditions of millions of people around the world deteriorate in tandem with the degradation of our natural environment, we must recognize that integration requires a more

⁵⁸ See, Peter H. Sand, "International Law on the Agenda of the United Nations Conference on Environment and Development," presentation to Aspen Institute Working Group on International Environment and Development Policy (Aspen, Colorado, 25 July 1991), cited by, Alberto Szekely and Diana Ponce, "The Challenge of the 1992 Earth Summit," *Transboundary Resources Report* 6(1) at 2.

⁵⁹ See, Institute for Agriculture and Trade Policy, letter to "Trade and Env.[sic] Friends," (Minneapolis: IATP, November 1991); Don Hinrichsen, "The Earth Summit," *Amicus Journal* (Winter 1992) at 15; Environmental and Energy Study Institute, "NGOs Gear Up to Pressure Administration on UNCED," *Earth Summit Update* (February 1992) at 4; Tom Teepen, "Road to Rio: 'Environmental President' Undermined the Earth Summit's Mission," *Arizona Daily Star* (17 May 1992) at F-3; see also papers coming out of the March 9-10, 1992 "Conference on Trade and the Environment" in New York, sponsored by Institute for Agriculture and Trade Policy, e.g., Action Aid, ELCI, Institute for Agriculture and Trade Policy, NOVIB and Task Force on Sustainable Agriculture in UNCED, "NGO Statement: Trade Policies for Sustainable Development," drafted as an amendment to paragraph 11, A/CONF.151/PC/100/Add.3, text of *Agenda 21*, Sect. 1, Chp. 1, on "International Policies to Accelerate Sustainable Development in Developing Countries and Related Domestic Policies" (New York, 18 March 1991).

fundamental integration than simply lowering trade barriers between nations and expanding markets for entrepreneurs, industrialists and financiers: it means that we must integrate economics itself with ecology.

The two sciences stem, after all, from the same Greek root: *eco-logy* being knowledge about the household or community or, in the larger sense, of the biosphere; *economics* being management of that household. As Herman Daly, senior economist at the World Bank says, "economy is an open subsystem of an ecosystem which is closed, finite and nongrowing."⁶⁰ Clearly, good economic management must take into account the special nature of the ecological support system of which it is a subset.

The imperative to integrate the two fields has been widely recognized as a need to move beyond out-of-date theories of classical liberalism which were developed primarily to "rationalize exploitation of man and nature by the market economy,"⁶¹ and which rest on a belief that the world and its resources—and, ultimately, its people—are no more than mere commodities to be bought and sold.⁶² To see the world from such a purely market perspective is to rob people of their humanity and the natural world of its integrity, to destroy the ecological balance upon which depend human and non-human species alike,⁶³ for pollution and depletion of our natural resources are to a great extent the result of the quest for short-term profits that derive from such a belief.

The Independent Commission on International Development Issues (the "Brandt Report") pointed out in 1980 that "care of the natural environment is an essential aspect of development."⁶⁴ The World Commission on Environment and Development (the "Brundtland Commission") said in 1987, "economics and ecology must be completely integrated in decision-making and lawmaking processes not just to protect the environment, but also to promote development."⁶⁵ Despite such sound advice, the primary goal of U.S. and Mexican negotiators remains only "to promote economic growth" and competitiveness⁶⁶ utterly free from anything resembling environmental integration or sustainability.

⁶⁰ Herman E. Daly, "Sustainable Development is Possible Only If We Forego [sic] Growth," *United Nations Development Forum* (September-October 1991) at 19.

⁶¹ W. R. Burch, *Daydreams and Nightmares: A Sociological Essay on the American Environment* (NY: Harper and Row, 1971) at 24.

⁶² See Burch, *supra* note 561 at 154; cf. Aldo Leopold, *A Sand County Almanac*. 2d ed., (NY: Oxford U.P., 1966; rpt., NY: Ballantine, 1970) at xvii: "We abuse the land because we regard it as a commodity belonging to us."

⁶³ Cf. Karl Polyani, *The Great Transformation* (Boston: Beacon, 1944) at 72: "labor, land and money are obviously not commodities."

⁶⁴ Independent Commission on International Development Issues ("Brandt Commission"), *North-South: A Program for Survival* (Geneva: United Nations, 1980) at 114.

⁶⁵ World Commission on Environment and Development ("Brundtland Commission"), *Our Common Future* (Geneva: United Nations, 1987) at 43.

⁶⁶ Dallas Draft, Chp. 1, Art. 102/103, at 7.

As such, the NAFTA can be seen not only as a rebirth of 19th C imperialism (as the GATT has been labeled⁶⁷), but as a new round of the exploitation and intervention syndrome that has characterized U.S. relations with Latin America since before the gunboat diplomacy and Good Neighbor days through the Alliance for Progress to the present Enterprises for the Americas Initiative.⁶⁸

Whether carried out in the guise of paternalistic foreign aid, humanitarian efforts to spread democracy, or incursions in the name of national security, the economic and political motives of the superpower to the north have been more or less obvious and account for the "anti-Americanism [that] has long been a strong element of the Mexican national character" and the consequent apprehension many Mexican nationals have about entering into a NAFTA.⁶⁹ As Elizabeth Cobbs has said, "the fundamental goal of [U.S.] policy has been to maintain the essential acquiescence of other nations in the region on economic and foreign policy questions by whatever means necessary, up to and including physical force. . . . 'Promoting democracy' thus becomes a way to cleanse periodically the North American conscience of the tarnish of other less high-minded but more persistent motives in international relations."⁷⁰

Richard Fagen has stated the case a little more bluntly, noting that the primary aim of U.S. activities in Latin America, at least since the end of World War II, has been "the preservation and extension of North American political, economic, and cultural influence and domination in the hemisphere, at the lowest possible cost."⁷¹

These earlier policies and policy goals are not materially different from those of the current free trade agenda which promotes the "free market" as the epitome of the concept of "freedom" in general.⁷² The case against reducing the meaning of the term to its economic sense has been

⁶⁷ Chakravarthi Raghavan, "Recolonisation: GATT in its Historical Context," *The Ecologist* 20(6) (November-December 1990), adapted from the author's *Recolonisation: GATT, the Uruguay Round and the Third World* (Penang: Third World Network, 1990).

⁶⁸ Edward Goldsmith, "The Uruguay Round: Gunboat Diplomacy by Another Name," *The Ecologist* 20(6) (November/December 1990) at 202; Anon., "Recolonization: GATT and the Third World, an Interview with Martin Kok Pen," *Multinational Monitor* (November 1990) at 15.

⁶⁹ The quotation is from William Langewiesche, "The Border," *The Atlantic Monthly* (May 1992) at 56. For a review of economic motives in US policies toward Latin America, see Paul W. Drake, "From Good Men to Good Neighbors: 1912-1932"; Leslie Bethell, "From the Second World War to the Cold War: 1944-1954"; Tony Smith, "The Alliance for Progress: The 1960s"; and Elizabeth A. Cobbs, "U.S. Business: Self-Interest and Neutrality," all in, Abraham F. Lowenthal, ed., *Exporting Democracy: The United States and Latin America*, Baltimore and London: Johns Hopkins University Press, 1991.

⁷⁰ Cobbs, *supra* note 69 at 290.

⁷¹ Richard R. Fagen, "Commentary on Einaudi," in Julio Cotler and Richard R. Fagen, eds., *Latin America and the United States: The Changing Political Realities* (Palo Alto: Stanford University Press, 1974) at 262.

⁷² For a concise summary of supply-side economics in relation to the GATT, see Herbert Guenther, "GATT: The Hidden Agenda," talk presented at the University of Colorado, 15

stated succinctly by Bill Hall: "Freedom of investment—freedom to expatriate profits, to manipulate local politics, to pay workers slave wages, to block social programmes, to spoil the environment unhindered by regulation—has been the true meaning of the word 'free' in 'free market'. It involves stealing away national sovereignty, repressing labour organizing and political parties, destroying self-sufficiency in food and basic goods (and imposing food and basic goods import dependency), keeping wages and the standard of living low, and broadening the gap between rich and poor."⁷³

Hall's statement of the problem is in concert with that expressed by a group of 700 Latin American priests, who, while quoting the *Populorum progressio* of Pope Paul VI, blamed "the international imperialism of money" as the chief impediment to "authentic regional development" in their countries.⁷⁴

It is, of course, not coincidental that U.S. policies in Latin America have been aided by the US-dominated International Monetary Fund, a free-trade institution of great influence in Latin America, the lending guidelines of which define economic "health" largely in terms of balance of payments, the unencumbered entry of foreign capital, and reduced government deficits without regard to environment and with little concern for social impacts.⁷⁵

In Latin America, such U.S. policies have served to maintain "dependent industrialization characterized by growing foreign control over industrial development, competitive advantages to foreign firms, a deformation of local industry, planned expansion in harmony with the needs of external purchasers of exports rather than those of the home market, and the outflow of profits. In addition, they have supported the formation and dominance of clientele local classes with a vested interest in such patterns."⁷⁶

Gross Production vs. Quality of Life

Insofar as U.S. policy has been concerned at all with raising the living standards of Latin Americans, on the theory that economic growth and increased profits at the higher economic levels of investment will eventually trickle down to the man in the fields, it has preferred to pursue the indirect course of increasing production rather than taking the politically difficult

February 1992, transcription available from Alternative Radio, Boulder Colorado.

⁷³ Bill Hall, "Who Owns Whom," (Winter 1986), cited by Goldsmith, *supra* note 68 at 204.

⁷⁴ *Latin America: Land of Violence*, document signed by 700 priests, in, J. Gerassi, ed., *Revolutionary Priest* (New York: Random House, 1971), at 1; quoted in Jayne C. Millar, ed., *Focusing on Global Poverty and Development: A Resource Book for Educators* (Washington: Overseas Development Council, March 1974) at 276.

⁷⁵ Richard R. Fagen, "Contemporary Capitalism: North, South and Global," in Richard R. Fagen, ed., *Capitalism and the State in U.S.-Latin American Relations* (Palo Alto: Stanford University Press, 1979) at 6.

⁷⁶ Ira Katznelson and Kenneth Prewitt, "Constitutionalism, Class, and the Limits of Choice in U.S. Foreign Policy," in Richard R. Fagen, ed., *Capitalism and the State in U.S.-Latin American Relations* (Palo Alto: Stanford University Press, 1979) at 26.

course of direct redistribution of wealth.⁷⁷

In the same what's-good-for-bullmoose vein, the Bush administration and other pro-free traders at least since the Eisenhower administration⁷⁸ have argued that increased economic growth stimulated by free trade will lead to a better quality of life. Assistant EPA Administrator for International Activities Timothy Atkeson, for example, in explaining the Action Plan to the House of Representatives, stated the case forthrightly: "The economic prosperity Mexico should experience under a free trade agreement will enable Mexico to strengthen its existing environmental programs to achieve the rising levels of environmental quality it needs."⁷⁹

Coupled with the Action Plan's glowing praise for Mexico's progress in beginning to get environmental laws and regulations on the books in the past few years,⁸⁰ the trickle-down hypothesis has been repeated so often as a foregone conclusion that it has become, if not true, at least something of an administration anthem—"How Great It Is in Mexico Now, How Much Better It Will Be with Free Trade." John Wise, Deputy EPA Administrator for Region 9, recited the Atkeson rendition word for word in a speech to the American Bar Association Annual Meeting, and added a coda that summarized the administration "line" in a neat equation: "trade = prosperity = enhanced environmental protections = further prosperity = environmental quality."⁸¹

Noting that such belief in free trade as "self-evidently good" is an article of faith of free traders, Herman E. Daly, has pointed out that the belief is based on a misunderstanding of the concept of comparative advantage, which however valid it "may be as a logical exercise, it is irrelevant in a world characterized by the international mobility of capital in pursuit of absolute advantage. . . . The confident assumption that an open trading system will benefit all trading partners is utterly unfounded."⁸²

Furthermore, the trickle-down hypothesis depends on an ecological impossibility, for economic growth, which is an increase in quantity of production, cannot be sustained indefinitely on a finite planet;⁸³ instead, it leads inevitably to resource depletion and contamination and a lowering

⁷⁷ This attitude is perhaps most clearly seen in U.S. policy toward Latin American agriculture; cf., e.g., Tony Smith, *supra* note 69 at 80.

⁷⁸ Cobbs, *supra* note 69 at 273.

⁷⁹ Timothy Atkeson, Statement before the U.S. House of Representatives Subcommittee on Commerce, Consumer Protection, and Competitiveness of the Committee on Energy and Commerce (8 May 1991) at 1.

⁸⁰ Action Plan, *supra* note 6, Tab 4 at 1.

⁸¹ Quoted by Ward and Fischer, *supra* note 31 at 5.

⁸² Herman E. Daly, "Free Trade, Sustainable Development and Growth: Some Serious Contradictions," Centre For Our Common Future, *Independent Sectors Network '92 Special Supplement*, Reviews of Agenda 21 No. 1 at 1, citing UNCED Agenda 21 Doc. A/Conf.151/PC/100/Add.3, at 2.

⁸³ Robert Costanza and L. Wainger, "No Accounting for Nature: How Conventional Economics Distorts the Real Value of Things." *Washington Post* (2 Sept. 1990) at B3; review of Herman E. Daly and J.B. Cobb, Jr., *For the Common Good*.

of the quality of life.⁸⁴ Economic growth eventually "makes us poorer, not richer."⁸⁵ The pro-trade argument that developing nations will be able to clean-up and protect the environment when they get rich from free trade, might be more accurately stated as if they get rich from free trade, they *may* try to clean up the pollution caused by getting rich. Ultimately, besides causing resource depletion and pollution, insofar as free trade leads to its desired increase in production, which it seems destined to do in an increasingly automated industrial environment, it also leads to fewer jobs, a long-term result seldom noted in NAFTA discussions.⁸⁶

Environmentalists argue that not economic growth but sustainable *development* should be the goal, an increase in the quality of life without necessarily causing an increase in quantity of resources consumed or of waste products generated.⁸⁷ Again to quote Daly, "We cannot grow forever: sustainable growth is an impossibility and policies based on this notion are unrealistic—and dangerous."⁸⁸ Growth addresses efficiency; sustainability also requires *sufficiency*.

In the past few years *sustainability* has become such a buzzword that its meanings have become

⁸⁴ Cf. Michael Gregory, "Sustainable Development vs. Economic Growth: Environmental Protection as an Investment in the Future." Presented to the International Trade Commission Hearing on Probable Economic Effect on U.S. Industries and Consumers of a Free Trade Agreement between the United States and Mexico (Scottsdale, Arizona, 8 April 1991) at 2: "Without effective controls to protect public, occupational and environmental health, free trade means not improved quality of life but a return to the Dickensian squalor of the early Industrial Revolution."

⁸⁵ Daly, *supra* note 60 at 19. The U.S. administration typically has refused to address issues of population and consumerist patterns of consumption in negotiations on global trade and environment. For instance, the Environmental and Energy Study Institute of Congress reported in March 1992 that "the U.S. delegation to PrepCom 4 has rejected the idea of linking steps toward more progressive population policies, or even population stabilization in developing countries, with steps to reduce wasteful consumption patterns in the wealthy countries, as proposed by some NGOs. State Department official Nancy O'Neill Carter said at a briefing for NGOs February 10 that it was 'unrealistic' to talk about tradeoffs between reduced consumption in the developed countries and population stabilization in the developing countries. Carter explained that population wasn't important enough to the United States to offer any concessions on the issue of consumption." See, Anon., "U.S. Nixes North-South Deal on Population, Consumption," *Earth Summit Update* (March 1992) at 3. On the other hand, a *New York Times* article reporting on the UNCED negotiations a few days later stated that "rich countries still feel strongly that population control deserves a more prominent place and more commitment"; see, Marlise Simons, "North-South Chasm is Threatening Search for Environmental Solutions," *New York Times* (17 March 1992), at A5.

⁸⁶ Herman Daly and John Cobb, Jr., *For the Common Good*, quoted in Mark Satin, "Alternatives to the 'Global Marketplace,'" *New Options* (26 December 1989) at 4. The maquiladora experience does not indicate that free trade results in significant increases in wages, either; e.g., cost of living on the Mexican side of the border is about 90% of that the U.S. side, but maquila wages are about \$5/day.

⁸⁷ Costanza and Wainger, *supra* note 83 at B3.

⁸⁸ Herman E. Daly, quoted in "Citings," *World Watch* 5(1), Jan.-Feb. 1992 at 8.

blurred; even the most destructive projects are billed as "sustainable" by promoters of growth. For instance, the first principle of the UNCED *Agenda 21* as drafted at PrepCom III, although purporting to promote "development through trade," really does little more than present "international trade and global economic integration as self-evidently good, and then call the result 'development'—even worse, call it 'sustainable development' in the hope that chanting this mantra will free us from the obligation to define it, and absolve us from our addiction to robbing the future."⁸⁹ This sustainability mantra bears obvious resemblance to the administration's NAFTA anthem cited above.

There are, however, certain essential elements of sustainability which should be part of a free trade agreement if that agreement is to be successful in the long run. They include qualities like equity, sustained yield, biological and cultural diversity, appropriate technology, right-to-know and local community empowerment.

Stability vs. Equity

One of the basic criticisms of the NAFTA is that it promotes short-term gain rather than long-term (i.e., sustainable) equity. Despite occasional lip service by development interests, equity has usually been seen as a human rights issue, perceived as unessential to business or directly detrimental to development. Accordingly, the USTR has dismissed it as a "social" issue outside the scope of trade negotiations,⁹⁰ despite the 1987 World Commission on Environment and Development insistence that sustainable development is "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs"; that gives "overriding priority" to the essential needs of the world's poor; and that pays particular attention to the "limitations imposed by. . . technology and social organization on the environment's ability to meet present and future needs."⁹¹

Although the Brundtland Commission was clearly overly-optimistic about the probability of meeting future needs through increased production while avoiding environmental disaster,⁹² the Report's statement of the goal of sustainability is compelling. Similarly, as the International Labor Organization's Convention Concerning Indigenous and Tribal Peoples in Independent Countries noted in 1989, sustainable development is "equitable development."⁹³ In other words, the success of economic ventures cannot be defined solely in terms of increased production and

⁸⁹ Cf. Daly, *supra* note 82 at 1. For World Bank loans to Mexico ostensibly lent in observance of World Bank guidance on sustainability but leading to environmental destruction in the Sierra Madre, see Richard Lowerre, "Evaluation of the Forestry Development Project of the World Bank in the Sierra Madre Occidental in Chihuahua and Durango Mexico," (Austin: Texas Center for Policy Studies, November 1990).

⁹⁰ Evelyn Iritani, "Social Issues Pact Doesn't Belong in Trade Agreement, Hill Argues," *Seattle Post-Intelligencer* (21 August 1991) at B5. Equity has become a major issue in the North-South debate during the UNCED talks.

⁹¹ Brundtland Commission, *supra* note 65 at 43.

⁹² Peter Montague, "Poverty Is an Environmental Issue: Confronting Real Limits to Growth," *Rachel's Hazardous Waste News* (23 October 1991).

⁹³ International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, Art. XXIII.

market expansion, but must be coupled with redistribution, environmental enhancement, and long-term community stability. Sustainability, said the Brundtland Commission, requires protection of "economic, social and cultural" rights as well as protection of the environment.⁹⁴

But economic and democratic reform in Latin America means change, often violent change and, as noted by Benjamin Barber recently in the *Atlantic Monthly*, "the primary values required by the global market are order and tranquility, and freedom—as in the phrases 'free trade,' 'free press,' and 'free love.' Human rights are needed to a degree, but not citizenship or participation—and no more social justice and equality than are necessary to promote efficient economic production and consumption. Multinational corporations sometimes seem to prefer doing business with local oligarchs, inasmuch as they can take confidence from dealing with the boss on all crucial matters. Despots who slaughter their own populations are no problem, so long as they leave markets in place and refrain from making war on their neighbors."⁹⁵

That business prefers a stable social climate has become part of the inherited wisdom about international capital in general and about Latin American development in particular. For instance, Angella Delli Sante, while noting that military intervention in Latin America on behalf of U.S. capital is not necessarily a thing of the past, nonetheless agrees that "in general, optimum capital expansion depends not on military intervention but rather on the existence of a favorable investment climate, an attitude of consumerism, and an acceptance of foreign investment" and that "in order to guarantee these conditions, modern capitalism requires the existence of a docile and politically uneducated labor class."⁹⁶

The investor's preference for political stability, regardless of democratic or social equity, appears to be generally applicable to most eras of U.S. policy towards Latin America. For instance, as Paul Drake has noted of the "Good Neighbor" era, "the main purpose of insisting upon elections was originally to create stability and. . . orderly political systems provided a better investment climate for U.S. businesses."⁹⁷ Similarly, in reference to the post-World War II policy of the U.S. in Latin America in general and Mexico in particular, Leslie Bethell notes that "above all, political stability had to be maintained—and not necessarily through the strengthening of democratic institutions."⁹⁸

Even more specifically, Lorenzo Meyer has pointed out that "by the late 1920's, in Washington all interest in fostering democratic change in Mexico disappeared—on account of its irrelevancy" to the traditional U.S. interests there; that is, "the protection of interests and rights acquired by Americans in Mexico."⁹⁹ As Meyer points out, even the Mexican "government's bloody repression in October 1968 of an urban and middle class movement that called for a

⁹⁴ Brundtland Commission, *supra* note 65 at 43.

⁹⁵ Benjamin R. Barber, "Jihad Vs. McWorld," *Atlantic Monthly* (March 1992) at 62.

⁹⁶ Angela M. Delli Sante, "The Private Sector, Business Organizations, and International Influence: A Case Study of Mexico," in Fagen, *supra* note 75 at 377-378.

⁹⁷ Drake, *supra* note 69 at 7.

⁹⁸ Bethell, *supra* note 69 at 58.

⁹⁹ Lorenzo Meyer, "Mexico: The Exception and the Rule," in, Lowenthal, *supra* note 69 at 228.

democratic opening up (*apertura*) did not provoke any alteration whatsoever in the normality of relations between the Mexican and U.S. governments, for the repression did not affect the central elements of that relationship; quite the contrary, it affirmed them."¹⁰⁰

James Robertson similarly notes that "the ideology of free trade has been used. . .to justify the strong in taking advantage of the weak—and to persuade the weak that it is neither conceptually respectable nor in their own best long-term interest to protect themselves. Today's international trading arrangements are as powerfully biased as ever against the interests of poorer countries."¹⁰¹

Nonetheless, as has been pointed out repeatedly by human rights advocates as well as international bodies like the ILO and Brundtland Commission, social equity and environmental justice are essential prerequisites to any long-term economic stability. In that light, it is significant that in Latin America "trade liberalization with existing lines of comparative advantage is likely to aggravate inequality,"¹⁰² an apprehension apparently borne out in the Salinas economic policy which, according to Mexican critics, is based on unsustainable debt, exploitation of the poor and the environment, and results in "making the rich richer—effects which are not unlike those reported in the U.S. under two decades of supply-side economics."¹⁰³

Monoculture vs. Diversity

Sustainability requires conservation, not only of non-renewable resources like fossil fuels and minerals, but of renewable resources like fisheries, wildlife habitat, grasslands and forests. Even

¹⁰⁰ Meyer, *supra* note 99 at 228.

¹⁰¹ James Robertson *Future Wealth: A New Economics for the 21st Century* (London: Cassell, 1990), quoted in Mark Satin, *supra* note 86 at 3.

¹⁰² John Sheahan, "Economic Forces and U.S. Policies," in Lowenthal, *supra* note 69 at 235. Typical development is inequitable at both ends, a truth recognized in the traditional definition of foreign aid as a taking from the poor of a rich country to give to the rich of a poor one.

¹⁰³ See, Trina Kleist, "Economic Reforms Benefit Only the Rich, Salinas Critics Say," *Arizona Daily Star* (10 May 1992) at C-2. As Kevin Phillips has documented in *The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath* (NY: Random House, 1991, at 9 *et seq*), the deliberate redistribution of wealth in the 1980s, what he calls a shift to plutocracy, was encouraged by "federal policy [that] favored the accumulation of wealth and rewarded financial assets" so that "the share of wealth held by the naively labeled 'super rich'—the top one half of 1 percent of U.S. households—had risen significantly in the 1980s after falling during the prior four decades," until "by the middle of Reagan's second term. . .[the 'super-rich'] had never been richer," accumulating an additional 4-6% more of the nation's total wealth, while the average worker's inflation-adjusted income was about 15% lower in 1987 than it had been in 1972.

Although studies differ as to how much richer the rich became during the 1980s, or whether the poor became poorer, there is general agreement that the number of poor grew inordinately in comparison to the rich, and that the gap between rich and poor widened considerably. See, e.g., Anon., "Richest 1% Got Richer from '77-89, Study Says" *Arizona Republic* (6 March 1992); Sylvia Nasar, "Very Rich's Share of Privately Held Property Grew During '80s, U.S. Government Says," *New York Times* (21 April 1992); Sylvia Nasar, "Those Born Wealthy or Poor Usually Stay So, Studies Say" *New York Times* (18 May 1992).

more fundamentally, it requires protection of diversity in such systems and in species and gene banks. None of these concerns is addressed effectively, if at all, in the IBEP, ER and Dallas Draft.¹⁰⁴

Even less noticed by the negotiators is the need of trade agreements to foster *cultural* diversity by recognizing the fundamental right of indigenous peoples and diverse cultural systems to exist. Preservation of cultural diversity, like the guarantee of equity, is normally perceived as opposed to free trade goals since the latter are based on the developing of export economies and consumerist ethics typically antithetical to indigenous cultures. The very concept of international development "implies the replacement of widespread, unquestioned competence of subsistence activities by the use and consumption of commodities; the monopoly of wage labor over all other kinds of work; redefinition of needs in terms of goods and services mass-produced according to expert design; finally, the rearrangement of the environment in such fashion that space, time, materials and design favor production and consumption while they degrade or paralyze use-value oriented activities that satisfy needs directly."¹⁰⁵

To counter the prevalent thrust of development towards cultural homogeneity, the development guidelines of the United Nations Centre on Transnational Corporations state that sustainability "requires that corporate executives seek to develop, use and transfer technologies that are compatible with the needs, skills, training, finances and natural environment of the people in the region where they are used."¹⁰⁶ In other words, sustainable technology is appropriate technology, a technology that promotes diversified economies and local self-reliance.¹⁰⁷

But self-reliance, too, is intrinsically incompatible with an export economy and typically

¹⁰⁴ Cf. IBEP *supra* note 2 at V-45, which plans to do no more than is currently being done between the two countries. Protection of gene banks, especially as regards development of genetic engineering, has been subject to intense debate as Trade Related Intellectual Property Rights (TRIPs) during the GATT talks; see, Environmental News Network, *GATT, The Environment and the Third World: A Resource Guide* (Berkeley, February 1992) at 7.1; Vandana Shiva, "Biodiversity, Biotechnology and Profit: The Need for a People's Plan to Protect Biological Diversity," *The Ecologist* 20(2) (March/April 1990) at 44; Anon., "Biotechnology and Biohazards," *Third World Resurgence* 13 at 29; Robert Weismann, "Prelude to a New Colonialism," *The Nation* (18 March 1991) at 336; European Network on Agriculture and Development, "Of Minds and Markets: Intellectual Property Rights and the Poor," *GATT Briefing* No. 2 (July 1990); Robert Weissman, "Patent Plunder: TRIPping the Third World," *Multinational Monitor* (November 1990) at 8.

¹⁰⁵ Ivan Ilich, *Shadow Economy* (Boston: Marion Boyars, 1981) at 15.

¹⁰⁶ United Nations Centre on Transnational Corporations. *Criteria for Sustainable Development Management* (NY: United Nations, 1990) at 3.

¹⁰⁷ Critics have pointed out that the Uruguay Round focus on deregulating services and investments in the GATT raises the specter of developing countries being unable to regulate the conduct of transnational corporations at the local level and therefore being unable to protect small and medium-sized local industries, including those employing indigenous and appropriate technologies, from overpowering competition. The concern is equally applicable to domestic and NAFTA-related deregulation in Mexico. See, Frederic Clairmonte, "Global Services: TNC Domination and the Third World," *Third World Economics* (February 15-28, 1991) at 10; Daphne Wysham, "Big Business Hijacks GATT," *Nation* (17 December 1990).

contrary to the goals of economic development interests.¹⁰⁸ As Ivan Ilich has said, "development based on high per capita energy quanta and intense professional care is the most pernicious of the West's missionary efforts—a project guided by an ecologically unfeasible conception of human control over nature, and by an anthropologically vicious attempt to replace the nests and snakepits of culture by sterile wards for professional service."¹⁰⁹

In order to be sustainable, the NAFTA should, accordingly, be sensitive to traditional economies based on "multiple forms of mutual reciprocity,"¹¹⁰ by encouraging economically and environmentally sound diversification of production methods based on existing community structures in order to prevent an excessive reliance on exports—a reliance that historically seems to lead inevitably to over-exploitation of resources, chemical-dependent monocultures, exponential growth in pollution and other waste products, and other activities that make unsustainable demands on the environment.

Technical Criteria vs. Trade Barriers

In addition to the above-noted weaknesses in geographic and cultural scope, the U.S. and Mexican administrations have been criticized for inadequately addressing such nuts and bolts issues as transparency, enforcement, funding, public participation, local implementation and the technical criteria that underlie all of these.

Pre-Emption vs. Environmental Protection

If one issue had to be picked to account for the sudden interest of the environmental community in trade, it would be environmental standards, an issue that first came to prominence in the heated debate over agriculture in the GATT talks. The question of standards for pesticide residues bridged the traditional gulf between trade and environment primarily because the Bush administration tried to use the GATT to circumvent environmental opposition at home to attacks on the Federal Food, Drug and Cosmetic Act's Delaney Clause.

Had it been successful in gaining its version of harmonized standards for agricultural products in the GATT, the administration would have been able to effectively get rid of the Delaney prohibition on carcinogenic pesticides in food by claiming a higher treaty requirement. Other GATT trading partners were very clear that harmonization would have to mean a lowering of the Delaney zero-carcinogen standard (probably to the Codex Alimentarius level). As Jean Marc Luc, Director of the GATT Agricultural Division said, "world trade cannot survive with a zero tolerance."¹¹¹

The question of pesticide standards thus became a cross-over issue to on-going Congressional debates on the Delaney clause, bringing up the whole gamut of standards issues (including harmonization, pre-emption and extra-territoriality), and for the first time involving a wide

¹⁰⁸ Robertson, *supra* note 101 at 2, 5.

¹⁰⁹ Ilich, *supra* note 105 at 20-21.

¹¹⁰ Ilich, *supra* note 105 at 66.

¹¹¹ Quoted in *Community Nutrition Institute Nutrition Week*, *supra* note 19 at 1.

segment of the environmental community in trade issues.¹¹²

The harmonization issue involves the ability of a nation, state or locality to prohibit import of a product or substance that nation had unilaterally determined to be toxic. At the same time that the Action Plan promised that "the United States will not agree to weaken existing U.S. pesticide, energy conservation, toxic waste or health and safety standards in the FTA" and will "maintain the integrity of the U.S. regulatory process,"¹¹³ the U.S. negotiators in the GATT talks were pushing for rules that would allow a nation to set import standards stricter than the international standards only if the nation taking such unilateral actions could provide a "reasonable scientific justification" for being stricter or show that the international standard lacked such "scientific justification."¹¹⁴

The environmental position on GATT and NAFTA standards has been that laws or regulations that a federal government or a political subdivision of a participating country deems necessary to protect environment, human health or physical and biological resources from exploitation or contamination should not be open to challenge as unfair trade barriers; international standards or norms should be seen as a floor, not a ceiling. The administration's opposing position is contrary to sound public health policy which recognizes that government regulation is not and should not be based only on 'sound science', but must respond to public concerns and acknowledge that since science seldom has all the answers (especially in speculative matters like exposure and risk assessment), protection of public, occupational and environmental health requires prudence, including wide margins of safety that cannot always be scientifically justified."¹¹⁵

While some environmental groups have argued that the burden of proving "scientific justification" should not be placed on the party seeking protection of human health and the environment, but on those challenging the unilateral regulation to "demonstrate that the regulation in question has no scientific basis whatsoever. . . . is not supported by the available evidence and reasonable inferences from that evidence"¹¹⁶; others argue that in a democratic

¹¹² That the public's fear of trade requirements forcing lowest-common denominator standards is not unfounded, is attested to by Japan's recent lowering of its pesticide standards to Codex Alimentarius levels. See, Naomi Ono, "Pesticide Limits Relaxed as Trade Pressure Intensifies," *Nikkei Weekly* (15 February 1992).

¹¹³ Action Plan, *supra* note 6, Tab 4 at 9.

¹¹⁴ GATT Negotiating Group on Agriculture, Working Group on Sanitary and Phytosanitary Regulations and Barriers, *Draft Text on Sanitary and Phytosanitary Measures*, Doc. No. MTN.GNG/NG5/WGSP/7 (20 November 1990) at paragraph 10.

¹¹⁵ Gregory, *supra* note 28 at 4.

¹¹⁶ Eric Christensen et al, Letter to Carla Hills, United States Trade Representative (29 November 1990) at 2; besides Natural Resources Defense Council, the letter was signed by representatives from the Community Nutrition Institute, Fair Trade Campaign, Friends of the Earth, Greenpeace International, National Family Farm Coalition, National Wildlife Federation and National Toxics Campaign. The "sound science" doctrine was raised unsuccessfully by the Canadian and Quebec governments in amicus briefs supporting the otherwise successful suit brought in U.S. court claiming that the U.S. ban on asbestos violated GATT because it went beyond "international scientific consensus" on dangers of asbestos. See, *Corrosion Proof Fittings v. EPA* 947 Fed. 2d 1201 (5th Cir. 1991), esp. briefs filed, 5th Cir. Docket No. 89-4596.

society, the scientific issue is a red herring and that if a community deems a standard necessary, that decision is sufficient in itself to allow that community to require adherence to the standard it so chooses and to prevent that standard's challenge as a trade barrier.¹¹⁷

The language on standards in the ER and in the Dallas Draft of the NAFTA is consistent with the U.S. negotiating stance in the GATT talks and little more than a reiteration of the Action Plan language. Not only does it not address the environmental concerns about loopholes in the "sound science" doctrine, but it limits whatever protection it might offer to only *national* standards.¹¹⁸ The environmental community, on the other hand, has consistently argued that whatever agreement is finally reached must allow states and local communities to protect themselves as well.

Under a trade agreement that protects only national standards, Arizona and California groundwater protection standards, for instance, would be in jeopardy of pre-emption because there are no federal groundwater laws in the U.S. or Mexico. California's strict pesticide standards similarly would be in danger of pre-emption by weaker federal or international norms.

Such pre-emption of state and local standards would be consistent with the 7 February 1992 GATT panel decision which declared GATT rules superior to U.S. state and local laws, and required U.S. federal authorities to bring states into compliance with the GATT.¹¹⁹

That the fears of the public about pre-emption were justified is apparent from a reading of the Dallas Draft of the NAFTA, the intent of which is not only to incorporate the GATT by reference, but to require that "the provisions of this Agreement shall have binding application and shall be observed by state, provincial and local governments."¹²⁰ The bracketed Mexican language on Insurance is even more specific: "each Party is fully responsible for the observance of all the provisions of this Chapter, and shall take all necessary measures to ensure such observance by all governments and authorities within its territory."¹²¹

¹¹⁷ Cf. Michael Gregory, "Transparency, Local Control and Binational Cooperation: Adding Conditions of Sustainability to the Proposed North American Free Trade Agreement," paper presented to the Foro de Impacto Ambiental y Tratado de Libre Comercio (Guadalajara, Jalisco: Universidad de Guadalajara, 29 November 1991), at 6.

¹¹⁸ ER, *supra* note 3 at 192.

¹¹⁹ See, Eduardo Lachica, "GATT Finds U.S., State Laws on Beer Discriminate Against Foreign Brewers," *Wall Street Journal* (13 March 1992); Lori Wallach, "Memorandum to State Legislators, Re: GATT Ruling Declares GATT Law Superior to State Law; Requires Federal Action to Ensure State Compliance" (Washington, D.C.: Public Citizen, 3 April 1992).

¹²⁰ Cf. Dallas Draft *supra* note 10, Chp. 1, Art. 102, "Extent of Obligations" at 2.

¹²¹ Dallas Draft, *supra* note , Chp. 1 at 3. Other articles, including those on technical standards, financial services, and investments, contain similar language which, although bracketed in the draft text, would, like the disputed Dunkel draft of the GATT, require nations party to the Agreement to ensure that subnational entities will conform to its provisions. The bracketed Canadian language for Article 103, Chp. 1 at 2, for instance, reads, "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state, provincial and local governments." Cf. Audley, *supra* note 11 at 6.

In cases where a border state or local authority on the border has a more protective standard than a given national or binational standard, or where standards of the two nations differ, public comments have repeatedly insisted that the highest (i.e., most protective) standard of any entity in the area shall apply on both sides of the border. Such a negotiating stance would comport with the precedent set by Annex IV of the La Paz Agreement, which requires copper smelters on both sides of the border to meet the more protective U.S. New Source Performance Standards.¹²²

But instead of clearly taking the "highest standard" position, the administration is either vague (e.g., stating only that the government will "take measures"¹²³) or else insists that national standards and sound science take precedence. The ER, for instance, states that "the U.S. is committed to maintain the rights of local, state and national governments to maintain the right, jointly or severally, *in reliance upon available scientific evidence and in accordance with the level of risk considered acceptable by the nation* in question to: ensure the integrity of their domestic regulatory system and processes; achieve higher levels of environmental protection than may be afforded by the development of internationally or regionally established standards; and take measures to address transboundary, regional and global environmental problems"(emphasis added).¹²⁴

Again, while directing the U.S. negotiators to "maintain the right to impose and enforce through trade restrictions product standards and technical regulations that are more stringent than international standards when these standards . . .reflect the level of risk a Party judges as appropriate," the ER limits the right to those instances "when these standards have a scientific justification."¹²⁵

The Dallas Draft language on Sanitary and Phytosanitary standards (the standards which apply to pesticide residues on food) also adheres to the "scientific justification" concept, stating that "the Parties shall ensure that sanitary and phytosanitary measures. . .are based on scientific principles [and] are not maintained against available scientific evidence."¹²⁶ Similarly, when an importing Party rejects a product on sanitary and phytosanitary grounds, the importing party "must outline the scientific evidence and methodologies used to justify the refusal."¹²⁷

When an importing Party does not have an applicable sanitary or phytosanitary standard, and no applicable international (e.g., Codex Alimentarius) standard exists, "the importing Party shall accept the exporting Party's sanitary and phytosanitary measure in order not to inhibit trade."¹²⁸

¹²² *La Paz Agreement* III, 1987, Art. XI at 13.

¹²³ ER, *supra* note 3 at 72.

¹²⁴ ER, *supra* note 3 at 72.

¹²⁵ ER, *supra* note 3 at 230.

¹²⁶ Dallas Draft, *supra* note 10, Agriculture: Basic Rights and Obligations, Annex XX2 (3) at 21.

¹²⁷ Dallas Draft, *supra* note 10, Agriculture: Basic Rights and Obligations, Annex XX2 (8) at 22.

¹²⁸ Dallas Draft, *supra* note 10, Agriculture: Basic Rights and Obligations, Annex XX2 (9) at 22.

The Dallas Draft generally promotes harmonization of sanitary and phytosanitary standards to "international standards, guidelines *or recommendations* (emphasis added), where they exist,"¹²⁹ but, in an apparent attempt to address public concerns about the harmonization issue, specifies that "the Parties may introduce or maintain sanitary or phytosanitary measures which result in a higher level of . . . protection than would be achieved by measures based on the relevant international" standard.¹³⁰ But this right to "harmonize upward" would be permitted only if "there is a scientific justification," if the measures are based on risk assessment, and "the Parties shall ensure that such measures are the least restrictive to trade, taking into account technical and economic feasibility."¹³¹

In addition to demanding that the administration protect local, state and national standards from pre-emption, since the infamous August 1991 GATT panel finding that the U.S. Marine Mammal Protection Act establishes a trade barrier,¹³² an even wider segment of the public has demanded that the NAFTA not prohibit a nation from protecting the environment outside its sovereign boundaries. The U.S. law seeks to protect dolphin populations by prohibiting imports of tuna caught in ways that do not protect dolphins at least as well as those the law requires U.S. fishermen to employ. The decision of the GATT in favor of Mexican fishermen "provided a jolting demonstration of the power this body has . . . to affect virtually any environmental law or action, by any member nation, that interferes with the Agreement's mission" to protect trade despite environmental costs.¹³³

The GATT panel decision that the U.S. embargo constituted an illegal trade barrier was based on two primary rulings, both of which were highly alarming to the environmental community. First, in addressing the extraterritoriality issue, the panel decided that the provisions of the GATT which allow exceptions to trade rules "to protect human, animal, or plant life or health" and "to conserve exhaustible natural resources" were applicable only to domestic, not to international resources like dolphins.¹³⁴

Second, the panel ruled that the U.S. import restriction was GATT-illegal because it sought to protect something other (i.e., dolphins) than the product being traded (i.e., tuna). Thus, "the ruling implied that countries cannot bar importation of a product that's been made in an environmentally harmful way, even if domestic manufacturers are held to the same high

¹²⁹ Dallas Draft, *supra* note 10, Agriculture: Harmonization, Annex XX2 (10) at 22.

¹³⁰ Dallas Draft, *supra* note 10, Agriculture: Harmonization, Annex XX2 (12) at 23.

¹³¹ Dallas Draft, *supra* note 10, Agriculture: Harmonization, Annex XX2 (12), (18-25) at 23-25.

¹³² See, General Agreement on Tariffs and Trade, *United States - Restrictions on Imports of Tuna: Report of the Panel*, DS21/R (3 September 1991).

¹³³ Hilary F. French, "The Tuna Test: GATT and the Environment," *World-Watch* (March-April 1992) at 9.

¹³⁴ GATT Articles XX(b) and XX(g), respectively. For a discussion of these and other GATT environmental measures, see, Charles Arden-Clarke, *The General Agreement on Tariffs and Trade, Environmental Protection and Sustainable Development* (Washington, D.C.: World Wildlife Fund, June 1991).

standard."¹³⁵

The popularity of the Marine Mammal Protection Act and the wide-ranging implications of the GATT decision allowed a wide cross-section of the U.S. public who had previously not been involved to become heated participants in trade issues, arguing that the GATT decision endangers not only dolphins but a wide range of environmental measures, including those designed to protect old growth and tropical forests, critical wildlife habitat, global atmosphere, oceans, the ozone layer, etc.¹³⁶

Public concern also led to introduction of Congressional resolutions drawing attention to the fact that the tuna/dolphin decision casts serious doubt on the President's promise in the Action Plan that if Congress approved fast-track, the administration would protect U.S. laws against any trade agreement. The promise had become particularly suspect because the Action Plan had coupled it with specific recognition of the U.S.-Mexico cooperative efforts to protect dolphins.¹³⁷ The Waxman/Gephardt Resolution, for instance, calls upon the President to "initiate and complete negotiations as part of the current Uruguay Round [and] to make the GATT compatible with the Marine Mammal Protection Act and other United States health, safety, labor and environmental laws, *including those laws that are designed to protect the environment outside the geographic borders of the United States*" (emphasis added).¹³⁸

The high level of public concern about the GATT tuna/dolphin decision and the intent of the Waxman-Gephardt Resolution do not comport well with the obvious intention of at least the U.S. and Mexican negotiators to subordinate not only the NAFTA, but domestic laws and regulations, to the GATT. As the Dallas Draft states, the NAFTA "will cross-reference the standards, technical regulations, conformity assessment procedures obligations of the Parties under the GATT, with provision for automatically incorporating into the NAFTA any modifications to the GATT regarding standards, technical regulations, if [sic] there is a successful conclusion to the Uruguay Round, and conformity assessment procedures. Second, if there is no successful conclusion to the Uruguay Round, it [sic] then this Article will reaffirm existing GATT obligations and specify the Uruguay Round provisions from the TBT [Technical Barriers to Trade] text that are in addition to the current Standards Code obligations, and the S&P [Sanitary and Phytosanitary] text. . . ."¹³⁹

¹³⁵ French, *supra* note 134 at 10.

¹³⁶ For general background on the public outcry, see Keith Bradsher, "GATT Overrules U.S. Ban on Mexico Tuna Imports, *New York Times* (23 August 1991); Stuart Auerbach, "GATT Rule on Wildlife Stirs Alarm," *Washington Post* (1 October 1991) at B5; Jessica Mathews, "Dolphins, Tuna and Free Trade," *Washington Post* (18 October 1991). The environmental position on the tuna/dolphin issue had been laid out clearly by several groups. See., e.g., Rod Leonard, letter to colleagues from the Community Nutrition Institute (5 September 1991); Justin Ward and Glenn T. Prickett, "Environmental Reform of the World Trading System," Testimony before the U.S. Senate Subcommittee on International Trade of the Committee on Finance (25 October 1991) at 1.

¹³⁷ Action Plan, *supra* note 6, Tab 4 at 7.

¹³⁸ H. Con. R. 246, *supra* note 1 at 2.

¹³⁹ Dallas Draft, *supra* note 10, Chp. 1, Art. 01, Additional Mexican and U.S. Equivalences, at 11.

Standards remain a central issue in the trade negotiations and will remain so during implementation of the IBEP and of the NAFTA, if it comes to pass. Since challenges are bound to occur, environmental groups have argued that the agreements should contain clear dispute resolution mechanisms to ensure that bona fide public, occupational and environmental health measures of any kind are not subject to attack as non-tariff barriers to trade. The IBEP, the ER and the Dallas Draft, far from containing such clear statements, appear to be specifically contrary to them.

Product vs. Process

From the Action Plan through the Dallas Draft, the administration's discussion of standards has been largely limited to the traditional trade issue of *products*.¹⁴⁰ But basic to any discussion of environmental standards is the distinction between *product* standards and standards for industrial *processes*. The argument for dolphin protection, for instance, is an argument to control a process. Pesticide standards for residue tolerances on food are product standards, but regulations that go beyond concern with residues on food to protection of workers, wildlife, water and air, aim at regulating processes.

While the administration focus has been on products and services, the environmental and labor communities have insisted that the NAFTA and IBEP must include mutually enforceable process standards to ensure that industrial, agricultural or other growth does not occur simply as a result of the NAFTA's institutionalizing of weak environmental standards or because of lax enforcement in Mexico. In general, the administration has responded by praising the progress Mexico has made in getting laws and regulations on paper and by reiterating the Action Plan promises that high standards will continue to be required for products entering the U.S.

Neither the ER nor the IBEP nor the Dallas Draft, however, requires or establishes mechanisms to ensure that industries coming into existence or expanding due to increased trade will (1) employ mitigation measures to prevent and reduce pollution and other waste products and to conserve natural resources; or (2) use the best available pollution prevention, waste minimization and pollution control technologies. Perhaps even more significantly, the NAFTA documents contain no monitoring requirements to ensure that regardless of what technologies they use, industries do not release unacceptable levels of pollutants into the environment.

Public comment to the administration recognized that a phase-in period of up to ten years could be necessary for some existing domestic industries in Mexico, especially smaller industries, to meet the highest standards, but that existing U.S. industries, Mexican facilities that are subsidiaries or otherwise part of larger production processes, and all new facilities in either country should be required to meet the highest standards without delay.¹⁴¹ However, case-by-case deals through fragmented agreements among countries or along binational borders is not a viable long-range solution; a world agreement to abate pollution is needed, something like a more comprehensive Montreal Protocol. The administration's call for harmonization to the

¹⁴⁰ The ER, for instance, under the heading "Product Standards," notes that "it has been agreed by the U.S., Mexico and Canada that a NAFTA will include provisions setting disciplines on the use of standards, technical regulations and conformity assessment procedures." ER, *supra* note 3 at 189.

¹⁴¹ Cf. Gregory and Kamp, *supra* note 12 at 5. Though not specifically in the context of standards, the ER states that "the Administration is prepared to consider transition periods in excess of those provided in the U.S.-Canada FTA (i.e., 10 years)" ER, *supra* note 3 at 59.

lowest common denominator, its protection of only national standards and its reliance on voluntary reductions all fall considerably short of that mark.¹⁴²

A more useful approach has been suggested by Alan Neff,¹⁴³ whereby the U.S. would unilaterally require its industries to control pollution at their foreign facilities at least as well as they are required to control it at home. Passage of a "Foreign Environmental Practices Act" such as Neff suggests, while not answering the need for an enforceable global convention, would go a long way toward solving existing problems since U.S. industries are among the world's heaviest polluters.¹⁴⁴ The approach could also be used to apply sanctions against foreign companies in the U.S., thus offering an effective bargaining chip to achieve global pollution reductions.

Clean-Up vs. Clean Technology

The free market is especially ill-adapted for dealing with the waste products of industrial society, which traditionally have fallen out of the accounting system because they were, until recently, neither saleable products nor necessary raw materials. "Market economies are effective instruments for organizing production and allocating resources, insofar as the utility functions are associated with two-party transactions. But in connection with waste disposal, the utility functions involve third parties, and the automatic market exchange process fails."¹⁴⁵

Until very recently, regulation of polluting industry, when it has not relied entirely on the "invisible hand" of free market philosophy, has depended on command-and-control systems based on concepts of "assimilative capacity"—the outdated and disproved belief that pollution problems can be adequately addressed by imposing end-of-the-pipe limits on specific waste products released from individual stacks, pipes or in individual steel drums at specific facilities.

In the past half century it has become obvious that even though the emissions of a specific chemical from a particular plant cannot usually be proved to cause cancer or birth defects, the *aggregate* effect of thousands of plants all polluting up to the legal limit is poisoning the world; the facility-by-facility, little-bit-here, little-bit-there approach is, in effect, nickel-and-diming us to death.

The assimilative capacity belief is closely related to the similarly-disproved belief that "dilution is the solution to pollution." While the dilution strategy has some validity in regard to high-threshold toxins (e.g., for biological vectors such as those typically found in household sewage), in regard to non-threshold toxins which have no threshold amount below which they lose their effect (e.g., carcinogens, mutagens, teratogens and certain immune-system poisons), dilution does not eliminate the risk but merely spreads it around.

¹⁴² Cf. Ritchie, *supra* note 19 at 11.

¹⁴³ Alan Neff, "Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act," *Ecology Law Review* 17(477), 1990 at 483.

¹⁴⁴ See "Cleaning Up: A Survey of Industry and the Environment," *The Economist* (September 8, 1990), at 9; A. Porterfield and D. Weir, "The Export of U.S. Toxic Waste," *Nation* 245(325, 1987) at 341.

¹⁴⁵ Jon Breslaw, "Economics and Ecosystems," in Garrett de Bell, ed., *The Environmental Handbook* (NY: Ballantine and Sierra Club) at 102.

While U.S. and Mexican political and regulatory bodies are largely still stuck in assimilative capacity models and after-the-fact penalties, the international scientific community is switching from concern with how to avoid exceeding regulatory limits to methods of preventing net increase of environmental loading. Problems like ozone depletion, global warming and widespread groundwater contamination make it fairly obvious to many that "add-on" or clean-up" controls at the end-of-the-pipe are inefficient and insufficient means for addressing industrial impacts, and that "the strategy of attempting to regulate and control each separate chemical, with the premise that each toxin is guilty until proven innocent" is hopeless.¹⁴⁶ Rather, toxic pollution must be stopped before it begins; the way we do business must incorporate either pre- or in-process prevention.

Whether it's called *pollution prevention*, *precautionary approach* or *clean technology*, other industrialized nations are generally ahead of the U.S. in this respect. In 1985, for instance, the Commission on European Communities recognized the desirability of "clean technology," which they defined as "any technical measure taken. . .to reduce, or even eliminate at [the] source, the production of any nuisance, pollution, or waste and to help save raw materials, natural resources, and energy."¹⁴⁷

Two years later, ministers from northern European nations, concerned about the industrial destruction of the North Sea and noting that the industrial assault on the environment was already far advanced, endorsed a set of "precautionary principles" for "eliminating and preventing pollution. . .even where there is inadequate or inconclusive scientific evidence to prove a causal link between emissions and effects."¹⁴⁸

As explained by Konrad Von Moltke, the precautionary principle means that "even when no environmental effects are discernable, the avoidance of emissions is preferable to allowing them."¹⁴⁹ "Pollution prevention," the corresponding term in the United States, includes the same concept: "a fundamental assumption of pollution prevention requires that emissions or discharges be reduced or eliminated whether or not an existing health risk can be demonstrated. In other words, a reasonably avoidable exposure to a toxic substance should be avoided."¹⁵⁰

Canada, too, has been more progressive than the U.S. in adopting precautionary approaches to toxic and hazardous substances, a policy reflected in the April 1992 recommendations of the International Joint Commission (IJC), a body comprised of Canadian and U.S. representatives charged with responsibility for environmental quality of the Great Lakes. In making its recommendations to the U.S. EPA and its Canadian counterpart, Environment Canada, the IJC called for a "weight of evidence" approach rather and noted that "if a chemical or group of

¹⁴⁶ E. Mann, "Environmentalism in the Corporate Climate," *Tikkun* 5(2): 60, 1990.

¹⁴⁷ Cited by Ken Geiser, "The Greening of Industry: Making the Transition to a Sustainable Economy," *Technology Review* August-September 1991) at 70.

¹⁴⁸ Nordic Council, Conference on Pollution of the Seas, Final Document, Copenhagen, October 16-18, 1989; quoted in, Greenpeace International, *Protection of the Environment through the "Precautionary Action" Approach* (Washington, D.C., July 1990) at 3.

¹⁴⁹ Quoted in Geiser, *supra* note 147 at 70.

¹⁵⁰ See Robert Ginsburg, "What's In a Name: Serious Implementation of Pollution Prevention," *New Solutions* (Summer 1990) at 60.

chemicals is persistent, toxic and bioaccumulative, we should immediately begin a process to eliminate it. Since it seems impossible to eliminate discharge of these chemicals through other means, a policy of *banning* or *sunsetting* their manufacture, distribution, storage, use and disposal appears to be the only alternative. . . .whether or not unassailable scientific proof of acute or chronic damage is universally accepted." Since "it is not possible to remove a persistent toxic substance from a source completely once that substance has been produced [n]or. . .to retrieve that substance completely once it has entered the environment. . . .the focus must be on preventing the generation of persistent toxic substances in the first place, rather than trying to control their use, release, and disposal after they are produced."¹⁵¹ Coming as they do from a body overseeing the U.S.-Canada border environment, the IJC recommendations for pollution prevention are particularly relevant to IBEP implementation and to NAFTA negotiations.

As defined by the U.S. Office of Technology Assessment in 1986, embodied in whole or part by laws in ten states, and promoted by the federal Pollution Prevention Act of 1990,¹⁵² a basic component of any pollution prevention program is "toxics use reduction," a set of strategies that includes goal setting, substitution of non-toxic material inputs for toxics, reformulating of processes, redesign of products, recycling in-process substances, and simple housekeeping procedures to improve operations and maintenance.¹⁵³ The most effective way to control waste of any kind is to reduce it at its source. Control of waste at the end of the pipe is merely waste management; control at the front end of the process is pollution prevention.

Despite repeated calls for pollution prevention to be incorporated in the trade negotiations,¹⁵⁴ the NAFTA and IBEP continue to be locked into the old assimilative capacity model. The President's Action Plan did not even mention the concept and although the ER and IBEP reiterate allegiance to it, the IBEP implementation program consists only of "nebulous commitments"¹⁵⁵ to information exchange, support for university research and community recycling pilots, and a

¹⁵¹ See International Joint Commission, *Sixth Biennial Report on Great Lakes Water Quality* (Ottawa, Ontario and Washington, D.C., April 1992), at 4, 25.

¹⁵² U.S. Office of Technology Assessment, *Serious Reduction of Hazardous Waste for Pollution Prevention and Industrial Efficiency* (September 1986); *Pollution Prevention Act of 1990*, 42 USCA 13101-13109.

¹⁵³ See Geiser, *supra* note 147 at 68-69; and Ken Geiser, "Toxics Use Reduction and Pollution Prevention," *New Solutions* (Spring 1990) at 1-8. The EPA has had some difficulty differentiating "pollution prevention" strategies, with their before-the-fact source reduction components, from the more industry-friendly, after-the-fact, end-of-the-pipe strategies of "waste minimization" or "waste reduction"; cf. the title of OTA's 1986 publication, *supra* note 152; see also, William K. Reilly, "Aiming Before We Shoot: The Quiet Revolution in Environmental Policy," statement before the National Press Club (26 September 1990); and US-EPA, "Pollution Prevention Policy Statement," *Fed Reg* 54(16), 26 January 1989 at 3845-3847.

¹⁵⁴ Jay Hair of the National Wildlife Federation, for instance, in Congressional testimony well before the fast-track vote included pollution prevention as one of the six essential environmental principles to be included in the NAFTA; see Jay Hair, Testimony before U.S. House of Representatives Committee on Agriculture (24 April 1991) at 4.

¹⁵⁵ Justin Ward, *Environmental Protection in the North American Free Trade Agreement*, Statement of the Natural Resources Defense Council presented in connection with hearings before the Office of the U.S. Trade Representative (Washington, D.C., 3 September 1991) at 7.

plea to industries to voluntarily cut back on waste generation and perform chemical safety audits.¹⁵⁶

Rather than setting up measures to *reduce* risk by cutting exposure to toxic substances, the trade negotiators have focused on *assessing* risk and *managing* it, an approach pushed by the U.S. negotiators in the UNCED process and fundamentally opposed to the precautionary principle. At the Geneva PrepCom in August 1991, for example, the U.S. negotiators notified the UNCED Chairman that "the U.S. does not support efforts to list hazardous chemicals for eventual phase-out as safer substitutes are identified. This 'all or nothing approach' ignores risk reduction alternatives short of a ban which would allow for continued use of a chemical under specific conditions where risk would be considered acceptable."¹⁵⁷

Accordingly, the IBEP, while noting that "pollution prevention/waste minimization is a principal goal of enforcement,"¹⁵⁸ devotes much of its program to "performance of baseline and periodic environmental health risk assessments"¹⁵⁹ and a two-year data collection program towards "development of an initial comparative risk study."¹⁶⁰

The Dallas Draft of the NAFTA similarly neglects the precautionary approach, requiring instead that standards be based on risk assessment, "taking into account risk assessment techniques developed by the relevant regional or international organizations"¹⁶¹ and "all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves"¹⁶²—consideration of which would, presumably, allow for continued use of toxic and persistent chemicals preferred by the State Department as noted above.

¹⁵⁶ See Mary Kelly, *A Response to the EPA/SEDUE Integrated Border Environment Plan*, (Austin: Texas Center for Policy Studies, March, 1992); Rich, *supra* note 35 at 32.

¹⁵⁷ See, e.g., [U.S. Department of State], *supra* note 17 at 1. The U.S. position on toxics at UNCED has been characterized as "a particularly stark, cynical, and vicious position" that "opposes sunseting or phasing out of particularly toxic chemicals. . . .opposes quantitative toxic chemical reduction programs [and] opposes bans on transboundary shipments of hazardous waste" while protecting the practice of selling in other countries toxics banned in the country of origin, and promoting lowest common denominator international standards; see, Mary O'Brien, "Toxic/Hazardous Wastes: Critique of U.S. Position at UNCED," paper presented at Earth Summit Town Meeting/Hearing (Portland, Oregon, 16 February 1992). The U.S. position had significant influence on *Agenda 21* risk assessment language proposed by the New York PrepCom; cf. Section 367, Chp. 19, "Environmentally Sound Management of Toxic Chemicals," Programme Area A, "Expanding and accelerating the international assessment of chemical risks."

¹⁵⁸ IBEP, *supra* note 2 at V-5.

¹⁵⁹ IBEP, *supra* note 2 at V-4.

¹⁶⁰ IBEP, *supra* note 2 at V-9.

¹⁶¹ Dallas Draft, *supra* note 10, Agriculture: Assessment of Risks and Determination of the Appropriate Level of Sanitary and Phytosanitary Protection, Annex XX2 (18) at 24.

¹⁶² Dallas Draft, *ibid.* at 25.

The final IBEP does correctly define pollution prevention as a multimedia concern with "changing chemical use or processes so that fewer toxic waste streams are produced,"¹⁶³ and establishes a new Working Group on Pollution Prevention, but since there are no concrete parameters or enforcement teeth in the plan, the new working group is subject to the same weaknesses that condemned the La Paz Agreement to ineffectuality.

The administration's end-of-the-pipe focus is apparent in the IBEP, where under the heading "Hazardous Material and Hazardous and Municipal Waste," hazardous materials from the front end of the toxics cycle are barely mentioned, and the focus is almost exclusively on waste products.¹⁶⁴ Similarly, in listing pertinent U.S. laws and regulations, the IBEP dwells on requirements for tracking hazardous waste shipments pursuant to the Resource Conservation and Recovery Act (RCRA) and the La Paz Agreement, but does not mention requirements for export and import notification of hazardous materials pursuant to the Toxic Substances Control Act (TSCA).

The ER, on the other hand, after commending EPA's development of chemical testing protocols, notes that "all commercial chemical substances imported into the U.S., from Mexico or any other country, must comply with EPA's regulations under TSCA." The ER does not mention, however, that the regulations in question have been widely criticized as ineffective and that "EPA has made little progress in developing information on the safety of the thousands of chemicals that affect our daily lives and has not taken action to regulate, or warn the public about, chemicals found to be harmful."¹⁶⁵

Furthermore, the IBEP discussion of pollution prevention is limited almost exclusively to air pollution, while mentioning in passing that the pollution prevention Work Group "intends to assess the potential effectiveness of other kinds of pollution prevention initiatives [since] pollution prevention projects affecting municipal wastewater treatment, water use efficiency, and agricultural chemical use may be especially beneficial in the border area."¹⁶⁶

Meanwhile, rather than imposing or even proposing specific goals and objectives and the means to achieve them (including adequate funding, public oversight, effective enforcement and mandatory use of best available reduction technology), the main thrust of the IBEP in regard to clean technology is simply a replay of the EPA's 33/50 strategy to encourage voluntary

¹⁶³ IBEP, *supra* note 2 at V-8.

¹⁶⁴ IBEP, *supra* note 2 at III-18.

¹⁶⁵ IBEP, *supra* note 2 at III-19, A-3; ER, *supra* note 3 at 121; US-GAO, *EPA's Chemical Testing Program Has Not Resolved Safety Concerns*, GAO/RCED-91-136 (June 1991) at 1. The GAO has issued a long series of reports on deficiencies of EPA's TSCA program. Cf. USA-GAO, *EPA's Chemical Testing Program Has Made Little Progress*, GAO/RCED-90-1121 (April 1990); US-GAO, *Effectiveness of Unreasonable Risk Standards Unclear*, GAO/RCED-90-189 (July 1990); US-GAO, *EPA's Efforts to Identify and Control Harmful Chemicals in Use*, GAO/RCED-84-100 (13 June 1984); US-GAO, *Assessment of New Chemical Regulation under the Toxic Substances Control Act*, GAO/RCED-84-84 (15 June 1984); US-GAO, *EPA Implementation of Selected Aspects of the Toxic Substances Control Act*, GAO/RCED-83-62 (7 December 1982); US-GAO, *EPA's New Research Controls: Problems Remain*, RCED-81-124 (14 July 1981).

¹⁶⁶ IBEP, *supra* note 2 at V-42.

reductions of seventeen specific air toxics by major U.S. industries.¹⁶⁷ As the IBEP admits, "little is being done in the area of pollution prevention to reduce the volume of hazardous material used or to identify alternative, non-toxic substitute materials."¹⁶⁸

This "trust me"/"business-as-usual" approach has even less chance of success in Mexico than it does in the U.S. In the Matamoros area, for instance, when faced with continuing releases of toxic hydrofluoric acid and the distinct possibility of a Bhopal-type disaster at the Quimica Fluor plant (one-third owned by the U.S.-based E.I. Dupont de Nemours & Co.), rather than require stringent cleanup and installation of state-of-the-art control technology, SEDUE and the company have instead proposed establishing a 1-1/4-mile buffer zone around the plant—a sacrifice zone where no one except workers would be allowed.¹⁶⁹

Not only is the concept of such a sacrifice area contrary to principles of pollution prevention and pollution control,¹⁷⁰ it also contradicts the basic principles of sound emergency planning, which recognize that a serious release of hydrofluoric acid might well not be contained in the 1-1/4 mile buffer, but could easily travel the five miles from the plant downwind to Matamoros and Brownsville, Texas, a sister-city community with a population of half a million people.

SEDUE's proposal for Quimica Fluor is not an isolated incident, but part of a general policy spelled out in the IBEP where SEDUE's intent to "establish buffer zones for industries" is included along with statements of the agency's other intentions to "formulate environmental criteria to evaluate environmental impacts and risks," "formulate rules governing environmental impact assessment for the maquiladora industries," and "develop programs for the prevention of accidents," as part of SEDUE's regulatory program to implement its "ecological policy for the Border Area."¹⁷¹ The credibility of the agency's other intentions is seriously called into question by inclusion of the buffer plan.

Emergency situations like that in Matamoros (and the recent disaster in Guadalajara) not only illustrate the attitude of the Mexican federal government towards pollution prevention and emergency planning in general, but indicate some of the typical conceptual problems of the NAFTA and IBEP. Effective emergency planning and emergency response capability are seriously lacking the whole length of the border and throughout Mexico. For instance, in Mexicali, sister-city to Calexico, California, a similar series of emergencies at the Quimica Organica plant have caused evacuations of thousands of people. Two of the incidents are particularly instructive.

¹⁶⁷ IBEP, *supra* note 2 at V-42.

¹⁶⁸ IBEP, *supra* note 2 at III-19.

¹⁶⁹ Patrick J. McDonnell, "Mexicans Fear Plant could Cause 'Next Bhopal,'" *Los Angeles Times* (20 November 1991). See also, James Pinkerton, "Border Plant Sends Fear Downwind," *Austin American-Statesman* (28 March 1988) at A1.

¹⁷⁰ The strategy of employing a low-population buffer zone instead of requiring effective prevention also underlies the Salinas administration's program to direct industries to the less-populated interior (see *supra* note 39). Instead of *lowering* risk at the front end by eliminating or reducing the hazard (i.e., the source of potential exposure), both concepts rely on *managing* risk by reducing the number of people potentially exposed.

¹⁷¹ IBEP, *supra* note 2 at V-41.

In the first, which occurred on July 17, 1990, the plant released a plume of hydrosulfonic acid, forcing evacuation of an undisclosed number of people; no fatalities were reported.¹⁷² Mexican authorities did not report the release to the EPA or activate the Binational Joint Response Team according to procedures laid out in the emergency response plan under Annex II of the La Paz Agreement¹⁷³ and under the "model" sister-city plan for Mexicali-Calexico completed with much ballyhoo by EPA and SEDUE in December 1988.¹⁷⁴ Not until three days after the incident did EPA hear about it, and then not according to plan (i.e., from the Mexican authorities), but from a U.S. NGO several hundred miles east of the incident who had heard about it from a Mexican NGO in Mexicali.¹⁷⁵

In January 1992, a similar set of events took place, starting with release of hydrochloric acid from the same chemical plant. This time, thousands of people were reported evacuated by Mexicali authorities, but Mexican officials again did not follow the plan; EPA again was notified via the same two NGOs. The main differences were that (1) this time the toxic plume sent more than forty people to the hospital; (2) the NGOs also reported the incident to the media; and (3) massive citizen demonstrations in Mexicali forced SEDUE to permanently close the facility.¹⁷⁶

These incidents are instructive in several ways. First, they indicate that in the border zone, plans on paper are not worth much. Second, they are a typical example of the failure of top-down federal intentions in the border area compared to the effectiveness of binational cooperation between NGOs working locally and regionally. Third, insofar as SEDUE had to be forced by riots to take effective action, they indicate the danger in placing much confidence in the will and ability of the Mexican government to effectively regulate polluting industries—despite the theme of Mexican progress played in the administration's NAFTA anthem.

¹⁷² Dick Kamp, "Structuring Environmental Protection into a U.S.-Mexico Free Trade Agreement: A Realistic Projection of Current Policy and Problems," Testimony before the U.S. International Trade Commission (Phoenix, Arizona, 8 April 1991) at 3; also, Dick Kamp, Letter to William Reilly, EPA (Naco, Arizona: Border Ecology Project, 28 March 1991) at 4; Dick Kamp, Testimony before the U.S. House of Representatives, Subcommittee on Regulation, Business Opportunities and Energy of the Committee on Small Business (Nogales, Arizona, 21 February 1992) at 2.

¹⁷³ *La Paz Agreement*, Annex II, "Joint United States of America-Mexican States Contingency Plan for Accidental Releases of Hazardous Substances along the Border" (29 January 1988).

¹⁷⁴ U.S. Environmental Protection Agency Emergency Response Section, Region IX and Imperial County, California, *Hazardous Materials Incident Contingency Plan, Calexico-Mexicali Sister Cities Program* (San Francisco: Ecology and Environment, Inc., Technical Assistance Team, 3 vols.).

¹⁷⁵ Kamp, Testimony, *supra* note 172 at 2.

¹⁷⁶ Ignacio Aguirre Calleja, "Aterrador Panorama por Fuga de Gas en Palaco," *La Voz de la Frontera Mexicali* (13 January 1992) at 3-A; Aracely Herrera, Jesus Jimenez and Aaron Santiago, "Programa Emergente de Proteccion Ciudadana," *La Voz de la Frontera Mexicali* (15 January 1992) at 3-A; Edmundo Bustos, "El Pueblo Condono a QOMSA a Desaparecer," *La Voz de la Frontera Mexicali* (14 January 1992) at 3-A; Anon., "El Sabado se Concretara la Clausura de QOMSA: SEDUE," *La Voz de la Frontera Mexicali* (14 January 1992) at 3-A; Sebastian Rotella, "U.S. Not Informed of Plant's Toxic Leak," *Los Angeles Times* (17 January 1992) at A3.

Tracking vs. Prevention

Congress, the media and others have focused attention on hazardous waste rather than other phases of the toxics cycle, and especially on shipment or, more precisely, lack of shipment of wastes to the U.S. from maquiladoras in Mexico. The administration has devoted several pages to the topic in the ER and the IBEP.¹⁷⁷

The requirement that hazardous wastes generated in Mexico by U.S.-owned maquilas must be returned to the U.S.¹⁷⁸ was added to the La Paz Agreement at the insistence of Mexican negotiators, and depends on enforcement of Mexican regulations for implementation. The failure of the La Paz Agreement to achieve such returns first came to light in 1986, and has been the subject of several investigations and articles.¹⁷⁹ SEDUE announced in October 1991 that only 31% of the maquilas had reported returning their wastes,¹⁸⁰ and that figure has been widely circulated by critics to point out the weakness in the La Paz Agreement and Mexican regulatory capability in general.¹⁸¹

While admitting that since 1987 only 91 maquila parent companies are known to have returned waste under the agreement and that unreturned waste is probably shipped or illegally disposed in Mexico,¹⁸² the IBEP discusses the problem in terms of information exchange, increased inspections and voluntary programs. While agreeing that source reduction is the best way to address the hazardous waste problem, the administration proposes no effective requirements to that end.

Current exemptions to the Mexican regulation create a huge loophole, allowing waste generated by U.S. *maquiladoras* to stay in Mexico if it is sent to a Mexican recycler. Under Mexican regulations, the residues from such recycled wastes (which are more concentrated and may be more toxic than the original waste) are considered "naturalized" and, as designated domestic waste, are not subject to the La Paz requirement.¹⁸³ As a consequence, the residues legally may

¹⁷⁷ ER, *supra* note 3 at 122; IBEP, *supra* note 2 at III-18, V-29.

¹⁷⁸ *La Paz Agreement Annex IV*, 1987, Art I at 3.

¹⁷⁹ Dick Kamp and Michael Gregory, *Hazardous Material Inventory of Agua Prieta, Sonora Maquiladoras* (Naco, Arizona: Border Ecology Project, 17 June 1988); Roberto Sanchez, *supra* note 53 at 1.

¹⁸⁰ ER, *supra* note 3 at 124.

¹⁸¹ Cf. Mary Kelly, Antonio Diaz and Susana Almanza, *Facing Reality: The Need for Fundamental Changes in Protecting the Environment along the U.S./Mexico Border* (Austin: Texas Center for Policy Studies, October 1991) at 18.

¹⁸² IBEP, *supra* note 2 at III-20. Cf. Anon., "Hazardous Waste from U.S.-Owned Plants in Mexico Dumped Illegally, Panel Told," *International Environment Reporter* (4 December 1991) at 656, citing report by US GAO that only about 1/3 of the waste generated by maquilas is returned in compliance with La Paz Agreement.

¹⁸³ The primary Mexican law that governs the maquiladora industry is the "Decree for the Promotion and Operation of the Maquiladora Industry for Exportation;" known as the "Maquiladora Decree," it was instituted by publication in the *Diario Oficial* on 15 August 1983,

be, and are being, disposed of in Mexico, giving rise to further concerns about the adequacy of Mexico's disposal practices.

The need for increased surveillance of transboundary shipments has been apparent to many. The most frequent recommendation has been for creation of a binational computer tracking system. Provisions to establish such a system were included in the final IBEP without details (though questions asked of EPA Region IX staff at a Tucson meeting on 2 March 1992, elicited the information that the systems would be set up at U.S. Customs and Aduana Fronteriza locations).¹⁸⁴

Since the whole maquila program would be subsumed, in effect disappearing, under a free trade agreement and the waste return requirement would also in effect disappear, the environmental community has argued that under a NAFTA the return requirement of the La Paz Agreement should be extended to all U.S. firms in Mexico, not just those in the border zone, until a waste management capability has developed in Mexico that can guarantee detailed cradle-to-grave tracking and standards of treatment, storage and disposal technology at least as protective as those in the U.S.

Bracketed Mexican text in the Dallas Draft would affirm the Parties' rights and obligations under La Paz Annex III,¹⁸⁵ but contains no clarifying language extending the scope of the La Paz Agreement to the interior of Mexico, where new development, and consequent hazardous waste generation, is proposed to occur.

The Border Trade Alliance has proposed that the IBEP should foster an intensive effort to create such capacity through development of a thriving hazardous waste industry in Mexico.¹⁸⁶ Ultimately, however, tracking and increases in disposal capacity are short-term responses that do not address reduction of hazardous waste at its source or minimization of the amount and toxicity of what is generated. Building greater disposal capacity to some degree only assures that more waste will be generated to fill the capacity.

Furthermore, commentators in Mexico and the U.S. have expressed concern that the pressures on

and allowed three options for maquilas to dispose of their hazardous waste in Mexico if they chose not to export it back to the U.S.: 1) destruction with oversight by Aduana Fronteriza; 2) donation to educational or non-profit organizations; and 3) nationalization. Article 15 of the Maquiladora Decree was revised by SECOFI in March 1989, giving authority over hazardous waste to SEDUE; the latter agency has taken the position that the first two disposal options were superseded by the 1988 Law of Ecological Equilibrium, and that a maquiladora wishing to carry out the third option must submit an application and justify its reasons for not returning the waste to the U.S. See U.S./Mexico Hazardous Waste Work Group, *The Maquiladora Industries Hazardous Waste Management Manual*, first edition (San Diego: Border Trade Alliance and National Maquiladora Association, November 1989) at 24.

¹⁸⁴ IBEP *supra* note 2 at V-30; Enrique Manzanilla, EPA Region IX Border Coordinator at meeting with Northeast Sonora-Cochise County Health Council (Nogales, Arizona, 1 April 1992).

¹⁸⁵ Dallas Draft, *supra* note 10, Chp. 1, Objectives and Scope, Art. 1202, Relation to Other International Agreements, at 10.

¹⁸⁶ Border Trade Alliance, *White Paper*, (Washington, October 1991) at 3.

U.S. generators to export waste, the growing reluctance of Third World countries to accept wastes, and favorable market conditions under deregulation in Mexico could combine with increased capacity in Mexico to convince the Salinas government to change current rules that prohibit import of wastes to that country,¹⁸⁷ a probability made all the more likely due to the failure of both governments to sign the Bamako Convention prohibiting the international export of hazardous wastes.

Mexican observers have been particularly concerned about U.S. opposition to Earth Summit proposals for international controls on dumping of radioactive waste. The U.S. entered PrepCom 4 with the position that "scientific evidence already proved that storage of radioactive wastes in or beneath the sea bed constituted no risk whatsoever 'beyond reasonable doubt.'"¹⁸⁸ Consequently, the U.S. delegation initially refused to sign even the modest UNCED proposal "'to prevent and minimize generation of radioactive wastes' as well as proposals for action on and completion of a legally binding ban on disposal of radioactive wastes at sea. . .and efforts toward a legally binding instrument on radioactive waste disposal based on the International Atomic Energy Agency's Code of Practice on the International Transboundary Movement of Radioactive Waste."¹⁸⁹

The U.S. subsequently agreed to at least consider the question and eventually lifted its brackets on explanatory and informational portions of the text, though retaining brackets on the recommendation that states "not promote or allow the storage or disposal of high-level, intermediate-level and low-level radioactive wastes near [and in] the marine environment unless scientific evidence, consistent with the applicable internationally agreed principles and guidelines, shows that such storage or disposal poses no unacceptable risk."¹⁹⁰

The U.S. opposition to an outright ban on extraterritorial dumping of radioactive waste has contributed to the growing concern of Mexican nationals about proposed nuclear waste dumps along the U.S.-Mexico border in Texas, and has led to their further scrutiny of the NAFTA in terms of hazardous waste issues in general.¹⁹¹

¹⁸⁷ Roberto Sanchez, *Environmental Concerns in a Future Free Trade Agreement between Mexico and the United States* (Tijuana: Proyecto Fronterizo de Educación Ambiental, 15 August 1990) at 10.

¹⁸⁸ See, Mark Valentine, "PrepCom 4: The Road to Rio is Paved with Good Intentions. . ." (San Francisco: U.S. Citizens Network on the United Nations Conference on Environment and Development, 20 April 1992) at 4.

¹⁸⁹ See, Environmental and Energy Study Institute, "Issue-by-Issue Summary for Prep-Com 3," *Earth Summit Update* (Special Supplement, October 1991) at 3.

¹⁹⁰ See, *Agenda 21* Sect. 367, Chp. 22, "Safe and Environmentally Sound Management of Radioactive Wastes," Activities (b): International and regional cooperation and coordination, Art. 22.5 (iii) at 3.

¹⁹¹ See, Anon., "No Aceptamos ser Basurero de EU: el Senador Guerrero," *La Jornada* (31 January 1992) at 42; Francisco J. Siller, "Esta EU en su Derecho de Construir 2 Basureros para Desechos Toxicos," *Nacional* (1 February 1992) at A8; Grupo de los Cien and Alert Citizens for Environmental Quality, Statement (Mexico City, 27 January 1992); Linda Lynch, "Waste Dump Violates Treaty, Writes Activist," *BordeReview* (February 1992) at 5.

Local Implementation vs. Federal Directive

Private Profit vs. Corporate Responsibility

The extreme environmental and human health problems related to industrialization and urbanization in the maquiladora communities confirm the dictum that since there is no real global community in the cosmopolitan environment where free trade exists, the main freedom international free traders achieve by moving to Third World countries and developing nations like Mexico is freedom from obligations of *community*.¹⁹² Environmental and other public interest groups have insisted that these responsibilities must be re-established if economic integration is not to result in the kind of environmental degradation the quasi-liberal *maquiladora* program has caused along the U.S.-Mexico frontier.

The IBEP recognizes the need for corporate responsibility, but pursues it primarily by encouraging industry to voluntarily cut emissions of certain air toxics¹⁹³ and to sign a non-binding pledge of "corporate commitments to environmental ethics."¹⁹⁴ Environmental organizations, on the other hand, have argued¹⁹⁵ that the responsibility should be a mandatory extension of the polluter pays principle written into the trade agreement as investment criteria or some form of "green tax" to ensure that part of the profits of industries that benefit from free trade will be shared with the communities where the industries are located and where the impacts of increased growth are most felt.

Besides accepting responsibility for installation of best available pollution prevention and pollution control technology to mitigate future effects of expanded trade (a responsibility progressive industries internalize as normal costs of doing business), in the developing world and especially in the U.S.-Mexico border zone, corporate responsibility requires that industries go beyond in-process improvements to provide for such basic community needs as cleanup of existing hazardous waste dumps and existing groundwater contamination. It requires that financial assurances be given to communities to assure that they can cope with increased demands on drinking water systems, sewage systems, housing, power, medical capacity and capability, schools, social services, municipal waste management, emergency response organizations, and other growth-related needs including capability for the local public to participate fully in the decision-making process to determine where, how and if development will occur, where resources will be allocated, etc.¹⁹⁶

As free trade draws the world communities towards global economic integration, it becomes increasingly apparent that the world economy, like the global biosystem, must be viewed as a

¹⁹² Daly and Cobb, *supra* note 86 at 5.

¹⁹³ *Supra* at 48; cf. IBEP, *supra* note 2 at V-42.

¹⁹⁴ IBEP, *supra* note 2 at V-8.

¹⁹⁵ See, e.g., Gregory and Kamp *supra* note 12 at 11.

¹⁹⁶ The IBEP usually uses the term "Urban Development" in referring to what are here called elements of community infrastructure (IBEP *supra* note 3 at III-41), reserving the term "infrastructure" for bridges and other transboundary crossings (IBEP *supra* note 2 at III-44); however, on occasion the IBEP uses the "infrastructure" term with the broader reference (e.g., IBEP *supra* note 2 at V-1).

complete entity; there is no escape to another system. Within that system, environmental costs cannot be written off or ignored as externalities because there is nothing external. In a globally integrated economy, the principle of polluter pays more obviously than ever means that costs must be internalized.¹⁹⁷

However, "there is an obvious conflict between an international policy of free trade and a national policy of internalization of external environmental costs. . . .A country which internalizes environmental costs into its prices will be at a disadvantage in free trade with a country that does not. . . . Therefore, national protection of a basic policy of internalization of environmental costs constitutes a clear justification for tariffs on imports from a country that does not internalize its environmental costs. This is not 'protectionism' in the usual sense of protecting an inefficient industry, but rather it is the protection of an efficient national policy of internalization of environmental costs!"¹⁹⁸

The public has raised the polluter pays theme persistently during the NAFTA debates, insisting that it must be applied to increased investment in Mexico. In a proposal to curb pollution and simultaneously empower local communities, for instance, the Sierra Club suggested that special Environmental Improvement Districts might be created on the border with authority to levy pollution taxes.¹⁹⁹ In response to the announcement of the President's Action Plan, the Sierra Club called for an "implementation hammer," including a "fifteen percent duty imposed on imports of the country responsible for pollution" causing deterioration of the border environment.²⁰⁰

More directly, the Environmental Defense Fund called for compensatory investment conditions in the NAFTA which would require "investors and businesses who profit as a result of a free trade agreement [to] invest a significant portion of their expected earnings in safeguarding the environment and public health."²⁰¹ The Natural Resources Defense Council favored putting "a 'green tax' on value-added by companies engaged in North American trade,"²⁰² and has proposed that unfair competitive advantage be prohibited internationally by classifying "'externalized' environmental costs as impermissible subsidies under GATT, NAFTA and other trade agreements."²⁰³

The concept of compensatory investment was also taken up by the National Wildlife Federation,

¹⁹⁷ Cf. Robertson, *supra* note 101 at 1.

¹⁹⁸ Daly, *supra* note 82 at 1.

¹⁹⁹ Michael McCloskey, Testimony before the Senate Committee on Foreign Relations, 22 March 1991 at 13.

²⁰⁰ Sierra Club, "Administration Mexican Free Trade Proposal: Sierra Club Charges a Lack of Assured Environmental Performance Standards," Press Release, 2 May 1991 at 1.

²⁰¹ Peter M. Emerson, Testimony before the U.S. House of Representatives Subcommittee on Commerce, Consumer Protection and Competitiveness of the Committee on Energy and Commerce (8 May 1991) at 3.

²⁰² Justin Ward, *supra* note 155 at 13.

²⁰³ Ward and Prickett, *supra* note 137 at 11.

which explored the issue²⁰⁴ in the context of the on-going GATT debate about trade-related investment measures (TRIMs), which have been opposed by industrialized nations as trade restrictions, but have been used by developing nations "to fulfill social and development objectives and to counter corporate behaviour that threatened these objectives." Such measures have included local content requirements, local equity requirements, measures to protect local firms from foreign competition or regulate flows of foreign exchange, measures designed to upgrade a nation's technological capacity, to require local training and to protect natural resources and, in general, pertain to a wide range of concerns about a developing nation's ability to regulate social and regional development, technology transfer and the conduct of transnational corporations.²⁰⁵

The NWF has also suggested that "the enforcement burden on Mexican officials charged with implementing these investment criteria" could be reduced by such measures as performance bonds, "collected from an investor in order to assure compliance with criteria stipulated by the government," thereby shifting "the burden of proof from the government to the investor, who must demonstrate compliance in order to retrieve the bond."²⁰⁶

Chronic lack of adequate funding for enforcement has been a major factor in keeping environmental law in Mexico largely "symbolic,"²⁰⁷ and environmental organizations have suggested that part of any "compensatory investment" companies make must go to helping Mexico develop its "regulatory infrastructure."²⁰⁸

But the IBEP, ER and Dallas Draft contain no mechanisms for assuring that polluters will pay for environmental degradation resulting from increased investment or that they will pre-pay to prevent such degradation and to substantially bolster Mexico's enforcement capability. The IBEP does "not outline any new revenue" sources to address the disastrous conditions of the border or to prevent them from getting worse.²⁰⁹ Instead, the NAFTA documents promote business as usual, but more of it, tempered only by proposed increases in governmental efforts to promote industry volunteerism.

Right-to-Know vs. Right to Act

The requirement to assess and disclose potential environmental impacts of planned actions in a transparent process open to the public is an intrinsic component of a democratic society, is at the core of environmental law, and is essential to sustainable development. In the U.S., the principle of disclosure is embodied in the National Environmental Policy Act of 1969 (NEPA) which

²⁰⁴ Randy Tucker, "Investment Criteria for Environmental Protection: Preliminary Draft of Main Issues Related to NAFTA" (Washington, D.C.: National Wildlife Federation, 1 August 1991).

²⁰⁵ Cf. Martin Khor Kok Peng, *The Ecologist* (November-December 1990).

²⁰⁶ Tucker, *supra* note 204 at 6.

²⁰⁷ Stephen Mumme, "System Maintenance and Environmental Reform in Mexico: Salinas's Preemptive Strategy," *Latin American Perspectives*, Issue 72, 19(1), Winter 1992 at 129, 133.

²⁰⁸ Cf. Gregory and Kamp, *supra* note 12 at 11.

²⁰⁹ Rich, *supra* note 35 at 31.

requires that federal agencies proposing actions with the potential to cause significant environmental impacts must prepare, with public participation, environmental impact studies and disclose to the public the potential impacts of a range of alternatives, including no action and mitigative actions. NEPA does not require that the least-impact alternatives be chosen, only that the information be made available to the public.

Various other U.S. laws extend disclosure requirements to private industry, particularly in regard to hazardous and toxic substances. Regulations under the *Occupational Safety and Health Act* of 1970 (OSHA), for instance, give workers the right-to-know the hazards and proper handling of substances in the workplace. The *Emergency Planning and Community Right-to-Know Act* of 1986 (EPCRA) requires some industries to disclose use and release of certain substances for purposes of local emergency planning. The *Pollution Prevention Act* of 1990 requires manufacturers covered by EPCRA also to report use, options and effectiveness of pollution prevention measures. The 1990 *Clean Air Act* amendments require some industries to perform hazard analyses. But U.S. law does not require full impact analyses of private industries unless their activities involve federal property or use of federal monies.

The Mexican Constitution contains basic disclosure principles, and the U.S. administration puts a great deal of weight on Article 29 of Mexico's 1988 *General Law of Ecological Equilibrium* which allows SEDUE to require any new industry covered by the article or any industry public or private which is a cause of "ecological imbalance," or any priority industry (i.e., those involving significant quantities of petroleum, petroleum derivatives, pharmaceuticals, plastics, cement, non-metallic mineral-based products, synthetic resins, artificial fibers, basic chemicals and fertilizers) to "describe the environmental impact"²¹⁰ and the risks that it may present before construction may be authorized."²¹¹ In addition, several Mexican states have environmental

²¹⁰ The ER (*supra* note 3 at 25) uses the term review, which comports well with its own title; the IBEP uses the phrase "impact evaluation" (*supra* note 2 at III-41) but also says the Mexican law requires new sources "to file an environmental impact analysis. . .and, for high risk activities, a risk assessment"(*supra* note 2 at A-2). The GAO uses the phrase "environmental impact appraisal" (U.S. Government Accounting Office, *U.S.-Mexico Trade: Information on Environmental Regulations and Enforcement*, GAO/NSIAD-91-227, [13 May 1991] at 7.) As explained by a well-known binational environmental consulting firm, under the Law of Ecological Equilibrium "there are three types of EIS: anyone contemplating a Mexican operation has to file a so-called 'General Statement,' otherwise known as a 'Notice of Proposed Action.' If the impact is negligible, that may be it. But SEDUE may require preparation of either an Intermediate EIS, known as the 'Preliminary Action Impact' or a specific EIS, which is a full environmental impact statement"; see, Bryan, Gonzalez y Vargas y Gonzalez Baz, "Presentation for the Border Trade Alliance Planning Meeting" (Tucson, 19-20 June 1989) at 3.

For specific forms used in these various EISs, see Rockwell International, *Maquiladora/Twin Plant Hazardous Waste Management Handbook* (Dallas, October 1989) at 22-1.

Not coincidentally, most of these "priority" industries are also industries which the Salinas administration has plans to privatize and deregulate. Some of those targeted for deregulation include automobile production, secondary petrochemicals, textiles, cement and domestic electronic appliances. See *National Development Plan (1989-94)* (1 June 1989), cited in U.S. International Trade Commission, *Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, Phase I: Recent Trade and Investment Reforms Undertaken by Mexico and Implications for the United States* (Washington: ITC, October 1990) at 3-8.

²¹¹ IBEP, *supra* note 2 at V-40.

protection laws that provide the basis for right-to-know measures.

The IBEP notes that as of early 1991, Mexico "had identified over 1100 maquiladoras whose activities require environmental risk analysis to determine their regulatory status,"²¹² but the IBEP does not indicate which of the facilities will be analyzed; when those analyses might be completed or by whom; when they will be reviewed or by whom; what criteria will be used to evaluate them; or what alternative dispositions are available to the Mexican authorities after evaluation. All such details are necessary to an understanding of the effectiveness of assessment process.

The IBEP claims that "economic development will be made compatible with environmental protection and public safety" through use of the impact evaluation process,²¹³ but that linkage is hardly guaranteed since neither the Mexican law nor the corresponding U.S.-NEPA sets criteria or contains specific mechanisms for denial of permission to construct a facility, even if its impacts are shown to be highly significant. The laws require only disclosure, not prevention. In addition, the Mexican impact review regulations apply only to proposed new facilities or major modifications of existing ones, even though existing facilities are the cause of the current pollution problems.

Furthermore, neither national laws nor treaties between the two countries require disclosure of transboundary impacts, and neither country has conducted a comprehensive environmental assessment of probable impacts of the free trade agreement itself on the respective countries and on the extraterritorial environment. Instead, the USTR has insisted that "environmental reviews" were sufficient disclosure of potential impacts.

The failure to complete an environmental impact study of potential impacts of the NAFTA led Public Citizen, Friends of the Earth and the Sierra Club, to file a complaint for declaratory and injunctive relief against the administration, claiming that the NAFTA is a major federal action under the definitions of NEPA and, therefore, requires a full EIS, not just a "review".²¹⁴ Others have argued that "given the recent unwillingness of the United States Trade Representative to prepare a full environmental impact statement for the proposed NAFTA, it may be time for Congress" to clarify that Congressional intent is for NEPA to "apply to federal government actions with extra-territorial environmental impacts."²¹⁵

²¹² IBEP, *supra* note 2 at III-41.

²¹³ IBEP, *supra* note 2 at III-41.

²¹⁴ See, *Public Citizen, Friends of the Earth and Sierra Club v. Office of the United States Trade Representative and George Bush*, U.S. Dist. D.C. Civ. 91-1916. On grounds that the plaintiffs did not have standing, the Court granted defendants' motion to dismiss; see, Memorandum Opinion (7 January 1992). Defendants appealed the lower court decision on 4 May 1992. Rep. Tim Wirth was one of several Members of Congress who insisted that the "environmental review" promised in the President's May 1st promotion of Fast Track was not equivalent to a full NEPA or "NEPA-type" assessment/analysis; see, Timothy Wirth, letter to William K. Reilly (7 May 1991) at 1.

²¹⁵ Mary Kelly, *Facing Reality: The Need for Fundamental Changes in Protecting the Environment along the U.S./Mexico Border* (Austin: Texas Center for Policy Studies, October 1991) at 28.

Another major criticism of the NAFTA process has been that the negotiations (like those on the GATT) are held in secret, with access typically limited to government officials and industry "advisors".²¹⁶ Responding to criticism that fast-track authorization would compound this lack of transparency by depriving the public of an opportunity for Congressional overview of the negotiations, the President's Action Plan promised that the administration would "consult with interested members of the public" in preparing the ER,²¹⁷ and the hearings held by the U.S. Trade Representative on its draft ER were a major step in the direction of transparency. Never before had trade negotiations been open to such public comment.

Another major step in the right direction was taken by SEDUE and EPA in their hearings on the draft IBEP,²¹⁸ an action particularly significant in Mexico where such events are unusual despite the Article 5 "Social Participation" directive of the 1988 Law of Equilibrium, which requires that the government consult with the public in environmental policy development and "seek formal agreements of cooperation" with a wide range of private and public organizations.²¹⁹

SEDUE's lack of experience in implementing such basic public disclosure and related participation measures is indicated by several procedural glitches in the hearings. For instance, some Mexican citizens hoping to attend and comment at the SEDUE hearings on the draft IBEP had to call Washington to find out where and when the meetings were being held.²²⁰ And there has been no indication of when or if SEDUE will prepare and hold meetings on the Mexican ER which President Bush had promised to encourage.²²¹ But despite the shortcomings, the SEDUE hearings were a milestone in Mexican progress toward an open, participatory approach to environmental protection.

Notwithstanding these improvements in public process, however, the transparency issue has not been addressed in regard to the negotiations themselves; the only access the public has had to those proceedings has been official press statements, the "leaked" Dallas Draft, and problematical access to NGO "representatives" appointed by the President to various U.S.

²¹⁶ See, Tom Hilliard, *Trade Advisory Committees: Privileged Access for Polluters* (Washington, D.C.: Public Citizen, December 1991).

²¹⁷ Action Plan, *supra* note 6, Tab 4 at 8.

²¹⁸ The IBEP itself raises some transparency issues since it, like the La Paz Agreement which preceded it, "is an executive level agreement, which unlike a treaty, does not require approval by the U.S. Senate;" see Kelly, *supra* note 215 at 18.

²¹⁹ Mumme, *supra* note 207 at 135.

²²⁰ See Rich, *supra* note 35 at 4. The EPA also received complaints about failure to provide adequately for public participation, especially from local governments who were excluded from formulation of the draft IBEP; cf. Sen. John McCain, letter to William Reilly (10 October 1991); William K. Reilly, letter to Sen. John McCain (2 December 1991); Press Release, "EPA Agrees to McCain Request to Include Local Input," (Washington, 16 December 1991). Complaints about the EPA process continued even after release of the final IBEP; see Keith Bagwell, "Environment Plan's Critics Say They Want More Input" (*Arizona Daily Star* 4 March 1992) at B2.

²²¹ Action Plan, *supra* note 6, Tab 4 at 8.

advisory committees.²²²

One of the recurrent questions in the IBEP process has been how to go beyond basic transparency and passive disclosure to develop a citizen-activated right-to-know (RTK) program in Mexico corresponding to the community right-to-know and worker right-to-know programs in the U.S. This issue is ignored in the ER and Dallas Draft, and although the section of the IBEP addressing RTK is generally the most innovative part of the document, ultimately it contains no clear answers. Partly this results from the documents confusing public participation with public disclosure,²²³ but it is also partly a result of circumlocutory thinking as, for instance, when the document ironically states in nearly opaque governmentese that "SEDUE and EPA will seek establishment of requirements for public availability of data on emissions and effluents of pollutants and other elements of a right-to-know program in the Border Area."²²⁴

More significantly, however, it probably stems from resistance of the Mexican negotiators because, as Stephen Mumme has accurately stated, "such freedom of information rules [would] run fully against the grain of past Mexican public administration and are bound to be controversial there."²²⁵

In lieu of clear mechanisms for assuring citizen and worker access to information, the IBEP's primary RTK strategy is development of massive databases and compilations of emissions data on the model of the U.S. Toxics Release Inventory (TRI), which compiles release data on selected industry classes and selected substances reported pursuant to EPCRA.²²⁶ The IBEP contains no mechanism to assure accurate monitoring or estimation of releases, nor any data collection system, but assuming that such data does become available in Mexico, under the IBEP it would be made available through "publication of triennial environmental indices and related data."²²⁷

While not denying the value of large databases (which, if actually developed, would compile valuable information heretofore unavailable), environmental organizations have insisted that such information is useful only if disseminated at the local level and coupled with community empowerment to allow local response to the information gained. The IBEP recognizes the need to establish mechanisms for transferring data locally²²⁸ and border-area non-governmental organizations have proposed several structures for accomplishing the needed transfer. In response to a request from EPA Assistant Administrator Tim Atkeson, for instance, in June 1991

²²² See *supra* at 10.

²²³ IBEP, *supra* note 2 at V-48.

²²⁴ IBEP, *supra* note 2 at V-49.

²²⁵ Stephen Mumme, "Free Trade and the Border Environment: A Critical Assessment of Recent Proposals for Transboundary Environmental Management," draft manuscript of paper presented at the 1992 Joint Meeting of the Association of Borderlands Scholars and the Rocky Mountain Council for Latin American Studies (El Paso, February 1992) at 16.

²²⁶ Cf. IBEP, *supra* note 2 at V-8, V-49.

²²⁷ IBEP, *supra* note 2 at V-49.

²²⁸ Cf. IBEP, *supra* note 2 at V-43.

eight environmental and academic organizations submitted a proposal to EPA for developing a model "grassroots" right-to-know program in the border area which, rather than being a "top-down" program, stressed that "to be effective, any right-to-know program will have to be implemented at the ground level by *municipios* and local ecological or planning committees." Focusing on such existing binational bodies and emphasizing the need to incorporate public participation into the process, and to fund such participation, the groups proposed to "assess community information needs," conduct "a preliminary hazard analysis" and a model for "effective transboundary communications."²²⁹ EPA did not respond to the proposal.

Another proposal,²³⁰ submitted to EPA pursuant to the agency's solicitation notice for Environmental Education Grants,²³¹ similarly focused on existing binational cooperative organizations, emphasized public participation, and included in the scope of its program not only disclosure of hazards, but disclosure of pollution prevention measures available to the community industries.

Such disclosure of available alternatives for eliminating or reducing exposure would complement changes in focus from how much risk is allowed to how much can be avoided; the information would be a useful addition to the TRI-type program of the IBEP and would also be appropriate in any efforts to develop right-to-know programs under the NAFTA.

Information alone, however, is not enough. Besides a right to know, the public must also have the right to act on its knowledge. A free trade agreement cannot be sustainable unless it provides the public a voice in the decision-making process. Grassroots right-to-know models such as those suggested above, given sufficient authority by governments and sufficient financial resources from compensatory investment funds, can provide the public on both sides of the border with effective means both to develop and access information and to use that information in solving site-specific problems. The model has the potential for becoming a powerful tool not only for dissemination of knowledge in the border area and beyond, but a model of democratic action as well.

Beltway Concept vs. Border Reality

In terms of political action, environmental consciousness and conscience are very recent phenomena in Mexico, stemming primarily from outside pressures. The first Mexican environmental law, the 1971 *Federal Law for the Prevention and Control of Environmental Contamination*, for example, "was a direct response to the international momentum for environmental change created by the United Nations' 1972 Stockholm Conference on Environment and Development. President Luis Echeverria, promoting Mexico's bid for Third World leadership, hosted a conference preparatory session in Mexico City and joined the ranks

²²⁹ *Proposal: Developing the Elements of a Public Disclosure/Community Right-to-Know Program in the US-Mexico Border Region*, submitted 11 June 1991 to the US-EPA by representatives of Arizona Toxics Information, Border Ecology Project, El Colegio de Sonora, Comité Civico de Divulgación Ecológica, Enlace Ecológico, Industrial Ecology International, Proyecto Fronterizo de Educación Ambiental.

²³⁰ Arizona Toxics Information, *Proposal: Arizona-Sonora Border Public Participation Project*, (Bisbee, Arizona, 8 March 1991).

²³¹ US-EPA, "Solicitation Notice of Environmental Grants," *Fed Reg* (5 September 1991).

of nations adopting national environmental legislation at the time."²³²

As Stephen Mumme points out, the *General Law of Ecological Equilibrium* was not enacted until 1988, primarily in reaction to serious conditions of environmental degradation in the Federal District and elsewhere. The current intense push of the Salinas administration is a response not only to the worsening of environmental conditions, but to the collapse of the Mexican economy in 1981 and his almost religious faith in economic liberalism as the means to save his country from utter bankruptcy.²³³

This lack of experience with environmental regulation explains in part the discrepancy between Mexican laws and regulations on paper, and their implementation in the field. It is part of what Dick Kamp of the Border Ecology Project calls the "Mexican reality,"²³⁴ a reality that the U.S. administration in its rush to open markets south of the border has, apparently, largely ignored.

Besides the difference between regulation and implementation, the "reality factor" may also account, at least in part, for several other phenomena discussed in this article that appear relatively inexplicable in terms of normal U.S. practice. For instance, the proposal to create a sacrifice zone around the Quimica Fluor plant in Matamoros; failure to notify EPA about the Quimica Organica releases, or to require safety measures at the plant before the community rioted; failure to enforce the Mexican requirement for maquilas to return their waste to the U.S. and the loophole that allows "nationalization" of foreign hazardous waste residues; failure to require monitoring of industries; failure to provide notice of where and when meetings on the IBEP were to be held.

Other examples abound. For instance, on February 11, 1992, SEDUE called a meeting in Nogales, Arizona to discuss its "next-to-final" draft of the IBEP. The copies of the plan distributed at the meeting were not "clean", but included text from the previous draft now struck-over. The stricken passages included "proposals to jointly determine types and residues of hazardous waste in the border, the interchange of specific data on hazwaste management [and] . . . data base on movement of hazmats and hazwaste on the border." Deleted were essentially every reference to public health assessments and to information-sharing on hazardous waste tracking, two topics identified in comments to previous drafts of the plan as being of high public concern. SEDUE officials explained that those issues were adequately covered by domestic laws and other binational agreements, and that public health was not an appropriate topic for an environmental plan. When the "final-final" IBEP was released by President Bush three weeks later, however, all the strike-outs had been removed, and text on the two issues had been restored.²³⁵

²³² Stephen P. Mumme, "Clearing the Air: Environmental Reform in Mexico," *Environment* 33 (10 December 1991) at 9.

²³³ Mumme, *supra* note 232 at 11.

²³⁴ Dick Kamp, "Environment and Free Trade: Reality and the President's Plan," Testimony before U.S. House of Representatives Subcommittee on Commerce, Consumer Protection and Competitiveness of the Committee on Energy and Commerce (8 May 1991).

²³⁵ The quotation is from Kamp, *supra* note 172, Testimony before the U.S. House of Representatives, at 4; see also, Michael Gregory, Testimony presented to the U.S. House of Representatives Subcommittee on Regulation, Business Opportunities and Energy of the Committee on Small Business (Nogales, Arizona, 21 February 1992).

Such instances, like the IBEP itself, are in keeping with "the Salinas program [which] has largely offered formal rather than substantive measures"²³⁶ and indicate why those familiar with Mexican procedures have insisted that EPA must take more account of the Mexican way of doing business and that the NAFTA and IBEP must spell out in very concrete terms the specific mechanisms by which such essential components of the agreement as funding, local control, enforcement, emergency planning, dispute resolution, public participation, public disclosure, etc., will be implemented.²³⁷

One of the most significant aspects of Mexican reality that has been more or less officially ignored in the ER and IBEP is the potential for far-reaching environmental effects from the economic deregulation and privatization that has followed Mexico's 1986 entry into the GATT. As carried out under Salinas' Programa Nacional de Solidaridad (Pronasol or "Solidarity"), these unilateral measures have already accomplished in Mexico much of what the NAFTA is commonly supposed to bring about.²³⁸

Concurrent with deregulation are the Solidarity plans for decentralization which, besides calling for a shifting of industry away from Mexico City and the border area,²³⁹ also call for shifting of responsibility to the states and *municipios*.²⁴⁰ At present it is unclear how much of this will occur or when, but a major component of the plan began going into effect in March 1992 when the Mexican press announced that SEDUE, until then Mexico's chief negotiator on NAFTA environmental issues, was to be downgraded to a commission under a newly created superagency, the Department of Social Development (Secretariat de Desarrollo Social, or SEDESOL).²⁴¹

Although details of the new arrangements were not immediately clear, by May 1992 it was announced that SEDESOL would be the primary agent for instituting the Pronasol. Consequently, those functions of SEDUE dealing with urban development would henceforth be handled directly by SEDESOL, while more distinctly environmental functions (i.e., those previously handled by the Subsecretariat of Ecology under SEDUE) generally would be addressed by two agencies: those concerned primarily with natural resources like water supply, fisheries, etc.,

²³⁶ Mumme, *supra* note 207 at 138.

²³⁷ Mary Kelly, "Mexico/United States/Canada Free Trade Negotiations and the Environment," Remarks before the U.S. Senate Finance Committee (20 February 1991); Kamp, *supra* note 234.

²³⁸ Cf. U.S. International Trade Commission, *supra* note 210 at 2-1.

²³⁹ Cf. *supra* note 39.

²⁴⁰ Gerardo Ponce de Leon, "Propone Sedue un Sistema Municipal para Controlar el Entorno Ecológico," *El Imparcial* (18 August 1991); cf. Dick Kamp, Letter to Charles, Deputy U.S. Trade Representative, "Re: Draft Environmental Review (DER) of NAFTA" (11 December 1991) at 2.

²⁴¹ See, Oficia de la Presidencia de la Republica, *Decreto que Reforma, Adiciona y Deroga Diversas Disposiciones de la Ley Organica de la Administracion Publica Federal*; also, Jose Cabrera Parra, "Forma y Fondo: Colosio, Secretaria de Desarrollo; Chirinos a Veracruz; Borrego o Palacio Alcocer al PRI," *La Voz de la Frontera* (10 March 1992).

would be under the Agricultural Ministry (SARH), while those dealing with pollution and enforcement would be retained by the new Comisión Nacional de Ecología.²⁴²

The shifting of national agencies has raised many questions about how Mexico will address environmental issues related to the NAFTA. For instance, although the decentralization process presumably is to be accompanied by a concomitant shift of authority to the states, it is unclear whether or not states will be given more responsibility with little or no authority or resources.²⁴³ As this article was being prepared for publication, it appeared that SEDESOL was planning to retain federal authority over all issues pertaining to toxics and pollution, and to the U.S.-Mexico border, while shifting enforcement authority to the states.

Environmental elements of the Pronasol are largely embodied in the Salinas administration's National Environmental Protection Program 1990-1994 (NEPP), an ambitious project to create almost out of whole cloth a comprehensive regulatory structure, the priorities of which are "(i) to strengthen the legal framework. . . (ii) to subject all economic activities and projects to strict criteria of environmental care; (iii) to design policies and take actions to prevent further deterioration of, and improve, air and water quality, prevent or slow down soil erosion, and introduce adequate treatment of solid wastes and hazardous materials; and (4) to increase public awareness of, and participation in, environmental protection."²⁴⁴

The first phase of the NEPP, which is the basis for a World Bank loan of \$50 million to Mexico, consists of four components: (1) Key Environmental Services, including monitoring of negative environmental impacts; (2) Modernizing Environmental Management; (3) Legislation and Standards; and (4) Studies. The modernization component includes the decentralizing of SEDUE. The Bank's Staff Appraisal of that component, and the accompanying annexed documents from SEDUE, provide the most detailed generally-available description to date in English of Mexico's decentralization plans, which include a pilot program, for transferring to up to five states (beginning with Jalisco and Tamaulipas) of "front-line pollution control and natural resources management" while "reserving second-tier oversight functions" to SEDUE and developing an "investment plan" to support the states' capacity to carry out their new responsibilities.²⁴⁵

²⁴² Gerardo Galarza, "La 'Supersecretaria' de Desarrollo Social Intervendrá en Todas las Áreas de Gobierno," *Proceso* (11 May 1992) at 16. As of this writing, many questions about the new arrangements and their implications for the environment remain unanswered; for instance, how the new Commission will be funded, who will be in charge, who will be represented, how the shift will be implemented, etc.; see, e.g., Anon., "Environmentalists Criticize Merger Involving Mexican Ecology Agency," *Arizona Daily Star* (12 April 1992) at A-8; Tim Golden, "Mexico's New Leader? The Whispering Begins," *New York Times* (13 April 1992); David Clark Scott, "Mexico Shake-Up Rattles Environmentalists," *Christian Science Monitor* (4 May 1992) at 6.

²⁴³ Cf. Maria Rosales Betancourt, "Desaparición de SEDUE," *La Voz del Norte* (27 March 1992).

²⁴⁴ The World Bank, *Staff Appraisal Report: The Mexico Project* (Washington, D.C., 9 March 1992) at 12.

²⁴⁵ The World Bank, *supra* note 244 at 24-27; see also, Letter dated 31 January 1992 from Sergio Reyes Lujan Undersecretary of SEDUE to Rainer B. Steckham, The World Bank, describing the "Strategy to Transform SEDUE into a Second-Tier Institution," with accompanying documents, "Profile of a Second-Tier Environmental Organization,"

Besides subordination to another agency and decentralization, SEDUE's transformation includes the agency's privatization, a process which could have serious impact on enforcement activities.²⁴⁶ In November 1991, for instance, SEDUE's field staff was privatized,²⁴⁷ and its plan to eliminate 48% of its inspectors was announced.²⁴⁸ In January 1992, it fired all its Sonoran field staff.²⁴⁹ These actions are in apparent contradiction to the otherwise reassuring report from EPA that the agency is increasing the number of its border inspectors by 400%.²⁵⁰ Furthermore, while in theory private inspectors will have high liability as an incentive to keep honest, privatization obviously presents a high potential for corruption (another aspect of Mexican reality).

Regulations vs. Enforcement

One of the recurrent criticisms of the NAFTA, and a fear expressed even by high-level Mexican officials, has been that it could worsen environmental conditions on both sides of the border and especially in Mexico, where environmental regulations have traditionally suffered from weak enforcement.²⁵¹ Similarly, a major criticism of the IBEP has been that it, like the La Paz Agreement which preceded it, is weak in the area of enforcement.²⁵² The question of enforcement—raising, as it does in Mexico, the specter of Yanqui imperialism and other threats to sovereignty—has been one of the more difficult issues for negotiators.²⁵³

"Coordination between SEDUE and SARH," and "Program for Delegating to SEDUE's State Delegations Review of Some Types of Environmental Impact Statements," translated as Annexes 1.6, 1.7 and 1.8, respectively, at 68-82.

²⁴⁶ E.g., according to Stephen Mumme, "a permanent agency can collect data, track, monitor, regulate and ameliorate environmental problems; this [shifting of agencies] only interrupts institutional continuity and hurts programs"; quoted in Anon., "Environmentalists Criticize Merger Involving Mexican Ecology Agency," *supra* note 242.

²⁴⁷ Anon., "Privatizara Sedue Politica Ambiental," *El Imparcial* (19 November 1991).

²⁴⁸ Rosa Ma. Chavarria Diaz, "Elimina SEDUE al 48% de los Inspectores que Verificaban Empresas Contaminantes" *El Nacional* (11 November 1991).

²⁴⁹ Personal communication with Miguel Angel Gonzales, fired SEDUE inspector (Agua Prieta, Sonora, 21 February 1992).

²⁵⁰ IBEP Summary, *supra* note 36 at 21.

²⁵¹ See, Juanita Darling, "Experts See U.S. Trade Pact as Mexico Pollution Threat," *Los Angeles Times* (17 July 1991) at A-1, citing a report "prepared by foreign experts commissioned by the [Mexican] government" which "indicates that high government officials privately share many of the worries about free trade expressed by ecologists throughout North America despite the government's assurances that free trade will provide the money for environmental improvement."

²⁵² E.g., Rich, *supra* note 35 at 31.

²⁵³ Cf. Scott C. Fulton, US-EPA Director of Civil Enforcement memorandum to Raymond B. Ludwizewski, US-EPA Acting Assistant Administrator, re. "Integrated Border Plan—Follow-up from Oaxaca Meeting" (26 June 1991) at 1: "The terms 'enforcement' and 'compliance

Beyond the resistance on the Mexican side, one of the problems is that the IBEP contains little of a binational nature to enforce, since it relies almost exclusively on unilateral enforcement by each nation of its own domestic regulations. Unlike the European Community, which has begun multi-regional integration of standards and regulation, the process foreseen by the NAFTA and IBEP is not integration at all, but a "separate-but-equal" arrangement which contemplates integrated action only in respect to mutual training, joint inspection and reciprocal encouragement of each partner's unilateral efforts.

Faced with public concern about obvious environmental degradation on the southern side of the border and the public perception of lax regulation by the Mexican authorities, the decision of the trade representatives to limit regulatory scope to compliance with existing domestic laws has led the administration to place great emphasis on the recent improvement in number and applicability of Mexican laws and regulations. The Action Plan and ER give what the administration apparently feels is its highest praise by stating that many Mexican laws are modeled on those of the U.S. Large portions of the ER and IBEP are devoted to review of existing US/Mexico cooperative efforts and praise of Mexican "progress" in coming up to US standards.

The regulatory reality, however, is that while "Mexican and U.S. environmental laws and regulations are similar. . . . Mexico's environmental implementation and enforcement system [is] still being developed."²⁵⁴ For instance, Mexico does not have regulations to address clean-up of abandoned waste dumps, to restrict land disposal of hazardous waste, or to regulate leaking underground storage tanks and has not identified sites that pose a significant hazard to human health or the environment.²⁵⁵

In this atmosphere what enforcement may mean is, in the words of John Rothman, EPA's Senior Attorney for Multimedia Enforcement and International Activities, "a mystery."²⁵⁶ It is particularly mysterious in regard to problems like air toxics and groundwater contamination for which neither country has standards, and the mystery deepens with reports that SEDUE officials believe the agency can enforce U.S. standards in Mexico even when Mexico has no corresponding regulations.²⁵⁷

monitoring' are difficult terms for the Mexicans. For them, these terms smack of 'police state' tactics, perhaps because of Mexico's turbulent history."

²⁵⁴ US-GAO, *supra* note 210 at 5. The "Legislation and Standards" component of the Salinas NEPP proposes to address this problem in part by issuing, between 1990 and 1994, a regulation on environmental risk, 87 technical standards in various environmental media and risk management, 17 technical guidelines for preparing environmental impact assessments, "a single standard for a large group of hazardous substances and industrial processes," a standard on transporting hazardous substances, and a regulation on risk management of industrial processes." See, World Bank, *supra* note 244 at 27; and "Technical Standards to be Enacted under the Project," Annex 2.1 at 102.

²⁵⁵ US-GAO, *supra* note 210 at 6.

²⁵⁶ John Rothman, personal communication at EPA Region IX Border Coordinators meeting with Northeast Sonora-Cochise County Health Council (Nogales, Arizona, 1 April 1992).

²⁵⁷ Rothman, *supra* note 256.

To U.S. observers, part of the mystery results from semantic difficulties, from things lost in translation, since basic regulatory terms and concepts in Mexico take on different meanings than they have north of the border. For instance, the term "plant closure," pointed to by U.S. pro-traders as an example of beefed-up environmental enforcement under Salinas,²⁵⁸ does not usually mean quite what a U.S. citizen might ordinarily expect. It could mean, for instance, no more than a paper closure, or a closure of a few hours while the industry in question gets its papers in order; it might mean closure of a leaky valve or a relatively insignificant part of the plant in terms of total toxics output of the operation—similar to US-OSHA's tagging of an unsafe railing or an electrical switch. Usually, a formal "worst case" or "permanent" closure means shutdown of a final 20% of a manufacturing operation.²⁵⁹

The IBEP does little to demystify the situation or to overcome the significant gaps in Mexican regulatory authority and capability. In regard to abandoned waste dumps, for instance, the IBEP says only that the two nations will attempt "to devise a strategy" for identifying sites on the Mexican side of the border²⁶⁰ and that Mexico will continue with its efforts to get industries voluntarily to "make a systematic effort to identify sites, select the needed cleanup action, and oversee the cleanup action."²⁶¹ As of April 1, 1992 however, no progress had been made towards accomplishing even these modest goals, and EPA officials were at a loss to forecast when SEDUE might begin the "systematic efforts."²⁶²

Even if they do begin, such commitments fall far short of being the adequately funded, scheduled, comprehensive monitoring program needed to determine public and environmental health conditions in all environmental receptors and to establish baselines for ongoing monitoring. They are even further from actual "cleanup of pollution along the U.S.-Mexico border"²⁶³ and specific mechanisms for preventing future contamination, which the IBEP and

²⁵⁸ The IBEP, for example, notes that inspections from March 1988 through the end of 1990, resulted in "980 partial and 1,139 temporary plant closings and 3 permanent plant closings"; IBEP *supra* note 2 at A-2. Cf. also IBEP Summary, *supra* note 36 at 13: noting that between July 1991 and February 1992, "70 facilities on the Mexican side of the border have been shut down for varying periods of time for environmental violations. Most were cited for violations of air pollution control laws or for the improper handling and storage of hazardous substances" (emphasis added).

²⁵⁹ Oral testimony of Fernando Medina-Robles, Director General of Comité Civico de Divulgación Ecológica, A.C. before the U.S. House of Representatives, Subcommittee on Regulation, Business Opportunities and Energy of the Committee on Small Business (Nogales, Arizona, 21 February 1992).

²⁶⁰ IBEP, *supra* note 2 at V-33.

²⁶¹ US-GAO, *supra* note 210 at 6.

²⁶² Enrique Manzanilla, EPA IX Border Coordinator at meeting with Northeast Sonora-Cochise County Health Council (Nogales, Arizona, 1 April 1992).

²⁶³ Bruce Babbitt and Ron Wyden, "Who's Afraid of Mexican Trade?" *Los Angeles Times* (11 February 1992) at B7. Clean-up of existing contamination in the border area has been a major issue in the NAFTA debate conspicuously absent from administration discussion; see, e.g. Gephardt, *supra* note 1 at 5. Had the bill passed, specific funding lacking in the IBEP would have been provided for cleanup of border pollution by "The U.S.-Mexico Border Environmental

NAFTA must contain if they are to be successful even in the short term.

As part of their enforcement "strategy", the EPA and SEDUE plan to "develop information on U.S. corporate affiliation with maquiladora plants."²⁶⁴ Presumably this information would be made available to the public along with TRI-type data as part of the agencies' plan to "use the stigma of unfavorable publicity to encourage industries to realize that noncompliance involves serious risks."²⁶⁵ It is not clear whether the risks referred to are health risks or public relations risks, but in any case public comments and EPA's own internal memos have suggested that the information made available should include the worldwide environmental compliance histories of transnational corporations,²⁶⁶ a suggestion not referred to in the IBEP.

A far more obvious enforcement strategy than trying to embarrass polluting industries through public disclosure, would be to provide the public of both countries with joint access to industry compliance records and with access to each nation's courts to obtain injunctive relief and to enforce compliance of nations and companies with the conditions of the trade agreement, or with the laws of either nation. Such citizen suit provisions, although frequently listed in public comments, are absent from the IBEP and Dallas Draft.

Border Commission vs. Local Representation

Implementation of the IBEP is supposed to occur through coordinated efforts of a broad array of state and federal agencies, most prominent of which are the International Boundary and Water Commissions (IBWC/CILA) and the La Paz Agreement Coordinators and their associated Working Groups. Both of these bodies have been strongly criticized and subjected to proposals for replacing, restructuring or subordinating them to EPA and SEDUE or to a new binational agency.²⁶⁷

Protection Act," (S. 503) introduced on 26 February 1991 by Arizona Senators John McCain and Dennis DeConcini. The IBEP itself has been popularly called a "border cleanup plan"; cf. press release from Sen. John McCain's office, *supra* note 181 at 1; Associated Press, "EPA Unveils Plan to Clean Up Border," *Sierra Vista Herald* (2 August 1991) at A-1; Ruben Hernandez, "Vagueness Hurts Border Cleanup Plan," *Tucson Citizen* (27 September 1991) at 1B; Maggie Rivas, "EPA Cleanup Plan Meets Resistance All Along the Border," *Arizona Daily Star* (30 September 1991) at 1B.

The term "Cleanup Plan" is misleading since there is no effective strategy for locating existing waste dumps in Mexico and even less strategy for cleaning them up if they are found. Furthermore, Mexican requirements for EIAs, as noted above, apply only to new or expanded facilities, not to the existing facilities that are the source of current problems. And neither country requires industries to re-evaluate their prevention and control technology at the end of each permit period and to install better technology that may have become available since the previous permit was issued.

²⁶⁴ IBEP, *supra* note 2 at V-8.

²⁶⁵ IBEP, *supra* note 2 at V-5.

²⁶⁶ Gregory and Kamp, *supra* note 12 at 12.

²⁶⁷ E.g., Stephen P. Mumme, "Pressures for Reform of the IBWC" *Transboundary Resources Report* (Winter 1991) at 4, 13; H. Ingram and D. White, "The U.S. Section of the IBWC: Expanding State and Local Involvement," presented to the Tri-National Conference on the North

Mary Kelly of the Texas Center for Policy Studies, for instance, notes that "it has not been any 'lack of authority' on IBWC's part that has caused the problems in Nogales or other parts of the border region. Rather, it has been the IBWC's lack of an [sic] aggressive planning and implementation that results in sewage release situations reaching serious proportions. . . . We believe that Congress should fully explore whether IBWC should have these planning responsibilities or whether they would be better carried out between EPA and SEDUE under the La Paz agreement or, even, through some new binational mechanism."²⁶⁸

Kelly has also called for raising the La Paz Agreement to treaty level in order to "allow for public participation and access to information in both countries [and] help insure enforceability."²⁶⁹ The La Paz Agreement, as has been frequently pointed out, has no teeth, depending like the IBEP primarily on volunteerism and non-binding encouragements.²⁷⁰ The IBWC, besides its restriction to water issues, has been strongly criticized for unresponsiveness to the public.²⁷¹

The La Paz Coordinators group and IBWC share other faults. Both, for instance, operate in relative opacity, both are open to the charge of being weak on public disclosure, both are appointed from the top down rather than representing the border public, both lack "mechanisms for adequate participation and enforcement of environmental norms and programs agreed upon by the two countries."²⁷²

Citizen right-to-know, grassroots participation, enforcement, community empowerment and local binational cooperation are the essential keys to building an effective and sustainable free trade agreement. They are exactly the elements federal-level appointed bodies like the IBWC and La Paz Coordinators are intrinsically ill-equipped to provide. The top-level bodies are also ill-suited to perform self-evaluation or allow citizen oversight of the IBEP implementation process itself. Such functions are best addressed on the ground by communities who are in a position to know what their problems are and how best to deal with them. Conversely, what local communities lack, federal-level bodies are more likely to have—i.e., authority and resources.

Recognizing the need for local participation in the existing national-level structure, the IBEP proposes several new bodies to address the problem by supplementing the existing national and binational bodies with various advisory groups.

At the local level, the ER notes that Mexico and the U.S. have begun a program to "encourage establishment" in other sister cities along the border of groups patterned after the cooperative efforts of the Comité Local de Ayuda Mutua (Local Committee for Mutual Aid, CLAM) of

American Experience Managing International Transboundary Resources (19-23 April 1991).

²⁶⁸ See, Mary Kelly, letter to Sens. John McCain and Dennis DeConcini, "Re: Senate Bill 503—U.S.-Mexico Border Environmental Protection Act" (Austin: Texas Center for Policy Studies) at 3.

²⁶⁹ Kelly, *supra* note 215 at 19.

²⁷⁰ Cf. Kamp, *supra* note 172 at 2.

²⁷¹ Cf. Kelly, *supra* note 215.

²⁷² Mumme, *supra* note 225 at 13.

Matamoros and the Brownsville Local Emergency Planning Committee (LEPC).²⁷³ CLAMs are similar in concept to the LEPCs, and were established to assist in implementing Annex II (1983) to the La Paz Agreement. Although they currently exist only in a few industrial cities, the IBEP proposes to "support local action groups" in general²⁷⁴ and, in particular, reiterates the plan to "establish additional local groups such as the CLAM/LEPC organization."²⁷⁵

Border NGOs had previously suggested similar bodies be established²⁷⁶ utilizing the LEPCs on the U.S. side and other committees, civil associations or similar groups in Mexico such as the *Comités Ecológicos* established at local and state levels under Mexico's 1988 Law of Equilibrium. The *Comités Ecológicos* have a broader purview than the CLAMs, are a component of SEDUE's planned decentralization, and have been proposed as the source of representatives in SEDUE's PAC.

The IBEP also proposes several other participatory structures at the local level. For instance, it proposes that "as specific environmental programs are developed and carried out in the sister cities, specific public advisory groups may be established to fit specific needs as they arise." These "project specific groups" would presumably be transitory and their "form and content" would be left to participants to determine.²⁷⁷

The closest thing to an existing model of this concept may be the Ambos Nogales Project, established in 1990 to address water contamination issues in the sister cities of Nogales, Sonora and Nogales, Arizona. Begun as a collaboration of non-governmental organizations, including non-profit environmental groups, public health professionals and universities on both sides of the border, the network has expanded to include local and state government officials and has had considerable success in developing local binational cooperative efforts to address broader environmental concerns than emergency response or primary health. Without help from SEDUE or EPA, the network began testing local water supplies, found industrial contamination, and started a complex planning effort to identify the scope of the problem and develop solutions.²⁷⁸

The Ambos Nogales Project does not quite fit the IBEP concept of a sister city or "project-specific" group. For one thing, it is deliberately independent of EPA and SEDUE; for another, the Project avoids the problems of being wholly advisory and wholly without funding—two principal weaknesses of the groups proposed by the IBEP. In addition, because the Project is truly binational and participatory, it escapes the fundamental failure from which all the EPA-SEDUE models suffer because, like the IBEP standards and enforcement programs, they institutionalize the "separate-but-equal" concept.

NGOs have proposed that EPA and SEDUE recognize another kind of organization besides those

²⁷³ ER, *supra* note 3 at 134; IBEP, *supra* note 2 at V-38.

²⁷⁴ IBEP Summary, *supra* note 36 at 28.

²⁷⁵ IBEP, *supra* note 2 at V-38.

²⁷⁶ Cf. Gregory, *supra* note 28 at 5.

²⁷⁷ IBEP, *supra* note 2 at V-47.

²⁷⁸ See, e.g., University of Arizona, "Interim Ambos Nogales Water Resources Study Summary of Water Quality Analyses Collected in June 1990," (Tucson, Az., October 1990).

linked to hazardous materials response groups, or, like the Ambos Nogales Project, to specific environmental media. Built around attempts to address a broad range of local community needs, these organizations, like the Nogales Project, would depend on independence and on local binational community participation.

The Northeast Sonora-Cochise County Health Council, for example, has been particularly active in identifying and prioritizing environmental health issues in its region, and has taken a proactive role in working with EPA and SEDUE to implement the IBEP. The Council has presented itself to EPA and SEDUE as a potential working model of how other communities along the border might organize to participate in the IBEP process.²⁷⁹ As Council members explained at a meeting with EPA in April 1992, the Council includes representatives of several cities, counties, health agencies and non-governmental organizations from both sides of the border in order to "provide regional assistance in the full range of public, occupational and environmental health problems that arise on either side of the international border as well as those that are transboundary in nature."²⁸⁰

Neither the Ambos Nogales Project nor the Northeast Sonora-Cochise County Health Council fits into the IBEP scheme though both are clearly carrying out the kind of activities envisioned by EPA and SEDUE. NGOs and local governments have suggested that the federal agencies should adjust their paradigms to fit the grassroots organizations into IBEP implementation.

One particularly debilitating weakness of all the groups proposed by the IBEP is lack of funding. It is the same weakness that has crippled LEPCs, many of which, though existing on paper, have never existed in fact and have never had the financial resources to carry out their federally-mandated duties to provide effective emergency planning and right-to-know activities in every U.S. community. Like the LEPCs, the advisory groups proposed in the IBEP (and, evidently, the CLAM/LEPC groups) are expected to do all the work as well as come up with the means to do it.

This problem is particularly acute on the Mexican side of the border where, under conditions of extreme poverty, funding of public participation is not a governmental priority. But there is no mechanism in the IBEP for transferring funds across the international line for use by local communities. NGOs have suggested that funding of grassroots participation is a particularly appropriate use of compensatory investment monies.

At the national-binational level, the primary vehicles for public participation under the IBEP are two Public Advisory Committees (PACs) to be "chartered in Mexico and the U.S. respectively."²⁸¹ The functions of these PACs include, besides acting in an advisory capacity to EPA and SEDUE, serving "as fora for the exchange of information and ideas;" assisting "in the promotion of information and technology;" serving "as conduits for the public dissemination of information [and] as a clearinghouse for the receipt of public comments;" and promoting

²⁷⁹ See, Agua Prieta Region Binational Border Health Council [the Council's earlier name], Environmental Health Subcommittee, memorandum to Ed Fox, Director, Arizona Department of Environmental Quality (3 February 1992) at 1.

²⁸⁰ See, Northeastern Sonora-Cochise County Health Council, memorandum to Enrique Manzanilla, US-EPA IX Border Coordinator, Re: Council Coordination with EPA and SEDUE for implementation of Integrated Border Environmental Plan (1 April 1992) at 2.

²⁸¹ IBEP, *supra* note 2 at V-47.

"community relations and right-to-know policies."²⁸²

While still in the draft stage, EPA was discussing the PAC concept (then called "U.S. border advisory board") as "composed of over 100 border community leaders representing NGOs, industry, religious, and environmental groups." From this unwieldy assembly, a steering committee would be "established, made up of representatives from the larger advisory body."²⁸³ None of this detail is spelled out in the IBEP, and EPA officials have more recently stated that the PACs will probably consist of only "about 30 members," and will include representatives of labor as well as the other interests.²⁸⁴ The Mexican PAC would draw heavily upon the Ecological Committees²⁸⁵ which are authorized nationwide but have yet to be established in most border cities.

While applauding the goals of the PACs, NGOs have criticized the concept for falling into the usual trap of federal top-down appointive bodies: they are not representative of local communities, are not binationally integrated, are strictly advisory, do not give locals any authority or funding and are, therefore, unworkable. A border-wide commission or Public Advisory Committee may be useful at the top for assimilating data and setting broad policy at the federal or binational level, but the actions of such bodies must be based on local participatory groups since local know-how is essential for dealing with local issues like identification of problems, hands-on clean-up, public education, information dissemination, etc.

NGOs have proposed several other organizations to implement and oversee the border plan while overcoming the weaknesses of the groups proposed by the IBEP. Various called Border Environmental Commission, Joint Commission, North American Commission (or Committee) on Trade and Environment or some other variant, these all are based on the principles of binational community representation and independence and all have in common certain functions—oversight of IBEP implementation, for instance, and identification and prioritization of problems, and channeling of resources to assure that those problems are addressed.²⁸⁶

²⁸² IBEP, *supra* note 2 at V-48.

²⁸³ Richard Kiy, EPA Special Assistant for U.S.-Mexico Affairs, letter to Dick Kamp (20 November 1991) at 2.

²⁸⁴ Manzanilla, *supra* note 262.

²⁸⁵ IBEP, *supra* note 2 at V-47.

²⁸⁶ See, e.g., Arizona Toxics Information *et al*, *supra* note 23 at 1; National Wildlife Federation and Pollution Probe, *supra* note 23 at 8. Cf. also, Gregory and Kamp, *supra* note 12 at 6, proposing that "a joint bilateral or trilateral commission shall be established, consisting of representatives from governments and non-governmental organizations of participating countries, to develop an effective regulatory program and to oversee its implementation." Cf. Ward, *supra* note 23 at 11 calling for a commission "composed of governmental and non-governmental experts from all three signatories. . . . empowered to hear complaints from governments, non-governmental organizations, and citizens regarding the failure of any signatory to enforce its own environmental standards or applicable international norms on trade-related activities." Cf. Kelly *et al*, *supra* note 12 at 45 citing suggestion of Grupo de los Cien for a new "joint commission" to address social and environmental issues, and providing for "multi-level governmental and NGO participation." Kelly, *supra* note 179 at 20, has proposed "a new binational agency. . . [with] authority for monitoring and enforcement" and a governing board

Similar proposals have been made in Congress. Senate Bill 503, for instance, introduced in 1991 by Sens. McCain and DeConcini of Arizona, would have created a Border Advisory Committee with functions similar to some of those proposed by border NGOs.²⁸⁷ A draft House Concurrent Resolution circulated in early April 1992 by Rep. Ron Wyden of Oregon proposed to establish a "Bilateral Commission of Environment. . . authorized to raise and spend money" to meet the "expenditures of several billion dollars. . . needed to provide sufficient environmental infrastructure capacity" on the border.²⁸⁸

In March 1992, a fundraising prospectus was floated by an organization with similar goals. "The Foundation for Border Progress (U.S.)/Fundación Progreso Fronterizo (Mexico)" identified itself as "a newly formed binational, private, nonprofit foundation whose purpose is to direct funds from private enterprise donations to existing organizations on both sides of the border [targeting] groups working in the areas of environment, health, housing, and education."²⁸⁹ Apparently begun as a concept in EPA's Office of International Affairs with Director Tim Atkeson and Border Coordinator Richard Kiy, Border Progress is meant primarily to answer the need for funding of IBEP implementation and as a means for transboundary channeling of corporate resources to nonprofit groups on either side of the border. The primary source of funds would be grants from the private sector.²⁹⁰

The most ambitious proposal for a border-wide citizens group calls for a Border Health Environmental Council (BHEC) which, as conceived by a broad contingent of environmental groups, health agencies, representatives of academic institutions and individuals currently active in border health and environment issues, would build on the concept of local binational committees like the Northeast Sonora-Cochise County Health Council to form an integrated network of local and regional bodies representing border communities. The BHEC funding proposal indicated that the organization would be rigorously participatory and binational, democratically selected, and "responsive and accountable to the needs of local border communities,"²⁹¹ and would "act as a catalyst, empowering local communities to begin to

that includes "representatives of state and local governments and community organizations on both sides of the border."

²⁸⁷ S. 503, *supra* note 263 introduced by DeConcini and McCain at 8.

²⁸⁸ Rep. Ron Wyden, Draft H. Con. Res., F:\M\Wyden\Wyden.002 (19 March 1992) at 2. On 6 April 1992 Rep. Jim Kolbe of Arizona announced that he too would introduce a bill to establish a "U.S.-Mexico Border Commission" designed to "examine the needs of border communities affected by a North American free trade agreement, and develop a program for meeting those needs" during the "transition" period; Commission members would be 50% from the U.S., 50% from Mexico and would seek funding from city, state and federal officials to address identified problems; see Ellen Gamerman, "Kolbe Seeks Panel to Aid Free Trade Transition," *Arizona Daily Star* (7 April 1992) at A4.

²⁸⁹ Foundation for Border Progress, "Preliminary Brochure, March 4, 1992," cover letter by Gail Sevrens (San Diego, 27 March 1992) at 1.

²⁹⁰ Personal communication from Dick Kamp, Director, Border Ecology Project (2 April 1992).

²⁹¹ U.S.-Mexico Border Environmental Health Council, *U.S.-Mexico Border Environmental Health: Planning for a New Era* (n.pl, 15 May 1992) at 11.

develop and institutionalize binational efforts geared toward the identification, prioritization, and implementation of strategies to resolve border environmental health problems" and seeking to guarantee "that citizens impacted by environmental and health problems set priorities for their own concerns, gain access to public, private industry, and foundation funds, and participate in the research and implementation of solutions."²⁹²

NGOs have proposed that the border council model, coupling local action groups with representative regional committees or commissions, is equally applicable beyond the border. Incorporated into the concept of a trinational Commission on Trade and Environment, it could provide local communities with the opportunity and capability to deal with problems that arise from increased investment in their areas. Both the IBEP and the NAFTA would benefit from inclusion of such bodies and the institutionalizing of specific mechanisms to (1) ensure that financial, informational and technical resources are available to and accessible to citizens at the local level; (2) involve citizens of both countries in the prioritizing of local problems and their solutions; (3) ensure that local communities have the authority to oversee and enforce conditions of the agreement; and (4) provide authority and otherwise ensure effective local development and implementation of measures for protecting human health and the environment, including the gathering and dissemination of information.

Conclusion

Unprecedented public interest in trade and the environment led the Bush administration, in its successful strategy for winning fast-track reauthorization, to commit to inclusion of trade-related environmental issues in the North American Free Trade Agreement (NAFTA). The administration's concession was tempered, however, by its tactic of addressing environmental issues on a parallel track, rather than integrating environment and trade in a single process.

The primary vehicles for dealing with issues on the environmental track have been two documents, a *Review of U.S.-Mexico Environmental Issues* (ER) and an *Integrated Environmental Plan for the Mexican-U.S. Border* (IBEP). Public participation opportunities in preparation of the ER consisted of several public hearings held by the Office of the U.S. Trade Representative. While these hearings, like consideration of environmental issues, were unprecedented in the history of trade agreements, the negotiations themselves remained closed to the public and the Draft ER presented to the public for comment did not include comprehensive disclosure of potential impacts, consideration of alternatives, mitigation measures, and other basic components of standard environmental analysis required of federal agencies under the *National Environmental Policy Act*. In addition, the ER, despite public comment to the contrary, focused almost entirely on environmental issues along the U.S.-Mexico border, rather than addressing the continental and global impacts of the proposed free trade agreement.

Although preparation of the IBEP also took place behind closed doors with no representatives of the public present, public participation opportunities in development of the IBEP have been somewhat greater than in development of the ER, with more public hearings, including a few precedent-setting sessions on the Mexican side of the border. Both documents, however, have been strongly criticized by the public as nearly totally inadequate responses to environmental concerns raised by the NAFTA proposal. In the broadest terms, the criticism has placed blame for the failure on the administration's insistence on promoting economic growth instead of sustainable development.

²⁹² U.S.-Mexico Border Environmental Health Council, *supra* note 291 at 4.

The environmental community has proposed inclusion in the IBEP and the NAFTA of a broad slate of specific elements essential to sustainability, including comprehensive scope; public participation; right-to-know; protection of biological and cultural diversity; protection of local, state and national health and environmental standards; pollution prevention; cleanup of existing pollution; enforcement; funding; citizen oversight; access to judicial redress; dispute settlement; community empowerment; and equity.

When measured against these and other specific elements, the ER, the IBEP and the Dallas Draft are significantly lacking. By failing to adequately address such specifics, the administration has not only brought into question the credibility of its commitment to include environment in the trade agreement and to provide the basis for the long-term benefits that might otherwise result from a continental free trade agreement, but has left itself open to charges that its plans for economic integration are no more than a replay of the imperialism which has characterized U.S. relations in Latin America for the past century and a half.

Recent proposals for creation of new environmental organizations to overcome some of the deficiencies of the IBEP have been put forward by the administration, Members of Congress and others; but insofar as the proposed organizations would be appointed rather than representative of local communities, separately-constituted rather than binationally integrated, and lacking in funding and authority, they would continue rather than correct major weaknesses of the ER and IBEP.

On the other hand, proposals made by environmental groups in all three countries call for creation of bi- and tri-nationally integrated, transparent and democratically-selected bodies with specific investigative, disclosure and enforcement authorities, and with secure funding based on compensatory investment measures required of the private sector. Such bodies, established at local, regional, and binational levels under the IBEP, would provide an effective mechanism for oversight and implementation of the IBEP in the U.S.-Mexico border area; established under the NAFTA, they could facilitate right-to-know, public participation and other elements of sustainability wherever increased development occurs as a result of economic integration. Without such mechanisms to ensure effective implementation of basic environmental safeguards, the groups have argued, the NAFTA should not be ratified.

The Sustainability Movement: Making It Happen (1993)

Michael Gregory, presented to the Arizona Earth Day Rally, Tempe, Arizona (22 April 1993)

In at least four ways, 1992 was an important year for the environment.

First, the Earth Summit in Rio put the concept of *sustainability* in everybody's consciousness—by which we understand that we can no longer continue to squander our children's and grandchildren's heritage; that we do not own the earth, but are only its stewards; that we have to conserve and protect the earth's resources and pass them on so future generations can enjoy the same or better opportunities as we have enjoyed. Rio reminded us that we not only *should*, but *must* walk lightly on the earth.

But 1992 was also the year when we found that the hole in the ozone layer is growing, that there is more than one hole; that the Earth's protective shield is deteriorating over North America as well as the South Pole. And in 1992 we found out that the oceans are filling up with junk and dying even faster than we thought. In 1992 we found ourselves in the US continuing to produce an obscene amount of junk per capita, smothering ourselves and our planet in waste paper, waste plastic, waste packaging, waste tires. . . you name it.

In 1992 we confirmed that the US is by far the largest generator of hazardous waste, including toxic discharges to the soil and water, and toxic smokestack emissions; that we are the biggest producer of toxic pesticides and the biggest exporter to Third World countries of those toxic chemicals that we have outlawed for use in our own backyard. In 1992, if we didn't know it already, we found out that we in the United States, with our over-consumptive lifestyle and military-dependent economy, in many ways are the world's worst environmental problem. 1992 was the year when we reaffirmed our status as the greatest throwaway society in history—and found out that what we are throwing away is our health and the health of future generations.

In 1992 we heard again that one out of every three Americans will contract cancer and one out of every four of us will die of it and that some forms of cancer—childhood leukemia, for instance—is on the increase. It's the year when more and more studies verified what we "environmentalist radicals" have been saying for some time: that cancer may be the least of our worries; that far smaller doses than we thought of those chemicals our industries spew into our environment by the millions of tons each year cause far more subtle and widespread problems than cancer. Problems like reproductive disorders and birth defects that may not show up for several generations; problems like immune system disease and nerve damage—including the kind of nerve damage caused by pesticides used in our schools and playgrounds, for instance, or that leak from hazardous waste sites; the kind that can cause learning disabilities in our children (who, by the way, are far more susceptible than most adults to the effects of our industrial poisons). And we found that non-human as well as human populations are already suffering from our low-dose poisoning of the planet.

We learned a lot about low dose exposure in 1992, and we also learned a lot about the kind of supply-side and trickle-down economics scams that lead to those exposures. As a result, in 1992 we threw out something else—after 12 years in office we finally got rid of the most anti-environmental administrations since the days of the robber barons; administrations that seriously believed the world would be better off in the hands of their friends in the board rooms of transnational corporations that have no sense of responsibility to the environment, to the communities they pollute, to their workers or to anything else except the bottom line.

Nationwide and worldwide we learned something about the need for corporate and executive branch responsibility in 1992. But in Arizona we do things a little differently: so after tossing a few small-time scammers out of office on a sting operation, we turned state government over to an administration and legislature dedicated to the same kind of 19th C/retro/cowboy/Marlboro Man/bible-thumping/backward-looking/half-baked theories that we got rid of at the federal level.

Consequently, *this* year, in the legislative session that just ended, we have seen an unprecedented number of attacks on our public health and environmental protection laws; and next year we can expect more of the same because the same people will still be in office: more attempts to raid the Heritage Fund, more attempts to allow pesticides in our water, more attempts to make Arizona even more of a dumping ground for California's hazardous wastes. and maybe most important, we can expect a major campaign by the state Chamber of Commerce and their friends in the polluting industries and the resource-destruction industries (the Cattlemen's Association, the Mining Association, the Realtors Association, the Cotton Growers Association, the Farm Bureau, and their ilk) to reinstate the so-called "Private Property Protection Act" or "Takings Law," the repeal of which we were successful in getting placed on the 1994 ballot.

If you think the fight to ban steel-jaw traps brought in a lot of big money from out of state, wait till you see the millions that polluters and right-wing fanatics send in to stop us from repealing the takings law.

All of which brings us to the question of "what can we do about it?" First of all, we need to start seeing environmental protection in political terms. If we want to do something about it, we have to get involved politically, to stop the anti-environmental movement from taking over and controlling our local, state and federal governments.

We need to start building a "Sustainability Movement" to counter the so-called "Wise Use Movement" that is spearheading anti-environmentalism across the nation. We need to see all of our actions—as individuals and as a society—in the context of environmental protection, to clearly recognize that all our social and political and economic needs are first of all fundamentally dependent on a healthful environment. And so we need to bring together our neighborhood groups, our ethnic and religious groups, our peace groups, our feminist groups, our labor groups and our environmental groups, and all the other forces working for social improvement and positive change. No matter what differences we may have, we all have a common interest in protecting the integrity of the environment.

And as always in bringing about change, in building movements and coalitions, we need to recognize that while formulating phrases and soundbites and ideal concepts is easy, making it happen, putting our ideals into action, is hard.

But now is the time to take up the challenge of the Earth Summit and start to implement the Sustainability Ethic. And what is that? In general, it's a restatement of the basic elements of democracy, because environmental protection in political terms is a basic human and civil right.

1. First and foremost, the Sustainability Ethic includes the Right Not to Be Poisoned, especially not without our knowledge, or against our wills for somebody else's profit. Practically speaking, that means we have to insist that industry implement Clean Production practices, that they stop acting as though they have a right to pollute and instead take seriously goals of zero discharge and pollution prevention.

Insisting on our right not to be poisoned means we have to start banning, or enforce existing bans on, certain chemicals. For instance, we should insist that the EPA start enforcing (rather

than trying to weaken, as they are now) our existing law (i.e., the Delaney Clause of the Federal Food, Drug and Cosmetic Act) against cancer-causing pesticides in our food. Carcinogenic pesticides should be prohibited in food, in water, in the air, in the field, period. And the same goes for other cancer-causing chemicals.

Governments and industries have a hard time with the concept of zero, but zero is exactly how much is safe and that's all that should be allowed. It doesn't make sense to spend time and money trying to figure out how little of a substance it takes to kill a statistically average 140-pound white male when what we need to be doing is cutting exposure as much and as soon as possible to protect all of us, especially our most sensitive members like children, the aged and pregnant women. And along with the carcinogens, we need to start banning manufacture of other toxics that persist in the environment and bioaccumulate in living organisms and that are just impossible to keep under control once they're created.

Chlorine-containing chemicals, for instance, are among the worst. Experience shows that once they're manufactured, they can't be controlled. No matter how hard we try, they leak, they spill, they get into our blood and brains and unborn babies. Instead of banning them one at a time like we have with DDT, PCBs, Agent Orange, CFCs and some others, giving them the same rights as people as though they're innocent until proved guilty, we need to start banning the whole class, getting rid of poisons like dioxin, TCE and formaldehyde from our food and water and building materials. And we need to stop exporting them to the Third World. We simply can't afford to keep adding these toxics to our environment. It's time to say no.

We should require the industries that use these chemicals to come up with safe substitutes and to clean up the mess they have already made. And we should stop inviting industries that use these chemicals into the state. Last week the State Legislature sent a bill to Governor Symington that gives major tax breaks to a paper company so it can locate in Arizona and start polluting the Colorado River. Paper companies are one of the world's largest sources of dioxin and other chlorinated pollutants. Somehow we need to make our Governor and legislators understand the difference between that kind of outdated economic growth and truly sustainable development.

2. Besides the Right Not to Be Poisoned, the Sustainability Ethic includes the Right to Know. The "Transparency Principle," they called it at Rio. The Right to Know which industries are poisoning us and how and what they and our governments are doing to stop and prevent the poisoning. And the Right to Know must include the right to say no, the right to deny any polluting company access to our community. Knowledge alone is not enough; it has to lead to empowerment of local communities so we can protect ourselves.

This "disclosure" principle is another one that was under attack in our state legislature this year. Industries really don't want you to know what they're doing, and we were only barely able to defeat an industry-backed bill that would have taken away large chunks of our existing right to know what polluting companies are doing.

3. A third principle of the Sustainability Ethic is known as Polluter Pays—which, as I said, is directly opposite of what the state government is practicing by giving tax breaks to polluting industries. Instead of giving companies tax breaks, we should be requiring them to put money up front for pollution-free technology and trust funds to protect the communities where they locate from the environmental impacts they bring with them.

4. There are several other basic principles of the Sustainability Ethic which I don't have time to go into here. They include the Diversity Principle, which in essence says that there is strength in diversity, be it biological, cultural, economic or technical. In regard to the last of those, for

instance, under the heading of "appropriate technology" we might reasonably ask, "Why doesn't the state and every county and municipality in Arizona require new subdivisions and new office buildings to use solar energy rather than depending on nuclear power?" "And why aren't lakes and fountains and green lawns outlawed?"

5. In closing, I'd like to mention just one more basic principle: the Principle of Participation which by extension includes the Principle of Equity: which means that we should all have a voice in the decisions that affect our lives. Our regulatory system should have built-in mechanisms to ensure that every individual and every community has ample opportunity for input to the decision-making process. But that only works if people want to participate.

So again I urge you to get involved. Just bellyaching or just talking to ourselves or just coming out once a year on Earth Day to have fun and listen to music just doesn't cut it. And it's easy to be discouraged and depressed and become a lone wolf, but lone wolves aren't going to change the system anymore than a few of us talking to each other is. If you want to change things, you have to become part of the decision-making process. Join an activist group like the Sierra Club. Sit down and talk to the opposition. Get your hands dirty talking to the polluters and developers. That's how democracy works. We can't afford to wait for crises like ENSCO and the Cholla Landfill to take us into the streets. Massive demonstrations like that are very expensive and basically inefficient and only slow down the process for a little while. Bad ideas never go away, so you have to be at the table where the decisions are made in order to stop those bad ideas from taking over. Constant vigilance is the price of environmental protection as well as democracy.

Recommendations Regarding NAFTA Draft Text on the Environment (1993)

Michael Gregory and Dick Kamp, for Border Ecology Project, Letter faxed to Bill Pistor, United States Environmental Protection Agency (31 August 1993)

Dear Bill:

Per your suggestion, please find attached a brief list of both specific and general recommendations regarding the NAFTA Draft Text on the Environment and associated language on dispute settlement and funding as published in *Inside U.S. Trade* on August 20, 1993. Given the obvious time constraints, we have not been able to conduct a full analysis of the draft; however, we offer here a sampling of our chief concerns and refer you to our comments of 20 August on the Summary, many of which are clearly pertinent to the draft language.

As we have stated in our comments on the Summary, we support many of the principles outlined in the Agreement on Environmental Cooperation (AEC). However, we are concerned that, due to multiple problems of omission and commission, the draft fails to provide adequate natural resource and human health protection and lacks clarity and strength in key areas. The Commission, for instance, is likely to be little more than a forum for discussion, rather than the instrument for corrective and preventive action that the environmental community has advocated. In this and several other respects, the draft is significantly weaker than the original U.S. proposal.

To a great extent, for instance, the obligations of Parties stated in the draft constitute an unenforceable wish list. In almost all instances, if a Party fails to live up to its obligation, there is no penalty and no recourse by citizens. The pervasive message of the draft is "Trust me."

In consideration of the magnitude of these and other issues still unresolved, we feel that it is extremely important that negotiations not be concluded in the immediate future but continue until resolution is achieved. We feel that it is especially important for negotiations to continue in regard to US-Mexico border issues, where major institutional changes and solid commitments to cleanup and pollution prevention are long overdue.

As you know, we advocate a strong AEC and would like to be able to endorse the final negotiated language; however, we would have difficulty supporting any text that does not correct such weaknesses as we point out in these comments.

Objectives

The obligations and functions of the Agreement (AEC) and the Commission (CEC) on Environmental Cooperation are too often non-binding and lack criteria for determining success. The draft contains little in the way of concrete solutions to the serious environmental problems raised by the NAFTA, but instead proposes a variety of "soft" responses in areas of education, reports and encouragements designed to promote voluntary actions by the Parties.

The instances of toothless "obligations" and intentions are too numerous to list, but a few examples may suffice to show how the text should be strengthened. The objectives as outlined in Article 1(h), for example, should require that the AEC "promote *and ensure* transparency and public participation in the development and *implementation* of environmental laws, regulations, and policies." Articles 3(1) and 4(2) should *require*, not merely *suggest*, that the CEC pursue the

duties described therein. Article 4(4) should require that the Council work to "encourage, *monitor and work to ensure...*" Article 4(5) should ensure that the Council will "promote and develop proposals *and establish programs in coordination with Parties' agencies dedicated to environmental protection. . .*"

The AEC should provide not just *encouragement of or promotion of*, but *guarantees of* effective public participation; effective public access to information; ratcheting up and expansion of environmental standards throughout the continent; broad investigative authority for the Secretariat and the Joint Advisory Committee; and oversight of natural resource laws and regulations whether or not they address management of commercial harvesting and exploitation.

In addition, rather than focusing entirely, as the draft does, on existing laws and regulations, the AEC should contain specific language committing the Parties to improving levels of protection not only in their own territories (as per Article 10), but throughout the continent. This commitment, a prominent part of earlier discussions and conspicuously absent in the draft, should inform many of the objectives and obligations of the AEC. For example, Article 4(3)(b), in concert with previous EPA goals, should read: "establishing a process for developing *more protective laws and regulations to improve environmental protection throughout the continent with greater compatibility. . .*"

Scope and Authorities

One of the most glaring problems with the draft is the unacceptably broad exclusion from the definition of environmental law in Annex I(2). Although there may be some justification for excluding "subsistence or aboriginal harvesting of natural resources," as written the draft would very likely exclude from the purview of the CEC most or all of such basic U.S. laws as the *National Forest Management Act*, the *Marine Mammal Protection Act*, and such other laws and regulations as are intended to manage in an environmentally sound manner the harvest or exploitation of natural resources. To cite just one other example, the amendments to the 1872 Mining Law presently being considered by Congress would be excluded under the draft's current language. In Canada and Mexico, the draft definitions' impact on natural resource-related activities would be even more debilitating.

It is essential that the definition of environmental law include all natural resource laws and regulations *whether or not* they address management of commercial harvesting and exploitation. The CEC must be given scope and authority to address all of the Parties' environmental laws. The geographic scope of the CEC's activities must be broadened. The obligations of the Parties should not be limited to problems that arise within their respective territories or extend across their mutual borders, but should also address issues arising in or affecting the global commons. At the very least, the Parties must be obligated to address issues throughout the trading region. In this regard, for instance, Article 4(2)(g), should ensure that the Commission addresses "transboundary and border environmental issues such as long-range transport of air and marine pollutants, *as well as adverse environmental conditions throughout North America.*"

The draft unacceptably limits the power of the Secretariat. For example, the Secretariat should be given clear authority to make recommendations on the Council's activities; in this regard, Article 5(19) should be amended to read: "The Secretariat shall incorporate any comments and submit the factual record to the Council, *along with recommendations for future Council action and dispute resolution options.*"

Under Article 5(7), the Secretariat's authority to issue reports is predicated upon a two-thirds approval of the Council. Unless there are compelling reasons not to, the Secretariat should be

empowered to issue reports on its own initiative and at its own discretion. The language of Article 5(7) of the draft is not clear concerning the Secretariat's authority in this regard. In particular, it is not clear if the sentence "Such other environmental matters shall not include issues related to nonenforcement of domestic environmental law by a Party" means that the Secretariat can or cannot issue reports on such matters by its own initiative, or if initiation of reports on such matters rests solely on "any person or non-governmental organization" pursuant to Article 5(10). We believe that the Secretariat should have authority to initiate such reports without going through a two-thirds vote of the Council.

Relation to other Agreements

The draft is ambiguous in its references to "other international agreements." Whereas discussions heretofore have referred to "international *environmental* agreements" (IEAs), the draft language (in Articles 18 and 32, for instance), by not specifically using the word "environmental" in this context, opens the unacceptable possibility that international *trade* agreements (like the NAFTA and the GATT, which require Parties to implement only such environmental measures as are least restrictive to trade), could take precedence or have jurisdiction over "environmental and conservation" issues. This, of course, was a major objection of environmental organizations to the NAFTA itself which was presumably to be corrected by the AEC.

Similarly, Articles 1(d) and 4(6) should clarify that the "goals and objectives" referred to are specifically those delineated in the Preamble to the NAFTA (as paragraph 4(6)(b), for instance, specifies that it refers to Art. 1114 of the NAFTA).

The restricted definition of "persistent pattern of failure to effectively enforce" in Article 20 to activities involving goods or services "traded between Parties or that compete with goods produced and services provided by another Party" unacceptably limits enforcement to trade or NAFTA-related activities. Even assuming, which we do not, that such activities and their environmental effects can be legitimately distinguished from economic activities in general, the CEC must have authority and means to address environmental problems throughout the continent, regardless of their origin. The CEC is an environmental commission, not a *trade* commission, although we applaud the efforts to develop a working definition that could apply to specific NAFTA-related disputes.

Similarly, while the Article 12 list of "appropriate governmental" actions is impressive, both that Article and the definition of "effective enforcement" in Annex II, are unacceptably conditioned by reference to the "other international agreements" referenced in Article 32.

Standards

The draft does not adequately address the many problems with NAFTA's environmental (product and process) standards, which were among the primary purposes for which the AEC was conceived.

The "consistency" language in Article 4(3)(b) and elsewhere in the draft [e.g., Article 32(2)] raises a major concern which needs to be addressed. As we and others have frequently pointed out, the use of terms like "consistent with" or "inconsistency" presents a serious impediment to environmental protection insofar as it prioritizes trade over environmental protection.

The development of standards should be an independent function of the CEC, not subservient to efforts to promote trade.

Furthermore, the draft does not contain specific language to accomplish the NAFTA intent (Article 1114) to discourage the lowering of standards by Parties to accommodate new investment or existing polluters.

Similarly, in regard to process standards, the draft does not correct the problems raised by the GATT tuna-dolphin decision but, in accordance with the "consistency" language and the ambiguous references to "other international agreements" as discussed above, apparently perpetuates those problems by leaving dispute settlement to trade panels, thus undermining the efficacy of this Agreement.

Public Participation and Public Access to Information

In order to expand the public's access to information, we suggest that a paragraph (d) be added to Article 4(6), to read: "*by serving as an information clearinghouse on environmental and health impacts of the NAFTA, and by ensuring full public access to that information.*"

In general, any information gathered by any branch of the CEC should be available and accessible to the public. For instance, contrary to Article 5(21) of the draft, the Council should be allowed to prevent dissemination of such information only under terms of specific criteria enunciated in the Council's operating procedures, and the word "appropriate" in this context should be defined.

Similarly, we are concerned about the restrictions on public participation and transparency in the portion of the draft dealing with the Secretariat. We object, for instance, to the power given to any two Parties, in Article 5(9) of the draft, to prevent, without any criteria or public participation, issuance of a report by the Secretariat.

Even more significantly, we object to the arduous steps which must be taken by a citizen or NGO wanting to have the CEC investigate and report on a Party's failure to effectively enforce. The steps listed in Article 5(10) and 5(11) effectively preclude participation by ordinary citizens and belie the purported public accessibility of the process. Among other changes to these sections, paragraph 5(11)(a), which would require the submitter to prove harm, should be deleted (since failure to enforce is in itself cause for action, whether or not harm has occurred; the goal of the AEC is to *prevent* harm). Similarly, paragraph 5(11)(d), which puts a stigma on public submissions which are "drawn exclusively from the mass media" should be deleted (often the media is the only source of information citizens have, especially in countries where government process is not transparent).

The draft should also be corrected to allow the submitter of a complaint to find out why a submission has been denied review, and the AEC should require the Secretariat to disclose in the annual report the number, kind, subject and action taken on submissions during the preceding year.

Although the language is ambiguous, the draft Article 31(4)(b) seems to go far beyond legitimate concern for protecting confidentiality. It would exclude from the Council's scrutiny any law which a Party determines would protect business. If this is a simple ambiguity resulting from unclear use of the conjunction "and," the syntax needs to be clarified. If, on the other hand, it was intended to exclude any "law protecting business," then the draft language is unacceptable.

The Joint Advisory Committee (JAC) as described will have even less usefulness than EPA's existing border Public Advisory Committee (PAC). The JAC has no power to investigate, no authority to issue statements, no required functions, the Council and Secretariat are not required

to accept recommendations or proposals from the JAC, let alone act on them, and the JAC is not even allowed to review factual reports unless given approval by a two-thirds vote of the Council.

The authority and duties of the JAC must be expanded to allow for broader participation in the preparation of reports and dissemination of Commission documents to the public. For example, Article 7(7) should read: ". . . or any other report prepared pursuant to Article 5(7) and Article 5(17), and may make comments. . . ." A paragraph 9 should be added to Article 7 ensuring that "*Joint Committee meeting minutes and reports shall be made available to the general public upon request.*" Article 7(2) should clarify that the JAC comprises 15 members total, five from each Party.

Pollution Prevention

The draft specifically provides for pollution prevention and abatement efforts only in relation to transboundary pollution, rather than addressing the whole trading region. Article 4(8), for example, should read: ". . .to permit another Party to seek the reduction, elimination or mitigation of transboundary pollution *and environmental problems throughout North America* on a reciprocal basis."

Article 9(1)(d) should read: ". . . and technology development, *including pollution prevention technology.*"

Article 9(1)(e): Unless the phrase "as appropriate" is defined, it should be deleted.

Article 9(3)(a) should read: "*Each Party shall ban or severely restrict the export of toxic substances which are banned or severely restricted within its territory.*"

Enforceability and Private Access to Remedies

The definition of "effective enforcement" in Annex II must include requirements for *demonstration* of effective enforcement, including specific criteria, rather than ambiguous terms like "reasonable" and "bona fide." This is especially important in light of Annex X and Article 12(3)(a), which, as written, condition applicability of sanctions or other "monetary enforcement assessments" upon vague considerations to such an extent that enforcement will be difficult or impossible to implement.

Although we are sensitive to the lack of enforcement resources in Mexico, we believe that conditioning compliance with the "effective enforcement" requirement of the AEC creates a huge loophole through which any Party may escape accountability merely by claiming pecuniary embarrassment. This loophole must be closed.

A step in that direction may be taken by requiring due diligence from the accused Party, along with cooperative support from the CEC. For instance, [as described in Annex 10(2)(b)] prior to the arbitration procedure reaching the level of potential application of trade sanctions should the accused Party face "resource constraints" in taking an enforcement action, the accused Party should be required to approach the CEC to explain what level of resources will be necessary for enforcement; the CEC should then work with the Party to ensure that enforcement occurs. In the event that the Party does not then carry through, the question of resource constraints should not be a consideration.

The AEC must guarantee the right of citizens to sue not only "another person," but the Parties themselves for failure to implement the Agreement. To this end, a new paragraph 13(3)(e)

should be added: "*(e) to sue a Party for either failing to effectively enforce environmental law or for failure to comply with the terms of the Agreement.*"

Moreover, in cases where such rights of private citizen access as are listed in Article 13(2) do not exist under a Party's "domestic law," the AEC should contain specific assurances that Parties will work toward correcting such deficiency.

In addition, the draft sets up a nearly impenetrable process for review of issues. Not only does it provide that the Secretariat and Council may arbitrarily ignore or exclude submittals and petitions from the public [e.g., Articles 19(2) and 26(1)], and that NGOs are limited to initiating informal (rather than formal) fact finding reviews [Article 5(10)], but the complex procedures it requires nearly guarantee that rulings of ineffective enforcement or other rulings adverse to a Party will, at best, seldom occur. The length of proceedings, lack of transparency and exclusion of public input combine to undermine the draft's enforcement provisions.

Furthermore, the veto power of a Party over fact-finding into its (mis)behavior is far too broad. Under Article 5(13), for instance, a Party may in effect kill a report on its alleged failure to effectively enforce merely by claiming that the matter is the subject of a pending legal proceeding (a category which may include any number of matters or any number of years, without leading to any improvement in the environmental conditions the petitioner was seeking to have addressed).

Similarly, Article 31(2) appears to allow a Party to escape scrutiny merely by claiming that a request for information from the Secretariat is "excessive or otherwise burdensome" and getting two-thirds of the Council to agree. Again, no criteria are set by which to judge the Party's claim.

Funding

It is unsettling that with side agreements and a NAFTA presumably close to presentation to Congress, we still lack sources of dedicated funding other than appropriations, marketing strategies and bonding authorities.

The funding for the CEC, should be independent of the Parties and linked to the environmental financing mechanism being developed to address environmental infrastructure needs that result from increased trade and investment. Funding for the financing facility and the CEC should be derived from the application of the "precautionary polluter pays principle," including financing by those who directly benefit from financial participation in the improved trading environment. Not only does the draft contain no provision for establishing mechanisms that require commercial and financial beneficiaries of trade to pay for the CEC, but Article 35 would require taxpayers to fund the CEC through equal payments from each Party. There is no provision for effective funding in the event that one or more Parties does not contribute sufficiently to allow effective functioning of the CEC.

In regard to the concept paper on funding for US-Mexico border problems, we note first of all that the AEC should establish funding mechanisms for environmental improvement throughout the continent.

Along with other border groups, we note that the US-Mexico border region is geographically, culturally and politically unique and presents a special opportunity for a binational environmental management body which, while operating parallel to and in cooperation with the CEC, would and should be most appropriately addressed through continuing negotiations of the Parties to develop a separate border institution established concurrently with, but functioning

independently from, the AEC.

Recommendations for including Sustainable Development in BECC Project Certification Criteria (1995)

Michael Gregory and Nicola Zeuner, presented to the Border Environment Cooperation Commission Public Meeting, Ciudad Juárez, Chihuahua (21 April 1995)

The preamble of the BECC/NADBank Agreement between the United States and Mexico establishes sustainable development as a major principle in the work of the new institutions, a concept which:

- recognizes the complex interactions between social, political, economic and environmental elements of development;
- takes into account the short-term and long-term effects of proposed actions; and
- provides for needs of present generations as well as those of future generations.

In establishing these institutions, the Parties agreed on:

- "the importance of the conservation, protection and enhancement of their environments and the essential role of cooperation in these areas in achieving sustainable development for the well-being of present and future generations" and
- "acknowledg[ed] that the border region of the United States and Mexico is experiencing environmental problems which must be addressed in order to promote sustainable development."

The Parties also agreed that sustainable development is an essential component of environmental infrastructure projects, which the Agreement defines as:

"project[s] that will prevent, control or reduce environmental contaminants or pollutants, improve the drinking water supply, or protect flora and fauna so as to improve human health, promote sustainable development, or contribute to a higher quality of life."

Despite these clear references in the original Agreement, recent discussions about the role and operating procedures of the BECC, while addressing some important elements of sustainability (e.g., public participation), have focused principally on such issues as economic growth and the technical and financial feasibility of projects (e.g. in the objectives set forth in the latest Project Submission Process draft). If the BECC is to live up to its original purpose, we suggest that rather than merely being paid lip service, the concept of sustainable development must find its way beyond the preambles of formal documents and into everyday practical planning processes. In particular, it must find its way into the BECC's "technical, environmental, financial or other criteria"[Art.II, Sec 3(b)] for certification and review of environmental infrastructure projects, as well as into guidelines for assisting entities in project development.

The BECC's criteria and the projects the BECC approves should clearly promote sustainable development in the border region. It is not clear that the kinds of projects contemplated so far (that is, primarily bricks and mortar public works projects) will do so; rather, they are likely to encourage economic growth and population growth, neither of which are, generally speaking, compatible with truly sustainable community development.

Sustainable development cannot be based on the financial feasibility of actions. If a project does not appear to be economically profitable or entirely able to pay back the loan from user fees etc., this should not be a criterion for immediate rejection. The BECC in such a case should assist the project submitting entity in identifying other sources of funding to be integrated in the proposal's financial plan. The BECC should generally be able to cooperate with other institutions and funding sources such as the World Bank Northern Border Environmental Project, the IADB and the IAF, not only in order to jointly develop policies and projects but also to promote the inclusion of public participation mechanisms and sustainable development criteria in their decision-making.

The Agreement sets forth that "the commission shall give preference to environmental infrastructure projects relating to water pollution, wastewater treatment, municipal solid waste and related matters." [Article II Sec. 2(b)] These are unarguably concerned with pressing problems that border communities face today; but although emergency situations such as the continuing discharge of untreated sewage should be a priority for the BECC, these immediate needs can and should be addressed in ways that contribute to long-term, sustainable and preventive solutions as well.

For example, the construction of a wastewater treatment plant does not promote sustainable development if factors such as toxics use reduction, industrial pretreatment, water reuse and reclamation are not incorporated. Similarly, narrowing the Agreement's original priority concern with water pollution to projects for supplying access to clean drinking water (as appears to have happened in the BECC's latest Project Submission Process draft), cannot be considered conducive to sustainability insofar as it ignores issues such as groundwater and surface water pollution, water conservation, and other aspects of the broader hydrologic context.

Similarly, funding of a solid waste incineration project cannot be considered a contribution to sustainable development unless it is predicated on source reduction and waste minimization programs; and should not be eligible for funding unless it has been evaluated against other alternatives for managing the proposed project's wastestreams throughout their lifecycle.

The BECC's definition of environmental infrastructure should be significantly broadened to include such contextual components of projects. Other essential components of community development, such as long-term community planning for land-use, economic development and hazardous materials management should also be covered by BECC criteria and NADBank funding for environmental infrastructure projects. Furthermore, the definition should be broadened beyond narrowly-defined technical components. Environmental infrastructure cannot be considered separately from human infrastructure, anymore than economic development can be considered separately from community development.

Access to environmental information and effective public participation must be two essential elements of any border project. Public access to environmental information about a project's demographic relations, potential domestic and transboundary impacts, etc. is an essential component of participation, so the BECC should include not only right to know criteria for project guidance and review, but should provide funding for technologies or other mechanisms that improve public access to such information.

Arizona Toxics Information and many others have commented on the necessity for effective public participation and transparency in the BECC process, so this paper will not elaborate further on this issue except to note that decision-making on all aspects of a project throughout its entire life-cycle (i.e., from initial submission and certification through planning, construction, operation, closure and periodic evaluation) should be open to review and subject to approval by

stakeholders in the affected community and other interested parties. No information concerning a project should be considered or kept confidential unless and until the criteria by which the confidentiality decision is to be made, have been established through the same kind of extensive public participation process that certification criteria are established.

Generally, for further planning of BECC and NADBank activities we recommend that needs assessments be carried out on the community level rather than pre-setting of priorities by governments or institutions. Clearly, the priorities in the Agreement should be checked against the priorities of the various communities as soon as possible and, if necessary, should be revisited.

Although we are sympathetic to the need for quickly addressing certain critical problems on the border and for the BECC to prove itself an effective institution, nonetheless we strongly recommend that no projects be certified until concrete criteria for sustainability like the following are established and met through an extensive public participation process. Just as the review of the individual proposals must include effective public participation, so must the development of criteria and guidelines be based on extensive public participation. All these processes require more time than recent timetables suggested by the BECC office would allow.

Sustainability Checklist for BECC Projects

In considering certification of environmental infrastructure projects the BECC should look beyond mere stopgap measures and recognize the impact of its decisions on long-term processes of community development in the border region. In this regard, project assessments should assure that projects promote

- social equity and environmental justice
- democratization of decision-making, including participation of stakeholders
- cultural diversity
- economic diversity, appropriate technology and other means of community self-reliance
- preservation and restoration of ecosystem integrity
- conservation of water and other natural resources for future generations

In order to ensure that projects promote these goals, before approving a project the BECC should test it against a set of criteria such as those in the following Sustainability Checklist. Unless at least a large part of the following questions and others like them can be answered in the positive, a project should not be certified by BECC.

Environment

- does the project apply an ecosystem approach, despite the political boundaries transecting ecosystems?
- does it contribute to preservation and/or rehabilitation of ecosystems?
- does it contribute to protection and enhancement of biodiversity?
- does it identify opportunities for changes in the patterns of consumption and reductions and/or improvements of efficiency in the use of natural resources?
- in its environmental impact assessment, does it provide a life-cycle analysis of pollutants processed by the project?

Social and Community Development

- does the proposal address (for instance in a social impact assessment) the full range of

- potential social and political impacts on the community?
- does the project take into account binational planning and does it have a positive impact on communities on both sides of the border?
- does it contribute to community self-reliance by improving community access to environmental information?
- does it benefit the community, and not just a particular economic sector?
- does it generally build and strengthen the capacity of the community to identify and address its environmental issues?
- does it contribute to the development of participatory mechanisms in decision-making?
- does it contribute substantially to raising of living standards or the elimination of poverty in the community?
- does it create jobs in the community and fill them with local and regional rather than outside employees?

Community Participation

- Does the project provide mechanisms for the community to participate in the needs assessment, project development, and consensus-building on the funding methods for loan and maintenance payments?
- does the project's participation program go beyond merely listening to community opinion and public promotion of the project by providing mechanisms for actually incorporating views from the community in all phases of its planning and operation?
- does the project's participation program effectively involve the public on both sides of the border, and provide for the necessary bilingual arrangements, such as translation of documents etc.?

Funding

- If the loan is going to be repaid with the help of user fees, are these scaled to ensure that industrial users or tourists bear a greater share than, for example, low-income communities?
- does it seek to keep the debt burden on the municipalities as low as possible by considering other sources of income such as grants from private foundations, financial participation by industry, etc.?

Technology

- Does the project contribute to toxics use reduction and other forms of pollution prevention?
- In addressing solid waste, does it emphasize source reduction rather than waste minimization and such treatment technologies as incineration and recycling?
- In addressing water issues, does it encourage reuse, reclamation and other means of lowered consumption by both industrial and non-industrial users?
- does it contribute to industrial pretreatment of wastewater?
- does it use the best available technology, including appropriate technology (e.g., that which is low-cost and low-tech)?
- does it encourage conservation through use of alternative technologies, for instance solar and wind technology, passive and self-renewing systems, etc.?
- does it involve mutual exchange of technology (rather than just one-way technology transfer)?

On the Draft Guidelines for BECC Project Submission and Criteria for Project Certification (1995)

Michael Gregory and Nicola Zeuner, submitted to the Border Environment Cooperation Commission (14 July 1995)

I. General Comments

A. Criteria Categorization and Application

We appreciate the time and effort which the BECC staff dedicated to drafting the Guidelines and Criteria and the consideration given to our earlier paper which recommended including elements of sustainable development into the BECC's criteria. However, the current draft document has numerous problems of terminology and questionable categorization of criteria, which need to be addressed in the next draft. In the following comments we offer recommendations on both general concepts and specific language to correct these problems.

At the outset, however, we feel that we must reiterate that no project should receive certification before a final criteria document is established. We understand the need to quickly come up with results, but caution that the BECC will lose most of its public support and credibility if projects are certified before criteria have been established through the full public process.

The categorization and terminology of the draft guidelines devalue those criteria which are intended to assure that a project promotes sustainable development. Sustainable development is emphasized as a major goal in the Agreement and Sustainable Development Criteria, rather than being relegated to a subset, should inform all criteria used for certification and prioritization.

In addition, many of the draft Sustainable Development Criteria cannot really be considered as measures of a project's contribution and adherence to the goal of sustainable development. This improper categorization is principally due to a confusion of concepts in the document, especially apparent, for instance, when a term like "economic sustainability" (meaning something like "economic feasibility" or the chances of a project to survive economically for fifteen years or so) is categorized as though it were identical with sustainable development (a concept which, of course, goes well beyond mere economic feasibility and such short planning horizons).

The draft guidelines criteria are geared to Phase One priorities but, in order to preclude a great deal of duplicated effort in the future, insofar as possible the present criteria document should be designed with later phases in mind, taking into consideration that in the future other projects than those of the priority areas of concern might be submitted for certification (e.g. projects addressing air pollution). To this end, criteria should be written in general language that addresses the principles and goals of environmental and human health protection and sustainable development rather than being narrowly focused on details specific to water and waste infrastructure projects.

In consideration of these and other aspects of the draft guidelines, we recommend that several changes be made to the terminology and categorization scheme, including the following:

- The heading "Fundamental BECC Criteria" should be changed to Certification Criteria.
- Several wording changes should be made to the draft Certification Criteria.

- Several of the draft Sustainable Development Criteria should be reworded and added to the Certification Criteria category.
- Some additional sustainability criteria which are not considered in the draft should be added to the Certification Criteria category.
- The draft Sustainable Development Criteria should be renamed as Prioritization Criteria, a heading more appropriate to their actual purpose.
- Some additional Prioritization Criteria should be included to provide better assurance of adherence to sustainable development goals as well as human health and the environment.

In Part II of these comments we recommend specific language to amend the draft guidelines in accordance with these recommendations.

Not every Prioritization Criterion (for example, “Education Programs,” “Binational Project” or “Human Health Issues”) will be applicable to every project. Furthermore, some criteria are more significant (i.e., contribute more toward achieving the goals of the BECC/NADBank agreements) and should be given more weight than others, or (in some instances) should overrule others. A point system similar to the one Lynda Taylor proposes in her recent *Workbook* article seems to be in order. The BECC could survey public opinion at the upcoming public outreach and public Board meetings in order to help determine relative weights the various Prioritization Criteria should be given.

The draft guidelines have one very serious failing, in that they establish no mechanism to assure that BECC certification and prioritization criteria will be followed by the NADBank and other financial institutions that may be co-funders in a project with the NADBank. Although the NADBANK is bound by the Agreement to comply with the BECC's conditions and criteria, a mechanism should be established to ensure that this happens and that other funding institutions also comply, not only in the beginning phases of a project's development, but throughout its entire lifecycle. The key component of such a mechanism must be public participation, without which it will be impossible to hold the NADBank and other funding institutions accountable to the principles of sustainable development and of environmental and human health protection. Applicants who do not wish to comply with those principles should find other funding sources than the NADBank and institutions that are not inclined to comply with the principles should be prohibited from becoming co-funders with the NADBank.

In the following remainder of these comments, recommended new language (redlined) is inserted directly into the original draft criteria document (starting with V.) and explanatory remarks added in the appropriate places *[italic in brackets]*.

B. Program Scope

In the list of potential wastewater treatment projects, the draft includes "systems providing for the beneficial use of sludge." In general, certification should be denied to projects which involve land application of sludge, due to the serious potential for migration of such common contaminants in sewage sludge as mercury, arsenic, lead, cadmium, PCBs and a variety of toxic chemicals, including chlorinated solvents and pesticides, all of which have been shown to present significant dangers at extremely low doses. If land application is considered, criteria must include strict parameters to prevent any adverse health or environmental impacts from exposure.

Among potential municipal waste projects, the draft inappropriately mentions waste to energy projects. Any form of incineration or thermal reduction projects are examples of unsustainable technology and should therefore not be certified by the BECC. Although thermal reduction is often promoted as promising a quick fix for reducing the volume of wastes, and in the case of waste to energy projects promising cheap energy, such operations are notorious for their unavoidable transfer of pollutants into various environmental media. Furthermore, their economic benefits are very questionable. It is well established that incineration does not destroy such toxic substances as heavy metals and arsenic, but merely redistributes them to air and water. In addition, incinerators unavoidably create a variety of toxic products of combustion from the thermal and chemical processes involving organic wastes such as plastics and other chlorinated polymers. Recent studies in the U.S. have shown that waste incinerators are a major source of dioxins and dioxin-like compounds. Rather than being a cheap and safe solution to waste management problems, incineration, as has often been said, merely creates "a waste dump in the sky." The illusion of safety and economic benefits of combustion projects typically leads planners to overlook adequate consideration of more sustainable waste management practices such as source reduction, product stewardship and recycling.

C. Definition of Terms

A number of terms in the draft are not defined and could be interpreted in various ways. They should be defined and added to the list of definitions. They include:

Appropriate technologies. Technologies that among other things satisfy basic human needs as well as local community needs; enhance community decision-making skills and rely primarily on community efforts in solving problems; emphasize the use of local skills, materials and financial resources; are compatible with local and user values, attitudes, and preferences; have low-impact capital costs and are low enough in cost to be affordable; create jobs using local skills and labor; are readily understood, operated and maintained by the people who use them and thereby foster technological innovation at the local level; foster local self-reliance; have low to moderate adverse environmental impacts; use decentralized, renewable resources; are flexible and adaptable to changing circumstances; are not dependent on patents and shipping fees; can be produced locally using local or regional materials; and facilitate community involvement and participation.

Impacts. Potential and actual environmental, social, political effects of project development and implementation. Impacts may be adverse or beneficial.

Project Life Cycle. Planning, development, construction, operation, closure and post-closure phases. *[Comments: The draft contains only a definition of Life Cycle Cost. To consider the whole life cycle of a project is important not only in terms of costs, but also in terms of mechanisms for public participation, pollution prevention planning, community stability and other long-term sustainability concerns.]*

Public Participation. Active and interactive involvement of affected communities in decision-making during all phases of project lifecycle. *[Comments: The draft uses the term 'public outreach' a number of times. It is not sufficient to simply inform the stakeholders about environmental infrastructure decisions. Furthermore, the draft seems to foresee public participation mainly for the phase of project development and planning, but it is a crucial component throughout the entire life-cycle. Participation programs must include mechanisms for actively involving and empowering the community.]*

Sustainable Development. Development which meets the needs of the present without compromising our ability to meet those of the future.

Other definitions should be clarified or expanded. They include:

Environmental Infrastructure Projects. "A project that will. . .or contribute to a higher quality of life. This includes projects which try to achieve these goals by building capacity of communities to address their environmental problems, by providing education of communities about environmental issues and sustainable development and by establishing mechanisms for public access to environmental information and public participation in decision-making.

[Comments: We are aware that the draft uses the definition from the Agreement, but don't think this addition will go beyond the spirit of the Agreement.]

Technology Transfer. Process in which ~~newer~~ technology developed in one location is acquired by another. *[Comments: The criteria should recognize technology 'exchange' between trade partners rather than one-way, usually north-south "transfer"]*

Wastewater Treatment. "Pre-treatment, primary, secondary, or tertiary treatment of. . ."

II. Comments on Specific Language

V. Technical Assistance Proposal Submission Procedures

Requests for technical assistance for development of proposals, project feasibility planning, and engineering design studies, and environmental assessments may be submitted at any time to the General Manager with the Step I Project Pre-Proposal Submission Form. Funds for technical assistance are limited but staff is available to assist with general proposal guidance. The General Manager will give priority to communities which have the least available resources for project development. *[Comments: This section needs to be expanded and clarified. Since the funds for Technical Assistance are limited, more specific criteria for eligibility should be established. Also it remains unclear to what extent and in what form Technical Assistance will be granted.*

As most of the border communities lack the resources to be able to pay back NADBank loans through user fees, it is essential that the BECC assist them in identifying additional funding sources. This assistance could be part of or attached to the technical assistance process.]

VI. Project Proposal Submission Procedures

A. Preapplication Communication

Prior to project submission, project originators are highly encouraged to meet or communicate with appropriate BECC staff to establish fundamental eligibility of the proposed project and to be briefed on the two step BECC project submission process and the BECC technical assistance program.

B. Step I: Project Pre-Proposal Submission Process

Step I is a preliminary stage in the project proposal submission process to be completed prior to, or in conjunction with, the comprehensive project proposal as described in Step II: Project Proposal Submission Process. Step I involves completion of a relatively simple,

straightforward form describing the project's basic parameters. These parameters will provide basic administrative information, will be used to establish initial project conformance with BECC objectives, and may indicate the applicant's need for technical assistance. The Step I: Project Pre-Proposal Form may be submitted at any time to the General Manager of the BECC.

The project information requested on Step 1 Form includes the project title, project sponsor information, project description, project type and location, expected benefits to human health and the environment, previous environmental and technical studies, engineering technical design, description of environmental assessment, community participation and support, estimated project capital costs, estimated annual costs, time schedule for each project phase, proposed method and sources of project financing, proposed sources of revenue for bank loan repayment, and additional information considered pertinent by the applicant. The Step I Form is provided in this document.

Border Environment Cooperation Commission Project Pre-Proposal Submission Form

(STEP 1)

1. Title of proposed project
2. Project sponsor/s
Name:
Address:
Phone:
Fax:
Email:
3. Type of project:
Wastewater treatment Water pollution/supply
Solid waste management Other related project
4. General information
Impact of the project. Binational National
Number of people directly affected _____
Is the project located within 100 km (62 miles) of the United States/Mexican border? Yes No
If the project is outside that region, does the project significantly impact the border? Yes No
Will the project have a positive environmental net-benefit to the community? Yes No
Does the project comply with local, regional, state, and federal laws and regulations and international agreements? Yes No
Is there a source of revenue to repay loans? Yes No
Is the project widely supported by the community? Yes No
Is technical assistance needed to complete the application process? Yes No
5. General description of project
6. Geographic location
7. Describe expected short-and long-term benefits to human health and the environment
8. Previous environmental assessments and technical feasibility studies regarding project development [*Comments: make 7. and 8. part of 10.*]
9. Description of engineering technical design
10. Environmental assessment

If the project is already in compliance with local, regional, state and federal environmental laws and regulations provide a list of permits authorized, documents approved, and authorizing agencies. Otherwise, describe how the project will comply with appropriate regulatory agencies.

Describe negative short and long-term environmental impacts of project

Describe implication of the no project alternative

Describe mechanisms to preserve, protect, and enhance environmental quality on a sustainable basis *[Comment: clarify this by using the following language:]* would the project further sustainable development by promoting/ensuring

- community self-reliance Yes ___ No ___
- ecosystem integrity Yes ___ No ___
- cultural diversity Yes ___ No ___
- natural resource conservation Yes ___ No ___
- consideration of the needs of future generations Yes ___ No ___

11. Describe community participation and support in project planning to date, and how it will be ensured throughout lifecycle of the project

12. Estimated project capital costs (dollars)

- Planning (including
 - Baseline Monitoring Program
 - Contingency Plans
 - Financial Assurance Plan

[Comment: A Financial Assurance Plan would ensure that the community is not overburdened with unforeseen costs in the event of accidents or system failures]

Closure and Post-closure Plan)

- Design
- Construction
- Equipment
- Education & training programs
- Public outreach participation program
- Other
- Total

13. Estimated annual costs (dollars)

- Operation and maintenance
- Equipment replacement
- Performance Monitoring Program
- Contingency Plan Exercises
- Closure
- Post-closure
- Other

	Estimated completion	
14. Time schedule	Number of months	date

Planning.....
 Design.....
 Environmental assessment.
 Site preparation.....

Construction.....
Start up operations....
Closure
Post-closure

15. Proposed method of project financing. Indicate actual and potential sources
16. Proposed sources of revenue for bank loan repayment. Indicate user fee system to be used, if any
17. Additional information

C. Step II: Project Proposal Submission Process

Step II of the project submission process may be completed in conjunction with, or subsequent to, completion of the Step I form. Step II involves provision of detailed project proposal information to the BECC in the following areas (1) general project description, (2) environmental assessment, (3) technical feasibility, (4) economic and financial feasibility, (5) social aspects, (6) community participation, and (7) operation and maintenance. The BECC requests that project information be submitted in the same order and using the same alphanumeric system as in this document.

The proposed project must meet ~~fundamental~~ BECC certification criteria for **project certification**. **Beyond the ability of a project to meet fundamental BECC certification criteria**, projects will be given additional priority ratings using ~~sustainable development evaluation~~ prioritization criteria which will prioritize projects that meet standards above and beyond ~~fundamental~~ certification criteria. The ~~fundamental~~ certification and ~~sustainable development~~ prioritization criteria are indicated for each of the seven sections described above. The process is designed to prioritize projects which achieve the BECC objectives to promote binational cooperation and sustainable development and to help preserve, protect, and enhance the environment.

[Comment: For rationale of changes made here see I. General Comments above.]

1. General Description of the Project

Information Requested

- a. Project Originator/s. Provide information for each project originator including, lead project manager, main contact for each project originator (if applicable), addresses, phone numbers, fax numbers, and Email addresses. **Provide proof of financial responsibility and a summary of the environmental compliance history for both corporations and their CEOs contracted by the project.**
- b. **Project Location.** Describe the geographical location of the project and provide a location map and a site-map.
- c. Environmental ~~Issue~~ Condition. Describe the environmental ~~issue~~ condition or problem to **be addressed by the project and activities taken in response to the environmental condition that lead up to this proposal.**
- d. Project Alternatives. Describe alternative methods considered to solve the environmental ~~issue~~ problem including the consequences of a no project alternative.

e. Project Justification. Justify the project including aspects which make project execution implementation necessary.

f. Project Strengths and Weaknesses. Discuss project strengths and weaknesses and available resources to overcome the weaknesses.

g. Binational Aspects. Discuss difficulties and opportunities created by the binational scope of the project and how these difficulties might be resolved or opportunities be exploited.

Fundamental BECC Certification Criteria

a. The project must be within 100 km (62 miles) of the U.S./Mexican border or has been found by the BECC, in concurrence with the U.S. Environmental Protection Agency and the Mexican Secretaria de Desarrollo Social, to remedy a transboundary environmental or health issue problem within the 100 km (62 mile) zone.

Sustainable Development Prioritization Criteria

a. National or Binational Project. A binational project will receive a higher priority for this criterion than a project which affects only one country.

b. Extent of Local or Regional Environmental Benefit. A project which has a higher positive environmental and human health impact at the local and/or regional level will be given a higher priority. *[Comments: A similar criterion can be found in the Environment section. If it is not eliminated, this criterion needs to be clarified. How would “environmental benefit” be defined and measured? How would the possibly conflicting environmental benefits for human health, ecosystem, wildlife, etc., be prioritized?]*

c. Scope of Project Impact. A project which addresses a crossborder, regional environmental priority condition/problem will receive a higher priority than a project which addresses a regional priority within only one country. A project which addresses a local priority in only one country will receive a lower priority. *[Comments: a. and c. should either be merged or the difference between the two should be clarified. It is unclear, what is meant by “Binational Project”. Because of the geographical restrictions in the Certification Criteria and the transboundary nature of most environmental problems in the region, projects will be more or less binational in scope in most cases automatically. However, this is one of the before-mentioned criteria which cannot be applied to all projects in the same manner. The binationality criterion should be outweighed or overruled depending on the seriousness of the environmental problem which the project tries to solve. A project having a very high net environmental benefit in one country, for instance, because it cleans up a significant health problem, may be of higher priority than a project addressing a minor transboundary problem.]*

2. Environment

The goal of BECC is to help preserve, protect, and enhance the environment in a sustainable manner in order to improve the quality of life in the U.S./Mexico border region and to cooperate towards the achievement of sustainable development. The applicant should ensure that all negative environmental impacts of the project have been avoided to the extent possible, and that those that appear to be unavoidable at the time of submission have been identified and considered in the project evaluation process, that appropriate safeguards have been included in the project for unforeseen potential impacts which could cause damage to natural resources human health or the environment, and that projects are in compliance with

appropriate local, regional, state, and federal environmental regulations as well as international agreements.

Information Requested

a. Documentation of Environmental Regulatory Compliance. Project originators must coordinate with appropriate local, regional, state, and federal agencies to identify all environmental impacts to natural and cultural resources as early in the project planning process as possible. Documentation of project approval by appropriate regulatory organizations must be provided to BECC prior to certification. There must be a credible schedule to obtain permits authorizations prior to start of construction.

i. Provide a list of all environmental issues affected by project development. *[Comments: The term “environmental issues affected” is very ambiguous. The guidelines should clarify, whether it means the ‘environmental problem to be addressed’ or the ‘environmental media and parameters impacted by the project’. The meaning of environmental issue may be very broad (e.g. desertification)]*

ii. Describe environmental action required, including no action, regulatory organization requiring the action, proof of action completed or proof of approval for method to complete the action in the future, and contact person.

iii. List required permits authorizations (i.e., permits, licenses, etc.), regulatory organizations providing permit authorizations, date permit authorizations approved, proof of approval, and contact persons.

iv. Provide copies of all documents submitted to regulatory agencies to BECC.

v. List specific environmental standards to be met, e.g. contaminant discharge limits.

b. Conformance with Local and Regional Conservation and Development Plans. Projects submitted to the BECC must conform with local and regional plans as well as land-use and zoning regulations.

i. List applicable local and regional plans and regulations, agency or agencies with authority, and contact person or persons.

ii. Describe how the project complies with the plans and regulations.

c. Environmental Assessment. Discuss short, medium, and long-term impacts on biological diversity, ecosystem integrity, sensitive environmental habitats, and human health. Include an analysis of environmental risks, negative and positive environmental impacts, *[Comments: The term “environmental risks” should not be used, since it implies that the Environmental Assessment should include a risk assessment. Risk assessment has come under intense attack from all sectors and is widely acknowledged to be an imperfect tool at best. Generally speaking, risk assessment is an unnecessary process in analyzing the appropriateness of a project. Usually what is needed rather than a risk assessment is a hazard analysis and a straightforward description of potential impacts on human health and the environment. The other parameters stated in this paragraph are sufficient and can stand alone without adding “environmental risks.”]* mitigation of negative impacts, environmental standards and objectives of the affected area, and project alternatives including implications of not implementing the project, and appropriate additional information which has not already been described in documents provided to the BECC.

Fundamental BECC Certification Criteria

a. Compliance with Applicable Environmental Regulations. All projects certified by the BECC must comply with all appropriate applicable environmental and other regulations. Projects which do not comply with appropriate applicable environmental and other regulations

cannot be certified.

b. Conformance with Applicable Local and Regional Plans. All projects must conform with applicable local and regional plans. Projects which do not conform with local and regional plans will not be certified.

c. Conformance with Applicable International ~~Treaties~~ Agreements. Projects must comply with applicable international treaties. Projects which do not conform with international agreements will not be certified. *[Comments: The term "treaties" has very limited meaning. The criterion should include other kinds of international agreements (e.g., the La Paz Agreement, the Integrated Border Environmental Plan and Agenda 21 are not treaties). Although we have suggested including the "will not be certified" clause in order to make the syntactic structure parallel with the other criteria, we recommend that the negative clauses be deleted in all cases since the category "Certification Criteria" itself implies that not meeting them will result in the project not being certified.]*

d. Environmental Mitigation-Protection. Projects must provide a net environmental benefit to human health or the environment. Projects that result in with a major direct net negative impact on the environment or human health with no reasonable actions to mitigate the impact will not be certified. *[Comment: The fundamental goal of projects should not be to mitigate, but to protect human health and the environment.]*

e. Natural Resource Sustainability Conservation. Projects which must promote natural resource sustainability conservation. Projects which do not such as a project which reduces waste at the source, uses fewer natural resources than conventional technologies, reuses or recycles, or implement other means of conserving natural resources, will receive higher priority not be certified. *[Comments: This criterion has been revised and moved from the draft Sustainable Development Criteria. Here, as in many other places, the draft overuses and hence often blurs the meaning of the term "sustainability"; in this instance, "conservation" is a more precise choice.]*

Sustainable Development Prioritization Criteria

a. Holistic Multi-media Ecosystem Approach to Natural Resource Management. Projects which adopt a holistic multi-media, ecosystemic approach to natural resource management and environmental protection by watershed, groundwater basin, airshed, land use planning, or similar method will receive higher priority. Projects addressing a single medium within a small area will receive lower priority. *[Comments: "Holistic" is an ill-defined, ambiguous and controversial term which should be avoided.]*

b. Natural Resource Sustainability *[Comments: This criterion has been revised and moved to the Certification Criteria category (e) above.]*

c. Energy Sources. Projects which use only renewable energy sources will receive higher priority. A project which uses a combination of renewable energy resources and fossil fuel resources will receive medium priority and projects utilizing only fossil fuel resources will receive lower priority. *[Comments: Use of renewable energy sources may not necessarily provide the best choice. For instance, wiping out a forest in order to use "only renewable" fuelwood may not be preferable to mining non-renewable natural gas.]*

d. Energy Efficiency. Projects which have stronger higher energy efficiency † and/or conservation measures will receive higher priority. Projects which do not have efficiency †

and/or conservation measures will receive lower priority. *[Comments: use of the diagonal (/) tends to be ambiguous; "and/or", while grammatically awkward in this instance, tends to be less ambiguous insofar as it does not lend credence to the inaccurate assumption that energy efficiency necessarily equates with energy conservation (a highly efficient vehicle or power plant, for example, may lead to unconservative (and unsustainable) consumption due to increased usage (and, hence, increased extraction of fuels, increased air emissions, etc.).]*

e. ~~Negative Direct Environmental Impact at Project Site~~. Projects which ~~do not create a direct negative~~ **have a clear and lasting positive impact on natural resources the environment and human health will receive higher priority. Projects which have a direct net positive impact** due to mitigation of negative impacts ~~that will be mitigated~~ will receive a lower ~~medium~~ priority and projects which ~~have a direct negative impact that will not be mitigated~~ will receive lower priority. *[Comments: The addition of a Certification Criterion disallowing projects with net negative impacts (at d, above) obviates the need for addressing such projects in the Prioritization Criteria. As in the Certification Criteria, prioritization must address human health as well as environment. The negative language of the original draft ("Projects which do not have. . .") is awkward. Furthermore, the scope of impact concerns should not be reduced to "direct" impact at the project site, but take into account potential off-site impact(s) (including regional or even, when applicable, global environment) and indirect (i.e., secondary, tertiary, etc.) impacts such as bioaccumulation in the food-chain and transgenerational health effects.]*

f. ~~Voluntary Environmental Mitigation and/or Enhancement Measures~~. Projects which provide mitigation measures for restoration of ~~degraded~~ habitat, biodiversity enhancement, ecosystem preservation, or other measures which improve the quality of life for local residents or enhance the quality of the local environment ~~such as parks~~ will receive higher priority. Projects which provide marginal mitigation or enhancement measures will receive medium priority. Projects which do not offer mitigation or enhancement measures will receive lower priority. *[Comments: Presumably the draft language intends this criterion to address off-site mitigation or enhancement measures that are supplemental or ancillary or relatively unrelated to the project, rather than those at the project site of operations. This distinction is unclear (e.g., both kinds of mitigative actions would presumably be part of "the project" or they would not be subject to consideration in the certification process). But perhaps it cannot go without saying that mitigation of any degradation caused by a project must be included as part of the project. This criterion should clarify that mitigation efforts must mitigate the specific impacts of the project, not just benefit the community in general. The adverse environmental and health impacts of, for instance a waste incinerator will not be mitigated by building a park or wildlife preserve for the community and such unrelated mitigation or enhancement should not be figured into a project's net benefit accounting. Furthermore, the "quality of life" clause as used in the draft is so broad that it could result in certification of projects that provide short-term inflationary economic benefit to current residents or other non-sustainable impacts without regard to environmental improvement of any kind, let alone furthering sustainable development. In any case, the term "voluntary" in the draft language is unnecessary: the project either does or does not include a mitigation or enhancement component; its volitional aspects are irrelevant.]*

g. Contamination Elimination or Reduction. Projects which ~~comprehensively address~~ eliminate or reduce a contamination problem will receive higher priority, projects which significantly reduce contamination will receive medium priority, and projects which do not reduce contamination will receive lower priority. *[Comments: The criteria in general, and this criterion in particular, should give top priority to projects which prevent or eliminate contamination rather than just reduce it (especially in regard to highly hazardous pollutants which are toxic, persistent and bioaccumulative), and to projects which actually do both or either rather than just vaguely "address" a problem. Several significant terms as used in this*

draft criterion are vague, ambiguous or otherwise confusing. It is not clear, for instance, if the criterion refers to pre-existing contamination the project is supposed to clean up or to contamination created or worsened by the project (an ambiguity which is heightened by the explicit use of the phrase "at Project Site" in the following criterion). In this regard, the draft's use of the term "reduce" would seem to be applicable only to pre-existing contamination since it is difficult to see how a project can reduce contamination that did not exist before the (supposedly "new") project existed. Furthermore, it is not clear what is intended by the term "comprehensively"; if it means that projects receiving highest priority must take into account the contamination potential of the substances used (i.e., stored, processed and released as product, byproduct, waste, etc.) throughout those substances' entire life cycles, thereby leading to an assessment of toxic use reduction options for the project, then the term is appropriate. The draft use of the term "problem" suggest that this truly comprehensive approach is not intended, but only a more immediate concern with conditions at the project site that might be dealt with through mechanical or other engineering fixes rather than through the management policy approach required for fostering sustainability.]

h. Prevention of Contamination at and from Project Site. A project which has a highly **effective pollution prevention or reduction program that prevents contamination at and from** the project site during construction, ~~and~~ operation and post-closure phases of the project will receive high priority, ~~an acceptable~~ moderately effective pollution prevention or reduction program will receive medium priority, and a less effective pollution prevention or reduction program will receive lower priority. *[Comments: Clearly, off-site as well as on-site contamination should be prevented, and prevention in the post-closure phase of a project facility should be planned for as well as the earlier phases. In addition, the terms "effective" and "acceptable" beg the question; how they are to be interpreted should be explained here or in the prior definitions. The use of these terms also brings up the question of what priority projects that have ineffective programs will receive, or why they should be certified at all.]*

i. Monitoring and Enforcement. Projects with a highly effective environmental monitoring **and enforcement program will receive higher priority. Projects with an acceptable moderately** effective program will receive medium priority and a less effective program will receive lower priority. *[Comments: Again, the terms "effective" and "acceptable" need explanation (for example, how is "effective" monitoring to be measured?), as do several conceptual aspects of this criterion. For instance, the rationale for coupling monitoring and enforcement as a single criterion is not at all clear. Monitoring can and should proceed with or without an enforcement program. Conversely, enforcement can and should proceed with or without a monitoring program. But while monitoring can be and typically is carried out by the operator of a facility or project, enforcement (except in the case of government operations) typically is carried out by a third (governmental) party. Yet the draft language assumes a single "monitoring and enforcement program." Does this criterion contemplate only government projects? Or is the criterion intended to assure that projects will not be certified unless governments maintain effective, acceptable enforcement? If the latter, how is this enforcement (which can, after all, be determined only during operations and post-closure) to be verified, measured (i.e., rated as to effectiveness), and (perhaps most interesting) how is the rating of the enforcement or lack of it to be applied to the project?]*

j. Human Health Issues. Projects which ~~address~~ satisfy critical human health needs will receive high priority. Projects which ~~address~~ satisfy some health needs will receive medium priority and projects which do not ~~address~~ satisfy health needs will receive lower priority. *[Comments: Again, projects should not merely "address" issue but should provide positive benefits or the strong probability thereof. The draft use of the term "some" is ambiguous, implying either that projects which address more than one health need (critical or not) or that*

projects which address certain health needs (rather than others) will receive medium priority. The document should clarify and, if the latter is intended, spell out the kinds of health needs that will be considered higher priority (which needs, for instance, are “critical” and which are not?).]

3. Technical Feasibility Technology

BECC will certify projects which use the best available appropriate technology and are designed, and will be operated and maintained in a manner which will achieve the project's purpose.

Information Requested

a. Project Specification. Include technical aspects which justify the project, providing the sensitivity analysis and justification of the following factors, dependent upon the type of project.

- Water Pollution: Growth analysis, both mid and long range for the proposed planning time frame; average daily consumption rate; characteristics of the production source, water quality analysis, water conservation program, pollution prevention program, transportation, and distribution infrastructure; type and capacity of treatment and its efficiencies, estimates of design and construction costs, estimated annual operation, and maintenance costs; and any other information that will ensure a better understanding of the project. *[Comments: Water Pollution is frequently a result of low water quantity; therefore quality and quantity issues must be addressed together and so criteria should require conservation measures.]*

- Wastewater Treatment: Quantity and quality of wastewater to be treated; projection of the wastewater volume for the proposed life of the project; design of collection system **including pumping; pretreatment conditions, including kinds of facilities performing pretreatment and levels of pretreatment; treatment methods, including, as appropriate,** treatments levels (primary, advanced primary, secondary, etc.); design of treated wastewater discharge or wastewater reuse systems; analysis of treated wastewater quality; sludge treatment analysis and system for final disposal of sludge; and any other information that will ensure a better understanding of the project. *[Comments: Public wastewater treatment facilities are seldom designed, and should not be expected to be designed, to treat industrial wastewater discharges. Rather, these must be dealt with through pretreatment programs conducted by the generators at the site of generation and the criteria should prohibit receipt at wastewater treatment projects of industrial wastewaters which have not undergone pretreatment.]*

- Municipal Solid Waste: Projection of amounts of solid waste generated by the population for the proposed life of the project; source reduction program; areas of collection; description **of operation efficiency; type and capability of proposed equipment; plan for treatment and disposal of household hazardous waste; source separation, treatment and recycling proposals** program; plan for the expansion, upgrade or closure of landfills; **incineration capabilities;** composting capabilities; **energy production capabilities;** and any other information that will ensure a better understanding of the project.

b. Technical Process. Use of **proven or known effective best available appropriate** technologies is encouraged. Criteria for selection and justification of the chosen technology should be included with emphasis on appropriateness to the community and efficiency of operation. Projects that involve the transfer of technology should describe the process and projected performance data.

c. Quality Control Program. Submit the quality control plan for all aspects of the project. It should include contractor and equipment quality control, personnel training, as well as other quality control issues.

d. Investment Timetable. Submit the project financing plan and the required sequence to be followed in order to implement different stages of the project. Provide project development with a detailed description of stages, and activities necessary to reach the objectives in a timely and cost effective manner. Include a bar diagram showing the actions to be carried out, an investment schedule, stages of progress, cost and source of funds. *[Comments: This criterion should be moved to the section on Economic and Financial Feasibility.]*

Fundamental BECC Certification Criteria

~~—None.~~

a. ~~Appropriate Technology. Projects which must utilize proven appropriate technology will receive higher priority. Also~~ and provide a closer match between the level of technology used and the ability of the local user to operate and maintain the system ~~will result in a higher project priority without creating dependency on high levels of resource inputs from outside the community and without adding significant stress to the environment or the social fabric of the community.~~ *[Comment: This criterion is a revision of draft Sustainable Development Criterion (b), below.]*

Sustainable Development Prioritization Criteria

a. ~~Transfer of Technology. Projects which transfer an appropriate technology previously unavailable to the community will receive a higher priority.~~ *[Comments: It would not serve the goal of sustainability to blindly apply this criterion to all submitted projects. For example, low-tech, passive systems may not require transfer, yet may be exactly appropriate; on the other hand, a project requiring import of extensive high-tech knowledge is not necessarily beneficial to a community.]*

b. ~~Level and Type of Appropriate Technology to be Utilized.~~ *[This criterion has been revised and moved to the Certification Criteria category above.]*

c. ~~Project Life Cycle Cost. Projects which have a lower life cycle cost will receive higher priority. Energy intensive systems, systems which incorporate high cost technical equipment, systems which require frequent maintenance and equipment replacement and that require labor intensive operation all tend to be high life cycle cost projects.~~

d. ~~Ease of Expanding Facilities to Meet Future Services Demands. Projects which can be expanded easily to meet future services demands will receive higher priority, projects which have restrictions in meeting future services demands will receive lower priority.~~

~~e. New Facility, Expansion of Existing Facility, or Rehabilitation of Existing Facility. Projects involving construction of new facilities will receive higher priority, assuming no facility is currently operating to deal with the environmental issue being addressed. Projects which expand the capacity of an existing facility or require addition of new facilities to existing facilities will receive medium priority and projects which rehabilitate existing facilities will receive lower priority.~~ *[Comments: It is unclear why this criterion was included. It is already covered by Prioritization Criterion d. in section 5.(Social Aspects) and could therefore be eliminated for simplification]*

4. Economic and Financial Feasibility

Economic and financial information will be used to verify the ~~viability~~ feasibility of proposed projects and assess the economic ~~sustainability~~ viability of the projects. *[Comments: As discussed in the beginning of this paper, to avoid a confusion of concepts, the term sustainability should not be used when talking about economic feasibility/viability of a project.]*

Information Requested

Applicants are requested to submit an analysis that shows a reasonable internal rate of return and payment capability and the basis for the assumptions. Furthermore, the applicant is requested to provide the following information:

- a. Analysis of the cash flow, balance sheet, income statement, and sources of financing.
- b. Plan to recover the investment and operational and maintenance costs. This plan should include an analysis of interest rate and anticipated income sources. If a user fee will be used discuss how the system will be set up and what assurances there are that users will pay.
- c. Sensitivity analysis which compares the result of economic factors differing from those assumed in project planning (e.g. different interest rates, population growth rates, economic growth rates).
- d. Financial statements for a 15 year horizon.

Fundamental BECC Certification Criteria

a. Benefit/Cost (B/C) Ratio. This ratio is the main indicator of the economic feasibility of a project. It measures the proportion of benefits to costs. Projects must have a ratio greater than 1 in order to be considered for certification.

Sustainable Development Prioritization Criteria

a. Relationship Between User Fees and Operating Costs (debt coverage). Projects which have a higher projected debt coverage (under payments as a percentage of required debt payment) will receive a higher priority.

b. Internal Rate of Return (IRR). The IRR indicates the economic feasibility of a project according to its expenditures and recoveries program. Projects having a greater IRR will receive higher priority than projects with a smaller IRR.

c. Community Economic Development. Projects which have a highly effective plan to promote local economic development such as procurement preference for local businesses and products and development of local employment and other community economic opportunities rather than promoting outside development will receive higher priority. Projects with a plan which adequately promotes local economic development will receive medium priority and projects with less effective local economic development plans will receive lower priority. *[Comments: Prioritization Criterion (e) from the next section (Social Aspects) should be moved and merged with this criterion. The draft language of this criterion tends to confuse the important distinctions between “community” and “local”, and between “economic development” and “community development” (of which latter, economic development is only a part). Both kinds of development are essential and the criteria should foster both. To this end,*

this criterion should be linked with the new recommended criterion (f) under Social Aspects.]

d. Economic Sustainability Viability. Projects should be both environmentally and economically sustainable viable. Projects which are economically sustainable viable over the long-term (e.g. projects which are sustainable will be maintained with locally generated revenue) will receive higher priority. Projects which are only economically sustainable viable on a short-term basis (e.g., projects dependent on sources of revenue not reasonably assured for the life of the project) will receive lower priority. *[Comments: If the term “locally” in the brackets above is applied, this might lead to a situation, in which projects submitted by low-income communities will not receive high priority. This is clearly a conflict with the BECC’s other priorities in the following section, which state that communities of small size, with low income and high unemployment should receive high priority. Paragraph (a), (b) and (d) are dealing solely with the economic viability/feasibility of projects. Therefore, again, the term sustainability should be replaced throughout this section.]*

e. Projects with no cash-income. Projects which cannot finance the payback of their NADBank loan through a constant locally generated revenue stream, but are nevertheless beneficial for environment and human health (such as creation of wetlands, environmental education, capacity-building and development of right to know programs), will not automatically receive low priority.

5. Social Aspects

The BECC recognizes the need to assess social aspects which may affect the success of a project.

Information Requested

a. Project Impacts on Local Populations. Provide information on the number of people who will directly benefit if the project is implemented and the number of people who would be affected directly and indirectly if the project is not implemented. Provide available data on prospective population growth, and how the project is taking these into account. Discuss impacts on local employment, local economic development, community infrastructure and other local issues.

b. Project Impacts on Cultural Resources. Provide information on the cultural resources impacted by the project, if any, including impact of projects on aspects of local cultural diversity (such as demographic changes due to project related population increases).

c. Characterization of Local Economic Situation. Provide the most current information available on the local unemployment rate, local market activities, local economic diversity, significance of local informal economy, the average per capital income, and current availability of environmental services.

Fundamental BECC Certification Criteria

a. Compliance with Applicable Cultural Resources Regulations. All projects certified by the BECC must comply with all appropriate applicable cultural resource regulations.

b. Negative Direct Cultural Resource Impact at Project Site. Projects which do not create a direct negative net impact on cultural resources or cultural diversity will not be funded. receive higher priority. Projects which have a direct negative impact that will be mitigated will receive medium priority and projects which have a direct negative impact that will not be mitigated

~~will receive lower priority. [Comments: Cultural resources, including cultural diversity, are as essential to sustainable development as environmental resources and diversity and should receive an equivalent level of significance in these criteria. This criterion has been revised and moved from the drafts Sustainable Development Criterion below]~~

Sustainable Development Prioritization Criteria

a. Size of Benefiting Community. Projects developed by small communities with fewer resources to develop projects independently will receive higher priority.

b. Unemployment Rate. Projects benefitting a population with a higher unemployment rate will receive higher priority.

c. Average Per Capita Income. Projects ~~affecting~~ benefitting a population with a lower per capita income will receive higher priority.

~~d. Availability of Services. Projects affecting benefitting an area with no previously without services (i.e. water, wastewater, electricity) will receive higher priority. Projects benefitting an area with partial services will receive medium priority and projects which improve existing services will receive lower priority.~~

e. Creation of Local Employment Opportunities. If most of the jobs created by a project are within ~~the border zone~~ the local area of the project, the project will receive higher priority. Projects which create jobs outside the ~~border zone~~ local area of the project rather than within ~~the border zone~~ it will receive lower priority. *[Comments: The border zone is too long and culturally, economically and environmentally diverse to be considered a unit for purposes of job enhancement benefits. This criterion should be placed in the Economic Feasibility section.]*

~~f. Negative Direct Cultural Resource Impact at Project Site. [Comment: This criterion has been revised and moved to the Certification Criteria Category]~~

~~g. Promotion of Community Development. A Project which benefits the development of the community beyond mere economic development and invests in human infrastructure by promoting public participation in long-term community planning, environmental education and capacity-building and which contributes to the elimination of poverty will receive higher priority.~~

6. Community Participation

~~Due to the nature of BECC's mission, community acceptance of participation throughout the lifecycle of projects takes on a highly meaningful role. An interactive process has been developed to ensure meaningful community participation in the project planning and process of developing project proposals. Applicants should obtain ensure community approval involvement by establishing consensus on the need for project implementation conducting public meetings, needs and priority assessments and establishing local working groups to participate in the project design, as well as for acceptance of support for user payments for service, operation and maintenance of the proposed project. Throughout the lifecycle of the project, the community's right to know about the operation and its potential effects must be ensured with transparent mechanisms.~~

Information requested

a. ~~Binational Public Expectations~~ Participation. Indicate what the public expects, if the project is ~~executed~~ implemented. Indicate how the public was involved in the project development process and how public priorities were measured. ~~For example, As proof of~~ binational public participation during the planning phase, submit documentation of media campaigns, mailings, community meetings and educational activities for affected citizens of all ages and groups on both sides of the border. In addition, submit a plan for binational public participation during the entire lifecycle of the project, indicating how, for instance, the public will be involved in decision-making, including a) community right to know programs for purposes of emergency planning and pollutant release inventories; b) facility and operation modifications; c) preparedness for social and economic impacts of closure; etc.

Fundamental BECC Certification Criteria

a. ~~Outreach~~ Binational Public Participation Program. Projects must have an effective ~~outreach~~ binational public participation program in order to be ~~considered for certification by the Board~~ certified. *[Comment: As noted above, outreach is only one element of public participation; an effective public participation program must result in community involvement and empowerment.]*

b. Public Opinion. Projects must be widely ~~accepted~~ supported by the public as evidenced by comments at public meetings, hearings and letters prior to certification by the Board.

Sustainable Development Prioritization Criteria

a. Education Program. Projects which include a highly effective environmental education program will receive higher priority. Projects which include an adequate environmental education program will receive medium priority and projects which include a less effective environmental education program will receive lower priority. *[Comments: It is unclear why and how this criterion should or could be applied to all submitted projects, or to what ends, on what issues the programs would educate, and to what extent the community is to be educated about those issues. In a worst case, this vague draft language could result in high priority for a project that does nothing more beneficial than propagandize the non-existent community benefits of a polluting facility.]*

b. Diversity of Community Participants. Projects with strong involvement in planning by diverse project sponsors, socioeconomic community groups and individuals will receive higher priority. Conversely, projects with little or no diversity will receive lower priority.

7. Operation and Maintenance

It is important to detect and correct any shortcomings in operations at an early stage in order to reach planned operational efficiency levels as soon as possible.

Information requested

a. Start-up Operation Program. Establish the sequence in which the infrastructure's operation will start as well as how any projected problems or defects in equipment or workmanship will be identified and corrected during the start-up phase.

b. Contingency Program. ~~Define~~ Describe actions and corrective measures to be taken ~~should a contingency program be needed during the start-up operations, during the operational life, or during the post-closure phase of the project.~~

c. Operation and Maintenance Program. A well-defined long-term operation and maintenance program is necessary. Describe the system's operation and maintenance program to include training and certification of operators, training of maintenance personnel and preparation of operation and maintenance instruction material. Also quantify funds reserved in project budget to ensure adequate support for operations and maintenance program.

d. Safety Program. Plan. An operational occupational health and process safety program must be an integral part of the operation and maintenance program.

e. Pollution Prevention Plan. Projects having a potential for release of pollutants must submit a pollution prevention plan identifying pollutants of concern at the operation, actions that will be taken to prevent or reduce their release, including projected year-to-year improvements during the life of the facility. (Pollution prevention includes actions such as substitution of less dangerous for more dangerous substances and improvements in process efficiency, but does not include such end-of-the-pipe procedures as waste minimization or off-site recycling.)

f. Closure and Post-Closure Plan. Submit a closure and post-closure plan, which describes, how waste resulting from the closure of the facility will be treated and disposed of, and how the site will be monitored after closure.

Fundamental BECC Certification Criteria

None

a. Life-of-Project Planning. A project that does not provide an operation and maintenance program, including an effective community right to know program for emergency planning, an operational occupational health and process safety plan, an effective contingency plan and, where applicable, a pollution prevention plan, a closure plan and a post-closure plan will not be certified.

Sustainable Development Prioritization Criteria

a. Preliminary Operations. Projects which have more effective start-up programs will receive higher priority.

b. Long-term Operations and Maintenance. Projects which have a planned and budgeted long-term operation and maintenance program, including personnel training, will receive higher priority.

~~c. Safety Program. Projects offering a plan for operational safety will receive higher priority. [Comments: this criterion has been included in the new recommended Certification Criterion (a) above.]~~

On the Draft BECC Certification Criteria and Guidelines (1996)

Michael Gregory and Nicola Zeuner, presented to the Border Environment Cooperation Commission, Juarez, Chihuahua (26 September 1996)

Thank you for the opportunity to comment on the revised draft Criteria. The Certification Criteria have become the heart and conscience of the BECC, an important guideline for staff, communities, project sponsors and NGOs to develop projects and check their compliance with basic principles of financial feasibility, sustainable development and public participation. It is therefore crucial that the Criteria be clear, user-friendly and strong at the same time. It is just as crucial, that the criteria be complied with by the project applicants, and thoroughly enforced by staff and board. In the past, unfortunately this has not always been the case. Hopefully, this improved version of the criteria will help to achieve compliance and provide the border region with a number of financially secure projects which are supported by the community and will further sustainable development.

Our comments reflect two years experience closely following the BECC process, both in the development of policies and rules as well as in analyzing, monitoring and assisting communities in developing projects. Since inception of the BECC we have focused especially on the inclusion of elements of sustainable development into the Criteria and into the project's designs.

This new version of the document is an improvement over the previous one, since the section on Sustainable Development has been amplified and clarified. We also appreciate the streamlining of the documents' format, and the inclusion of the Project Development Assistance Program and the Principles for Private Projects. We congratulate staff for successfully reflecting one year of practical experience as well as for incorporating public comment, including most of ATI's earlier recommendations.

In a few places, however, the document needs further improvement.

Private Projects

In b., Categories of Private Projects, 2) describes "projects that are designed specifically to address local communities or public at large infrastructure needs". The phrasing "or public at large" is much too broad and should be deleted. While it may be feasible and desirable for a project to satisfy the needs of both the local community where a project is located and a broader public, no project should be certified that does not specifically satisfy the needs of the local community. For instance, applications should not be accepted for a project that would be dependent upon importing wastes from remote places to be disposed of, incinerated or recycled in a local community of the border region, since it would provide no specific environmental infrastructure benefit to that community. As the Sierra Blanca situation shows, importing wastes from outside the region is extremely controversial and is not compatible with sustainable development.

Project Development Assistance Program

We congratulate BECC for developing this program, which has potential to be a meaningful tool to ensure that communities with few resources and capacities will be able to develop their projects. As a non-profit organization with strong interest and expertise in the areas of human and institutional capacity building, community participation and incorporation of sustainable development principles, and an organization that has assisted several project applicants in

addressing those principles, we especially appreciate the inclusion of assistance in these areas. Unfortunately, the RFQ that was recently published for the purpose of identifying consultants does not incorporate these elements, but seems to focus entirely on assistance in the engineering and technical sense. Hopefully, the BECC will stick to the promising outline of the PDAP to make sure project development from its early stages on includes elements of sustainable development and that the assistance helps to build capacity that remains with the community after the consultant has completed his or her job.

Environment and Human Health

The phrase in this Section stating that an Environmental Assessment in some cases may not be required should be deleted. For many public and private activities in both the US and Mexico an EA would not be required by state or federal authorities; a higher standard should be applied in the border region. A letter from the authorities stating that there is no expected impact cannot be considered sufficient. The Environmental Assessment is a crucial part of the application since it provides for a review of alternatives; notification of authorities and public across the border on expected transboundary impacts; monitoring of predicted impacts and their mitigation after the project has been initiated; and, most important, for public access to information and opportunity for public comment prior to certification. With the great variety of projects before the BECC however, some flexibility should be maintained as to what kinds of information the EA actually must contain, so that small scale community-driven projects do not suffer an undue burden.

Financial Feasibility

Our experience with both the Naco and the Nogales projects has shown that community support for the project is often dependent on user fees, and that if the fee structure is not developed with the participation of the community (as was the case with Nogales), it can become a very controversial issue. There should be a certification criterion added to this section concerning the user fees. If, as in most cases, a new structure of user fees will be the basis of loan repayment, applicants should demonstrate that the fee structure is supported by the community. The criterion should read:

“ User Fee Structure. A socio-economically feasible user fee structure must be developed with public participation, the proposed structure must be made available for public comment, and the structure must be widely supported by the affected community.”

Under Information Requested, the document should outline some guidance for applicants on the scaling of user fees for industrial, commercial and residential users, including substantial fee breaks for low-income households.

Sustainable Development/High Sustainability Recognition

We appreciate the inclusion of new Sustainable Development Criteria, however this section could be strengthened by including some of the very concrete elements now found only in the High Sustainability Recognition Section. The High Sustainability Recognition Section has evolved into a good collection of examples for characteristics of Sustainability. However, we seriously doubt the effectiveness and attractiveness of the voluntary recognition, and recommend making some of its elements mandatory. For example, there should be a criterion added on Energy Efficiency which should state:

“Energy Efficiency. The project must reduce consumption of energy by means of efficient operation and energy saving devices. If and where practicable, the project must use

renewable sources of energy.”

There should also be an added Criterion on Pollution Prevention:

“Pollution Prevention. The project must have an effective pollution prevention program”

The difficulty in establishing precise sustainability criteria obviously lies in the fact that not all criteria can always be applied to all projects. However, there are some very essential requirements for a sustainable project within the three categories of projects to be considered by the BECC. Therefore we suggest categorizing projects the same way as in the Technical Feasibility Section and then applying some specific criteria to them. The criteria should read:

“Water Supply. The project must include a water conservation program.

Wastewater Treatment. The project must include a wastewater reduction program; a recharge and/or reuse component; and, for treatment plants that will treat industrial wastewater, a pre-treatment program (or a demonstration that equivalent reduction in toxics will be achieved by other means).

Municipal Solid waste. The project must include a source reduction and a recycling program.”

Finally, the Criterion d., Regional Compatibility should be strengthened by rewording it to say:

“Projects must be compatible with the regional environmental, social and economic setting, and must not encourage population and industrial growth that is incompatible with the carrying capacity of the regional ecosystem.”

Summary

Arizona Toxics Information commends BECC staff for producing this improved version of the criteria. In summary we recommend that

- the Criteria require that private projects must provide significant environmental infrastructure benefits in the community where the project is located, and not just benefit communities outside the region;
- the existing requirement for an Environmental Assessment be retained;
- the Criteria document include an added criterion and guidelines for user fee structures;
- the Sustainability Criteria be strengthened by raising some essential characteristics from the High Sustainability Recognition Section to Criteria status.

Earth, Inc.: A Failure of Vision (1997)

Michael Gregory, presented to the Earth Day Rally, Arizona State University, Tempe, Arizona (2 April; 1997); *Voices: Sierra Club Journal of the Environmental Justice Network* (Autumn), pp.6, 27.

The first Earth Day in 1970 heralded the beginning of what came to be known as the Environmental Decade—the ten year period when most of our environmental laws were passed or significantly amended, including the *Clean Air Act*, the *Clean Water Act*, the National *Environmental Policy Act*, the Superfund for hazardous waste, the *Endangered Species Act*, and the *Toxics Substances Control Act*.

It's hard for some to remember what a mess the environment was in back then, but bad as things are now, in many ways they were a lot worse before we had those laws. But now, exactly because the laws were successful, the polluters and their friends in the state legislature and Congress say we should repeal them. We don't need "command and control" anymore, they say; the polluters have learned their lesson, we're all environmentalists now and will do the right thing without being forced to. Like the ads say, "For Miners, Every Day is Earth Day."

Hopefully, most of us know that is pure bull. But the Arizona Legislature and US Congress believe it and are busily dismantling those laws and deregulating business as fast as they can. They have to be stopped. We can't afford to give up what little we've won over the past 20 years, and there is a lot more to do. For instance, despite the victories of Rachel Carson's *Silent Spring* (the book that in many ways was responsible for the first Earth Day and the environmental movement in general), three to four times more pesticides are being used on US farms now than when she wrote, and many of them are far more dangerous in far lower doses than DDT, the pesticide she focused on.

Species and habitat are being wiped out faster than ever before. Every year, thanks mainly to loopholes industry lobbyists have put in the laws, a thousand or so new man-made chemicals are put on the market without full health and environmental testing. The number of Superfund sites and polluted aquifers continues to grow, the number of wetlands continues to shrink and, thanks to so-called "free trade" and high tech methodologies, we're exporting our destructive products and habits to the Third World and the global environment faster than ever.

One of the major failures of our time is the failure of vision, a failure to be able to even imagine what an alternative might be to the corporate-consumer paradise painted for us by the marketing units of our businesses and their politician buddies.

More than any other country in the world, we really have *bought into* the sales pitch that what is good for business is good for us; that business should be the business of government; that the public interest really *is* best served by the products of private greed and competition; that our being a free people depends on our businessmen having a "free market"; that the public good is best measured in terms of private profit; that the technological convenience of our middle and upper classes outweighs the moral and environmental inequities manifest in the luxury of the super-rich and the desperation of our growing underclass of destitute and homeless.

These are the myths of our corporate America, so much a part of us that we can hardly question them. But they have to be questioned. The National Cancer Institute tells us that one out of every four American will die of cancer. Over 735 million Americans are officially poor; that's one out of seven overall, and one out of five of our children—the ones who suffer most from our bad

environmental decisions

What we do to the environment we do to ourselves. Economics is a subset of ecology and our environment is out of whack primarily because we've focused so narrowly on economic growth without paying attention to the ecological consequences. A city councilman in Sierra Vista, for instance, recently announced that protecting the riparian habitat of the endangered San Pedro River is not worth one job in the city. What arrogant nonsense!

In our liberal fantasies about "being fair," we like to talk about "balancing" the "rights" of business against environmental protection and human health, as if "fairness" had anything to do with polluting industries being allowed to cause cancer and birth defects in workers and the public at large.

Only people have rights. The so-called "rights" of corporations—which are essentially licenses to pollute—are, like corporations themselves, legal fictions given force of law by politicians bought and sold by the corporate culture while we, the people, were busy consuming TV and rock stars, tennis shoes and spectator sports, junk food and all the other junk whose production and consumption is directly linked to destruction of our rainforests and deserts and ozone layer, extinction of species, and contamination of our air and water.

The real economic issue is not the deficit, but the fact that between 1977 and 1992 the richest 1% of Americans gained 91% in after-tax income, while the poorest 20% of us lost 17%. The fact that today, the income of the top 1% equals the combined incomes of the bottom 40%. Balancing the budget is not going to balance that economic inequity, and that is an environmental issue.

Not only are we wrecking the environment worldwide to make our toys, but we dump our wastes on the people at the bottom of the economic heap, both overseas and at home. It's not by accident that we put our waste dumps not in Scottsdale, but in low-income communities of color like Mobile. Economic inequity and environmental injustice go hand in hand, and they're obviously related to our democratic system having become contaminated with big money politics.

We like to think of ourselves as free. But how free are we if we're only free to buy, only free to vote for one corporation candidate or another, only free to put our time into a lifestyle enjoyed by less than 10% of the world's people but responsible for 80% of the world's hazardous waste, 95% of the world's habitat destruction, and 100% of the nuclear plants, nuclear submarines, radioactive waste, tactical bombers, and all the other apparatus of our war on the environment?

People complain about welfare mothers—but the real welfare fraud is not the occasional abuse by people at the bottom, but the fact that the government has not provided enough decent jobs for people to live on. It's worse than just hypocritical to punish the unemployed while at the same time artificially manipulating interest rates to protect investments of the well-to-do, thereby guaranteeing that a certain percentage of the population is *forced* to be out of work. All the public welfare programs we've got could easily be paid for with the money we put into one or two B-1 bombers or aircraft carriers. Think how many hot lunches and prenatal visits could have been paid for with the millions that went into that one A-10 the Air Force lost in Colorado the other day.

The drain on the Treasury caused by Medicare and other public welfare programs is minuscule compared to the corporate welfare our elected officials give away in the form of permits to pollute and tax breaks for industries.

Why is it that we've never seen the peace dividend we were supposed to collect at the end of the Cold War? It's not because we have to maintain a massive military in order to be the world's policeman; that's as big a myth as the one that says we have to poison our food and soil and water with pesticides because it's our humanitarian duty to feed the world.

Not only did we not cut the Pentagon budget, the Clinton administration actually raised it, because our consumer economy is so out of touch with the natural world that the politicians and bankers are afraid it would collapse without those multi-billion dollar handouts to military contractors.

Despite all our righteous rhetoric about spreading human rights and democracy, American companies are by far the largest purveyors of weapons on the world market and arms sales are always among our largest and most profitable exports, Why? Again because supporting military regimes is good business, the same reason that despite all our talk about concern for the environment, our Congress and White House have refused year after year to require US companies to meet the same health and environment standards in their foreign plants as they're supposed to meet here—or even to require them to stop manufacturing and selling products to the Third World that have been banned here because they're too dangerous.

People get worked up about the pollution and horrible working and living conditions across the line on the Mexican side of the border, but those maquiladoras are US companies that moved into Mexico (as they have to Taiwan, Indonesia, the Phillippines, etc.) exactly because they saw a way to get away from our domestic labor and environmental laws.

Corporate flight is part of the New World Order endorsed by every President from Nixon to Clinton. It is a major plank in the platform of our one-party Republicrat system. The successful strategy of that Business Party was clearly laid out by the Reagan warriors, it is being pushed by the Clinton administration, and unless some serious objection is made, it's likely to continue into the foreseeable future, carried out through eight basic tactics:

1. Increase corporate welfare at taxpayer expense through scams like free trade, balanced budget amendments, and privatization of public resources like forests, telecommunications, and the educational system
2. Increase the military budget at the expense of public goods and services
3. Use advertising and propaganda to focus people's frustration not on the real problems, but on government itself, the only institution with potential to increase democracy in the face of corporate power
4. Pack people into what are increasingly becoming inner city horror chambers
5. Increase the size of police forces and the number of prisons
6. Pit people against each other by generating fear, especially economic fear, and direct it especially against people of color; immigrants; the old, young and disabled; and the environment
7. Export pollution and natural resource exploitation to the Third World, the so-called "developing countries"

8. Establish a virtual “right to pollute” by weakening existing laws, passing new exemptions from discharge limits, eliminating opportunities for public scrutiny, making public education into a factory for production of interchangeable components of the corporate octopus.

If we want a cleaner environment, if we want forests and grasslands and abundant, diverse biosystems for our children and grandchildren, we’re going to have to wake up, get smart, get involved, and:

- Get the money out of politics—insist on real campaign reform (not what the two parties in Washington are cooking up for us)
- Get the corporations out of control—repeal the laws, regulations and privileges that give them the same or greater legal power than we have as individual human beings
- Get the peace dividend back from the arms dealers and Pentagon into the hands of the public where it can be used for productive rather than destructive purposes—better schools, affordable housing, parks and wildlife preserves, clean air, really universal health care
- Get a life that doesn’t depend on consuming the material and intellectual brand name products the corporations offer
- And get a vision of a future where our kids and their kids have a better environment than we do, a future where the air and water are clean again; where our food is not a chemical stew; where businesses exist in, of and for the communities we allow them into as a privilege, not a right; where an ecological economics geared towards a 500- or 1000-year sustainability has replaced the short-term dog-eat-dog economic anarchy we have today; where corporate responsibility has taken the place of corporate welfare and corporate domination; and where we have time to do more with our lives than work and buy.

We’ve known for a long time that there’s supposed to be more to life than getting and spending, but that’s the way it’s always going to be as long as we let the corporations control our lives, our governments and the environment.