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**DEALS FOR NAFTA VOTES II:
BAIT AND SWITCH**

"Both supporters and opponents of NAFTA agree that the side agreements have had little impact, mainly because the mechanisms they created have no enforcement power."

"Not a single worker was ever reinstated, not a single employer was ever sanctioned, no union was ever recognized."

"The record on environmental protection is similarly thin...only one [complaint] has resulted in an actual investigation."

-The Wall Street Journal, October 15, 1997.



**Global Trade Watch
November, 1997**

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Deals for NAFTA Votes II: Bait and Switch

Today, the White House is scheduled to reveal a list of offers on worker retraining, community adjustment funding and other goodies veterans of the 1993 NAFTA fight will find remarkably familiar.

As this report documents, many of the policy-related promises "announced" today were never satisfied when first made in 1993. Thus, it appears the Clinton Administration is trying to recycle them to sell again in their current scramble for fast track votes.

As our October 23 report on the list of broken non-policy deals made to obtain NAFTA votes showed, the Clinton Administration record on follow-through with its commitments on trade goodies does not inspire confidence with Members now to make any deals on fast track. Today, the Administration will resort to trotting out more members of Congress who already are fast track supporters because their attempts to "make deals" are having no effect on undecided Members.

Indeed, the November 3 "announcement" of an earlier version of this same list of promises failed to obtain fast track support from the environmental groups who supported NAFTA in 1993. Rather, those groups are having a news conference today to decry the recycled goodies and restate their opposition to fast track. Nor did the November 3 Administration "offer" attract the support of any undecided Members of Congress. Only several Democratic Senators, such as Daschle (D-SD) and Johnson (D-SD) who had already been working with the White House to organize the pro-fast track effort in the Senate, were willing to appear with the Administration. Of course, the Senate has never been a real fast track battle ground. Today's announcement will similarly be accompanied by House Members from Texas who already supported fast track (re)announcing their support.

What is the origin of this doleful dole? When the House Ways and Means Committee passed a "fast track" bill on Oct. 8, 1997 that included significant GOP changes from past fast track terms, only four of the Ways and Means Committee's Democrats supported the bill. The absence of Democratic support for the GOP fast track is widely perceived as a warning of the difficulty the bill now faces if it is taken to the House floor.

The Nov. 2, 1997 Washington Post quotes an Administration official off-the-record admitting that the Administration's hope for passing the bill lies only with making special deals with Members of Congress to procure the needed votes.¹ "The trade bazaar is open for business," noted a recent *Wall Street Journal* article.²

Special deals to buy controversial trade votes was the Administration's method in 1993 for passing the North American Free Trade Agreement (NAFTA). Weeks before the vote, NAFTA opponents had a slim majority. Yet NAFTA ultimately passed. At the time numerous press reports documented deals -- many unrelated to NAFTA -- that the Administration had made with Members of Congress to obtain

1 "Slow Start on Fast Track Forces Administration Into Come From Behind Mode," Peter Baker and John E. Yang, *Washington Post*, November 2, 1997.

2 Bob Davis, "Administration Offers Package to Get Liberal Democrats to Back Fast Track," *Wall Street Journal*, October 13, 1997.

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North American Free Trade Agreement (NAFTA). Weeks before the vote, NAFTA opponents had a slim majority. Yet NAFTA ultimately passed. At the time numerous press reports documented deals -- many unrelated to NAFTA -- that the Administration had made with Members of Congress to obtain their votes for NAFTA.

A coalition of consumer and environmental groups and think tanks, including Public Citizen, released a report in July on NAFTA's three year impact showing broken promises on NAFTA performance: threats to the safety of the nation's food supply, undermined environmental regulations, downward pressure on wages and the loss of good U.S. jobs.

On October 23, Public Citizen released a report studying the outcomes of the special deals made in 1993 to push NAFTA passage. The October report, "Deals for NAFTA Votes: Trick, No Treat" focussed on deals made to protect particular industries. We found that numerous broad-ranging industry and sectoral deals (such as Florida agriculture, durum wheat), as well as narrower deals with individual Members (a highway project, extradition of rapist) were not kept. Several promises that were "kept" in letter were broken in spirit, so underlying concerns remained unaddressed (textiles, wine.)

In this new report, we focus on "deals" that were supposed to make the NAFTA package itself better. Rather than deals for bridges, this report reviews the outcomes of promises on policy issues. As noted above, many of these unkept deals are the exact same ones being re-announced today. Promises reviewed in the report include:

Promise 1: The "Domestic Window" Adjustment Program for Harmed Communities

Broken: Promised Funding of \$150 Million Fizzles into \$22.5 Million

Broken: Program Not Staffed or Launched Until Third Year of NAFTA

Promise 2. Trade Adjustment Assistance for Harmed Workers

Broken: Training Programs and Requirements Fail Workers

Broken: No Jobs Created for "Retrained" Workers

Broken: Many Harmed Workers Cannot Qualify for Any Assistance

Broken: Workers Cut Off When Program Runs Out of Money Before End of Year

Broken: Less Than 2% Actually Receive NAFTA-TAA Benefits

Broken: Most Workers Not Aware of Program Because No Mandatory Notice

Promise 3. Border Environmental Clean Up: North American Development Bank and the Border Environmental Cooperation Commission

Broken: Only One Project Funded in Four Years

Broken: Few Projects Approved for Possible, Eventual Funding

Broken: Loan Criteria Cut Out Poorest Communities Entirely

Broken: Border Environmental and Health Infrastructure, Quality Declines

Promise 4. Core NAFTA Environmental Provisions Will Safeguard Domestic Laws, Stop Competitive Deregulation

Broken: Already 2 Major NAFTA Challenges of National Environmental Laws

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Broken: Carcinogenic Fungicide's U.S. Residue Tolerances Not Canceled After NAFTA Claim
Broken: Mexico, Canada Use Environmental Deregulation to Attract Investment

Promise 5. Guarantees to Protect and Promote Labor Rights in Mexico

Broken: Promised Executive Order on Labor Rights Never Issued

Broken: Mexican Wages Have Not Kept Up With Productivity Gains

Broken: Mexican Labor Conditions Have Deteriorated

Promise 6. Labor Side Agreement to Ensure Enforcement of Domestic Labor Laws

Broken: Cornell Study Shows NAFTA Used to Undermine U.S. Unions

Broken: No Cases Make It Through Labor Side Panel

Broken: Mexican Labor Rights Conditions Deteriorate

Promise 7. NAFTA Environmental Side Agreement to Ensure Enforcement and Sunshine on Environment

Broken: Environmental Commission Refuses to Hear Cases Requesting Enforcement of Laws

Broken: Single Major NAFTA Environmental Impact Study Stalled Indefinitely

Promise 1: The "Domestic Window" Adjustment Program for Harmed Communities -- Funding to Help Communities Most Economically Harmed by NAFTA

Members of Congress who based their support of NAFTA on the NADBank had also demanded and were promised a community adjustment branch or "domestic window" within NADBank to help communities cope with job loss and other negative economic impacts of NAFTA. "It's to allow U.S. Communities to create alternatives, like to buy out a company that say it is going to Mexico," said Rep. Esteban Torres (D-CA)³ The domestic window was to implement the Community Adjustment and Investment Program (CAIP) which was promised to be able to lend or guarantee loans totaling \$150 million. To qualify for assistance a community must be able to demonstrate that an economic downturn it is experiencing resulted from NAFTA.⁴

Then Treasury Secretary Lloyd Bentsen promised that the domestic window "is designed to leverage at least \$200 million of financing and perhaps considerably more..."⁵ Indeed, both the U.S.-Mexico agreement establishing the NADBank and the NAFTA Statement of Administrative Intent which Congress passed as part of the NAFTA implementing bill provided that "10 percent of the sum of actual U.S. paid in capital and the U.S. callable shares associated with that paid-in capital will be reserved for loans, guarantees, and grants by the community adjustment window."⁶ The program was specifically approved as part of the NAFTA implementing bill.⁷ The NAFTA Statement of Administrative Action

3 Interview with Rep. Esteban Torres (D-CA), December 5, 1995.

4 "NADBank's U.S. Community Adjustment Branch," Tina Faulkner, *BorderLines* 30 (Vol. 4, No. 11, Dec. 1996.)

5 Letter from Treasury Secretary Lloyd Bentsen to Rep. Estaban Torres (D-CA), November 17, 1993. (On file at Public Citizen.)

6 *Id.*

7 NAFTA Implementing Legislation, Section 543.

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specifies that a \$150 million capital base would be made available for the Domestic Window program.⁸

Outcome: Administration Never Delivers Promised Funding

Instead of the promised \$150 million capitalization promised and despite the statutory requirement, the Clinton Administration only provided \$22.5 million with only \$7 million available through the direct loan program. "Given this striking loss of lending capacity, one could argue that the Administration used "'bait and switch' tactics to secure our support for NAFTA," wrote Rep. Esteban Torres in an October 7, 1997 letter.⁹ Torres' letter criticized the Administration's re-offering of the same NADBank promises that had not been kept in relation to NAFTA to attract votes for fast track.

Indeed, the Administration's November 3, 1997 draft announcement of "new" NADBank funds intended to attract support for fast track would only add \$37 million to the \$22.5 million paid in -- thus falling \$90.4 million short of the *initial* 1993 pledge of Domestic Window funding. The Administration's November 3 "proposal" notes that the additional paid in capital would allow the Bank "to leverage in private capital markets to provide over \$150 million in additional financing to trade-affected communities."¹⁰ Thus, relying on stable markets, the new "offer" would allow the Domestic Window program to leverage the amount of money that was promised in 1993 to be paid in to the program directly.

Outcome: Domestic Window Program Left Unstaffed, Uninitiated Two Years into NAFTA

In December 1995, after growing protests from the Members of Congress who had relied on the Domestic Window program, an existing Administration official was named Interim Director and an advisory committee was appointed.¹¹

Three years into NAFTA, a group of nongovernmental organizations and academic institutions finally began developing suggested application guidelines and procedures. The first communities identified by this consortium in December 1996 included four California counties: Orange, Santa Cruz, San Diego, and Los Angeles, and two California industries: the agricultural industry in Watsonville and the garment industry in Los Angeles.¹²

NADBank's Domestic Window program suffers from the same problem that bedevils NADBank generally-- the communities most in need of assistance are those least likely to be able to repay NADBank loans.

By spring of 1997, NADBank's Domestic Window program had not yet loaned a single cent nor had further areas been certified as possible recipients.¹³ After a group of Latino Members of Congress

8 NAFTA Statement of Administrative Intent, explanation of Sec. 543(a), page 680A.

9 Letter of Rep. Esteban Torres (D-CA) to Rep. Xavier Becerra (D-CA), Oct. 7, 1997. (On file at Public Citizen.)

10 Administration November 3, 1997 Proposal on NADBank, Section VI. (On file at Public Citizen.)

11 Interview with Rep. Esteban Torres (D-CA), December 5, 1995.

12 "NADBank's U.S. Community Adjustment Branch," Tina Faulkner, *BorderLines* 30 (Vol. 4, No. 11, Dec. 1996.)

13 Interview with Hugh Loftus, Director, NADBank Domestic Window Office, April 21, 1997.

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accused the administration of delaying implementation of the program, it released on Aug. 1 a list of 35 communities in 19 states that will be eligible for the loans.¹⁴ The Associated Press reported that on September 26, 1997 almost four years to the date the domestic window promise was made and weeks before the vote on fast track, the Clinton administration added 12 communities to the list eligible for economic development loans to deal with NAFTA job losses. Businesses in the designated areas will be able to apply for loans and loan guarantees administered through the Domestic Window of the NADBank.

Ironically, if the Domestic Window ever did go into operation, it would cause a deep contradiction within the NADBank program. The NADBank is required to use the bulk of its money for infrastructure projects that help to clean up the industry-ravaged border. Yet the NADBank's Domestic Window eligibility criteria contain no sustainable development requirements. Indeed, projects given domestic window funding are intended to create jobs in places like the U.S. border cities, such as El Paso and Nogales which have seen major job loss to Mexico. El Paso was among the hardest hit of all areas in the US. This area is being considered for domestic window projects by NADBank. Yet El Paso, like most border towns, also suffers from aridity, lack of water treatment infrastructure and some of the worst air pollution in North America. A recent report in *Business Week* states that "Juarez and El Paso, sharing the worst air pollution anywhere on the border, are the prime example of a deepening environmental crisis. Explosive industrial growth and uncontrolled urban expansion have far outstripped the reach of basic municipal services, from sewers to street paving."¹⁵ It would be a grim irony for NADBank, under its domestic window program, to be loaning money for water-intensive businesses to open up or expand in El Paso. To accommodate any increased demands on infrastructure created by new or expanding businesses, NADBank then would have to loan money to BECC-certified projects that are supposed to be incorporate sustainable designs.

Promise 2. Trade Adjustment Assistance for Harmed Workers

The origin of assistance for workers laid off due to NAFTA related layoffs goes back to President Bush. In 1992, President Bush proposed a \$4 billion-a-year NAFTA related worker training program¹⁶ At the time, Bush's plan was attacked by Vice Presidential candidate Al Gore as insufficient who called the plan a "foxhole conversion" that would not be delivered on.¹⁷

The next incarnation of assistance for workers losing jobs due to NAFTA came from the Clinton Administration during its attempt to push NAFTA through Congress. Shortly before Congress voted on NAFTA, then Secretary of Labor Robert Reich wrote to Representative Michael Andrew of Texas: "...we are taking steps as part of the implementing legislation to insure that any worker who must change jobs because of NAFTA will be held harmless from the implications of this change."¹⁸

¹⁴ "12 More NAFTA Loan Areas Named," Associated Press, 9/26/97.

¹⁵ Geri Smith and Elisabeth Malkin, "The Border," *Business Week*, May 12, 1997.

¹⁶ "Fast Track Clears Key Hurdle in the Senate", John Maggs, *Journal of Commerce*, November 5, 1997.

¹⁷ "Fast Track Clears Key Hurdle in the Senate", John Maggs, *Journal of Commerce*, November 5, 1997.

¹⁸ Letter from then Secretary of Labor Robert Reich to Rep. Michael Andrews of Texas, November 10, 1993.

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Four years later, the program created to deliver on this promise has failed miserably to hold "harmless" the more than 400,000 Americans laidoff "harmless" workers laidoff due to NAFTA.

The NAFTA implementing legislation created the NAFTA Transitional Adjustment Assistance Program (NAFTA-TAA). To date, only one-third of NAFTA job loss victims are being certified as potential recipients of benefits. Benefits include basic readjustment services, employment services, training, job search allowances, relocation allowances and income support for up to 52 weeks after unemployment insurance has run out.¹⁹

As of mid-October 1997, 144,691 workers have been certified as eligible for assistance under the NAFTA-TAA program.²⁰ Less than five percent of the workers who qualify for NAFTA-TAA actually receive any benefits. Since only one-third of Americans laid off due to NAFTA are certified for NAFTA-TAA, less than 2% of all NAFTA job loss victims actually receive any benefits. Two-thirds of workers laid off due to NAFTA have not even qualified since most eligible workers do not apply and many laidoff workers are not eligible.

NAFTA TAA expires September 30, 1998. According to the Clinton Administration, to expand NAFTA-TAA an additional two years, the Congressional Budget Office estimates it would cost \$102 million.²¹

Many workers laidoff due to NAFTA do not know the program exists. There is no mandatory posting of information about the program required for local unemployment offices. Of course many workers may not be aware that they have lost their jobs due to NAFTA. Companies are unlikely to draw attention to the role of NAFTA in the layoffs.

For example, Levi Strauss & Co. claims that free trade had nothing to do with its recent layoff of 6,400 workers. But according to the *Journal of Commerce*, "the company has been quietly in touch with federal officials to ensure the workers get special trade benefits to the victims of the North American Free Trade Agreement."²²

Also, only workers who produce a product (rather than a service) that was "directly affected" by

¹⁹ General accounting Office, North American Free Trade Agreement, Impacts and Implementation (GAO/T-NSIAD-97-256), September 11, 1997, p.9.

²⁰ Memo distributed by Charlotte M Edelen, U.S. Department of Labor, October 20, 1997.

²¹ "Making It Possible For All Americans to Share In the Benefits from Open Trade", Clinton Administration Policy Paper, November 3, 1997.

²² "Trade Connected to Levis Decision to Downsize U.S. Workforce,@ *Journal of Commerce*, November 3, 1997.

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NAFTA can qualify. The program's narrow criteria exclude a significant amount of NAFTA job loss. For example, workers at an auto assembly plant that relocated to Mexico would be good candidates for NAFTA TAA. But, the plants' parts manufacturers and suppliers, as well as stores and restaurants in the community, would not be eligible for the program. The service sector is largely exempt from the program.

Also, many workers laid off under NAFTA may apply instead for generic Trade Adjustment Assistance which provides the same benefits with easier administrative requirements. The program has a very restrictive timetable requiring workers to be enrolled in training by their 16th week on unemployment insurance or their 6th week. Workers do not get laid off by the semester, and the existing guidelines do not give workers the leeway they need to meet pre-requisites for training schools or academic programs. Because of these restrictions, some unions advise members not to apply for NAFTA TAA.

A vivid example of how the NAFTA TAA job loss data understate actual NAFTA job loss involves the case of jeans maker Guess Inc. According to the *Wall Street Journal*, Guess has cut the percentage of its clothes sewn in Los Angeles from 97% prior to NAFTA to 35% as of February 1997 as it sent work to five sewing factories in Mexico, and to plants in Peru and Chile. More than 1,000 Los Angeles Guess workers lost their jobs in August and September 1996 alone. None of these Guess jobs that shifted to Mexico shows up as having even applied to NAFTA TAA, much less as being certified for assistance.

Another example of NAFTA TAA's gross understatement of NAFTA job loss involves Florida tomatoes. According to a June 14, 1996 University of Florida Institute of Food and Agricultural Sciences press release, "...before NAFTA, tomatoes were a \$700 million industry for Florida with more than 200 growers. By 1995, with the NAFTA provisions in place and a peso devaluation of more than 50 percent, revenues shrank to \$400 million and growers numbered less than 100." Yet, with 100 Florida tomato firms wiped out, only one company associated with Florida tomatoes, Regency Packing Company of Naples, has been certified by the Department of Labor's TAA program. That one firm's closing resulted in over 1,000 workers being certified under NAFTA TAA.

The NAFTA TAA program also does not apply to U.S. retail workers harmed by the peso devaluation. For instance, as reported in a January 1996 *Miami Herald* story on the impact of the devaluation on U.S. border retail outlets, in Calexico, California, 1,322 jobs were lost due to the December, 1994 peso devaluation. The loss of cross border retail business by newly impoverished Mexicans gave the town of 18,600 the highest unemployment rate in the state (40.6%). Not a single NAFTA TAA petition was filed from the town of Calexico and Calexico's newly unemployed would not qualify for NAFTA TAA if they did file.

Moreover, even those who do manage to find out about the program, apply for it, and get certified for benefits do not always receive the promised assistance. Workers report that the NAFTA TAA program is restrictive and difficult to use compared to the broader TAA program. For example, workers at Owens Brockway, a company which used to produce pump sprays in Chicago, applied for NAFTA TAA benefits after the company shifted production to Mexico. However, when the federal government shut down the Illinois TAA program ran out of funds, and the workers had to discontinue their education. Because workers are supposed to complete their training while they are still receiving

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unemployment benefits, several workers reported that they would not be able to complete training.²³

Retraining programs rarely result in jobs that pay as well or more than the jobs lost. A study by the *New York Times* in the early 1990s found that only one laidoff worker in three will find an equal or higher paying job. Their study also found that the median annual pay drop of a worker who is hired after being laidoff in the early 1990s is \$4,420.²⁴

As a recent Economic Policy Institute analysis has found, average wages in U.S. industries where imports increasing rapidly are well above the national average and are even higher than wages in industries where exports are growing rapidly.

A comprehensive adjustment program would include: regional job creation programs including low interest loans and other incentives for investment in high casualty areas and serious penalties for sudden shift of investment out of high impact areas.

The European Commission used its tax code (largely) to reincentivize behavior, with a ten year phase in. For example, for the first ten years, if you left a "high blight" area in Belgium for Greece, you owed the workers in Belgium three years salary, etc.)

Child care and medical coverage for retraining period and transition to "new" job. The original EC transition programs gave access to low cost health care and child care to anyone in one of the "blighted regions" which had the tax incentives and job training/education programs.

Just a comprehensive retraining plan without the other necessary elements would cost significantly more than the original Bush plan of \$4 billion. Given that this fast track is to not only expand NAFTA, but to move the model to Asia through APEC, and given that the largest share of the U.S. trade deficit comes from the combined deficits of: Japan, Korea, Taiwan, Phillipines, Malaysia, Indonesia, Hong Kong, Japan and Singapore -- and China which wants in to APEC -- the demand for worker assistance would only skyrocket.

Promise 3. Border Environmental Clean Up: North American Development Bank and the Border Environmental Cooperation Commission

Promise: More Funds for Border Clean up -- NADBank & BECC

The North American Development Bank [NADBank] was to provide new financing to supplement existing sources of funds and foster the expanded participation of private capital in border environmental infrastructure and clean up projects. NADBank was capitalized in equal shares by the United States and Mexico with capital of \$3 billion dollars. NADBank was to consider for loans projects approved by the Border Environmental Cooperation Commission [BECC].

²³ Interview with Don Wiener, Chicago unionist, 10/31/97.

²⁴ "More Than 43 Million Jobs Lost, Reaching Every Walk of Life", *New York Times*, reprinted in the *National Times*, December, 1996.

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The creation of the NADBank and BECC was key to securing Congressional support for the passage of NAFTA. Several Representatives and their constituents, deeply concerned over the environmental and economic conditions in U.S. Mexico border communities prior to NAFTA, were led to believe that the NAFTA border environmental institutions would usher in a new era of sustainable development, new public health infrastructure (sewage and water systems for instance) and funding for clean up of the environmental mess now on the border.

Outcome: NADBank Has Not Worked, No New Projects Actually Funded

Only four projects have received NADBank loan-approval. Of the loan money committed, only one project, the wastewater treatment facility at Brawley, California, has actually received any money in any form -- in this case not a loan, but loan financing. Moreover NADBank involvement in the project was opposed by two of the five Brawley City Council members, who charged that NADBank involvement actually wound up costing the city more money than it would have had to spend otherwise.²⁵ The total amount of loan money that NADBank has approved is a mere \$2.267 million -- approximately 1.5 percent of the NADBank current cash assets.

Despite promises that poor border communities would be helped by these institutions, by their very design, the NADBank and BECC mechanisms cannot help communities which are too poor to meet commercial loan rules. The number one criteria for eligibility for NADBank loans is the ability to pay them back. A report by the Government Accounting Office (GAO)²⁶ states that "U.S. Colonias [unincorporated and impoverished border communities] lack the financial and institutional standing to obtain needed capital because they are unincorporated communities subject to jurisdictional disputes between counties, cities, and providers of environmental services, such as corporations that supply water to rural areas... it is unclear whether poorer communities on either side of the border will be able to afford these loans unless they are combined with grants or with low-interest loans from other sources." Indeed, the GAO report found that NADBank failed to assist the most needy communities.²⁷

In nearly four years of operation, the NAFTA border environmental institutions have neither fulfilled nor are on track to fulfill the promises that were made for them. According to Mary Minette of the National Audubon Society, one of the environmental groups that supported NAFTA in 1993, "Neither of the border institutions have lived up to the expectations people had of them."²⁸ NADBank has been plagued by questions of public accountability and skewed funding priorities; moreover, even had NADBank spent all the money which was theoretically available to it, it would still have been overwhelmed by the magnitude of environmental problems in the border region, which have been exacerbated since the passage of NAFTA with a 21% increase in maquila industrial development and

25 Interview with Mary-Jo Shields, Brawley City Council, April 1, 1997.

26 Government Accounting Office, "International Environmental Infrastructure Needs in the US-Mexican Border Remain Unmet," GAO/RCED-96-179, July 22, 1996., p.3.

27 Government Accounting Office, "International Environmental Infrastructure Needs in the US-Mexican Border Remain Unmet," GAO/RCED-96-179, July 22, 1996, p.4

28 Interview with Mary Minette, lawyer, National Audubon Society, April 24, 1997.

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with the work force of the maquila sector up 60% in NAFTA's first three and one half years.²⁹

NADBank has not brought the resources needed to fulfill its ostensible goal: cleaning up the border environment. Some argue it never could. As Helen Ingram of the University of California, Irvine wrote in November 1996, "Neither federal government on either side of the border provided sufficient investment to alleviate infrastructure deficits ... Within border communities, businesses profiting from border growth and development were not paying their fair share of the burden. Human health along the border was endangered, especially that of mothers and children. All these problems are now worse than before, and the best opportunity we have had or are going to have in future decades to make things better has been invested in BECC, NADBank, and the CEC. These institutions are strong on process but woefully weak on action, even many little actions."³⁰

Estimates of how much money would be needed to clean up the mess at the US-Mexican border before the post NAFTA boom in maquila ranged from \$8 billion, according to the US Government, to as much as \$20.7 billion, according to the Sierra Club -- more than 6 times the entire capital of the NADBank.

Promise 4. Core NAFTA Environmental Provisions Will Safeguard Domestic Laws, Stop Competitive Deregulation

Some U.S. environmental groups supported NAFTA passage in 1993 after obtaining what they called the NAFTA "environmental package." An element of this package was several environmental provisions in the core NAFTA text the groups had pressured the Bush Administration to include.

These environmental groups now oppose fast track. With almost four years of real life data to judge by, they have concluded that the NAFTA model was not what it was promised to be. For example, the National Wildlife Federation, which claims to be the largest conservation group in the country, and which supported NAFTA in 1993, has called on Congress to reject President Clinton's proposal for "fast track" trade negotiating authority. In testimony before the House Ways and Means Subcommittee on Trade, NWF's Steven Shimberg cited Administration performance under NAFTA as evidence that environmental safeguards cannot be left to "trust in the Administration."³¹

Promise: Provisions Against Competitive Environmental Deregulation

NAFTA provision 1114 was promised to stop environmental deregulation to attract investment under NAFTA rules. NAFTA Article 1114 states: "...it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not ... or should not

²⁹ Mexico's National Statistics Institute, July 1996, cited in Transport Topics, Alexandria Virginia, October 7, 1996; Ciemex-Wefa, reported in "Reportan un aumento de 21% in maquilas," REFORMA June 2 1997; Mexico's Secretary of Commerce, quoted in *La Jornada*, May 12, 1997. See also Mexican Labor News and Analysis web site maintained by Dan La Botz and the United Electrical Radio and Machine Workers of America (UE) at [HTTP://www.igc.apc.org/unitedelect](http://www.igc.apc.org/unitedelect), which includes current social statistics.

³⁰ Helen Ingram, School of Social Ecology, University of California, Irvine, *Perspectivas*, Udall Center, University of Arizona, November 1996, p. 12

³¹ National Wildlife Federation press release, September 30, 1997.

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offer to..." lower standards to attract investment. This measure was aimed at stopping competitive deregulation, even though it was not mandatory, (i.e. if it had been mandatory the command of "shall not" would be used.) Now, we have the real life evidence to see that it simply has not had the promised effect.

Outcome: Competitive Deregulation is Underway and NAFTA's Provision Art. 1114 Has No Use or Effect.

Carl Pope, Executive Director of Sierra Club, documented in testimony on NAFTA's environmental impact before the House Ways and Means Trade Subcommittee, that Canada under NAFTA, has actively weakened its environmental laws by turning over almost all environmental responsibilities to the provinces.³² This major change to Canadian environmental regulation, widely opposed by environmental experts in Canada, allows investors to play subnational units of government against one another. For instance, the Province of Alberta adopted legislation in May 1996 taking away the right that had been established in national Canadian environmental law for citizens to sue environmental officials to enforce the law. Instead, Alberta's authorities advertise the province's lax regulatory climate as the "Alberta Advantage" to draw investment to the area.³³

Such environmental deregulation to draw investment has not been limited to Canada. In late 1996, Mexico gutted the provisions of its General Law on Ecological Equilibrium and Environmental Protection (LGEEPA), Mexico's comprehensive environmental law, that required Environmental Impact Statements for major projects.³⁴ The changes have made it easier for maquiladoras to open up, now that they no longer have to pay for and file a separate Environmental Impact Assessment if they take up residence in an industrial park that has already done so.³⁵ The decree subjects numerous industries to the EIS waiver, including some of the most polluting industries, such as the petrochemical industry, which has long been the exclusive domain of the state oil company, Pemex. The environmental law weakening came weeks before the government was to open bidding for the privatization of aspects of Pemex. The foreign investors expected to bid for parts of Pemex could now look forward to investing in this highly polluted sector with diminished prospects of having to file an Environmental Impact Statement. "It appears that this was done in order to pave the way for foreign bidding on the petrochemical plants."³⁶ reported Betty Ferber of the Mexican environmental NGO Grupo de los Cien.

Shortly thereafter, a new forestry law deregulating past forestry rules was put in place in Mexico promoted by the U.S. conglomerate International Paper Co. The new law menaces the indigenous environment by allowing for the development of forests of non-native trees.³⁷ The new law provides for International Paper to plant Eucalyptus plantations on 50,000 hectares of land. According to Homer Aridjis, Chairman of the Mexican environmental NGO Group of 100, the Forestry law was practically drafted by International Paper

32 Carl Pope, Chairman of Sierra Club "Forging an Environmentally Responsible Trade Policy," testimony before the House Ways and Means Trade Subcommittee, March 18, 1997.

33 Id.

34 "Understanding By Which Processing of the EIS is Simplified For Selected Industries, Subjecting Them to a Preventative Statement Requirement," Diario Oficial, SEMARNAP, October 24, 1996.

35 LGEEPA Article 31 Part III.

36 Betty Ferber, International Coordinator, Grupo de los Cien [Group of 100], interview with Public Citizen, November 21, 1995.

37 Homer Aridjis, Founder and Artist, Grupo de los Cien, Mexico, interviewed by Andrew Wheat, June 5, 1996.

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and the Mexican Government made it law.³⁸ Mexican forests also are newly under siege since NAFTA because of a deforestation project known as the "model forest." This new forestry policy has been opposed by almost all the ecological groups in Mexico and the opposition PRD party. Under this new Forestry Law, indigenous people and peasants have lost any voice in determining how local lands will be used. The new law was negotiated between transnational forestry companies and national government officials to increase foreign investment in the sector.³⁹

The only other environmental measure provision in the core NAFTA text is Article 104. Article 104 provides partial protection to the three major environmental treaties (Convention on International Trade in Endangered Species, the Basel Convention on toxics dumping and the Montreal Protocol ozone treaty) in case of NAFTA conflict. So far, this provisions has not been tested, although several Asian nations are challenging U.S. endangered species laws on turtles at the WTO.

The restrictive grant of negotiating authority in the Archer bill would forbid negotiation of even this modest NAFTA environmental provision in the future. President Bush had the discretion under the old fast track which provided negotiating authority for all "trade related" matters to work with the pro-NAFTA environmental groups and negotiate this provision. NAFTA Article 104 is clearly "trade related" because it concerns what happens when trade rules conflict with environmental treaties. There has been considerable speculation in trade lawyer circles that this is the provision that pushed Rep. Archer to the "directly trade related" formulation, as Article 104 is the only truly enforceable environmental provision in NAFTA, is the only one that clearly sets environmental objectives above commercial ones and was strongly opposed by Rep. Archer during NAFTA's negotiations to no avail.

Under the Archer fast track, Article 104 would be outside of the president's trade negotiating authority. Article 104 is not "directly trade related" because trade only is incidentally related if and when there is a conflict with trade terms. That is to say the primary objective of Article 104 is to protect the three treaties' environmental objectives, not to expand or set other rules for trade. (The sorts of measures that would be "directly trade related" are, for instance, pesticide rules that determine terms of trade in agricultural products, such as, one cannot import X commodity if it contains Y pesticide residue. Rep. Archer has been quite clear that the "directly related to trade" formulation's use would be to allow the U.S. to negotiate to eliminate such pesticide laws that might limit access of U.S. commodities to foreign markets.)

Promise: Concerns About Environmental Laws Being Attacked Under NAFTA Chided

Both the Bush and Clinton Administrations dismissed the larger concerns of NAFTA critics that NAFTA's other provisions would undermine domestic environmental laws and enforcement in NAFTA countries. Critics feared that many specific NAFTA provisions, enforceable by binding dispute resolution and trade sanctions, would eviscerate the best environmental laws in all three countries.

Outcome: Two Major NAFTA Challenges to Environmental Laws Already and Elimination of Carcinogenic Fungicide Stalled in U.S. After NAFTA Claim

³⁸ Homer Aridjis, Founder and Artist, Grupo de los Cien, Mexico, interviewed by Andrew Wheat, June 5, 1996.

³⁹ Homer Aridjis, Founder and Artist, Grupo de los Cien, Mexico, interviewed by Andrew Wheat, June 5, 1996.

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A. Ethyl Corporation's NAFTA Challenge Against Canadian Environmental Law

For the first time ever in a trade or investment agreement, NAFTA provided foreign corporations and investors with "private legal standing" to overcome usual sovereign immunity safeguards and sue governments for monetary damages. It was not long before this "investor to state" provision was used by a corporation against an environmental law arguing the regulation cut into profits.

The U.S.-based Ethyl Corporation is suing the Canadian government for \$251 million for that government's ban on a gasoline additive called MMT. MMT [Methylcyclopentadienyl Manganese Tricarbonyl], is a gasoline lead substitute produced by Ethyl that is designed to increase octane levels and reduce the knocking sound in engines.

Exposure to Manganese is suspected to cause brain damage in children and infants.⁴⁰ The MMT additive interferes with pollution control devices in cars (such as catalytic converters).⁴¹ The state of California has banned its use of MMT entirely. In the spring of 1997, the state of Michigan urged marketers and producers not to use MMT until health research could be completed.⁴² Little MMT is used in the U.S.

MMT was widely used in Canada.⁴³ In April of 1997, the Canadian parliament acted to ban the interprovincial trade and import of MMT, considering the fuel additive to be a public health hazard.⁴⁴ The ban was also backed by auto manufacturers who were unhappy with MMT's impact on cars' pollution control devices.⁴⁵ Ethyl used NAFTA to sue for \$251 million in damages. Ethyl maintains that MMT is completely safe.⁴⁶

Ethyl argues that the Canadian ban on MMT constitutes an "expropriation" of their investment. A NAFTA provision protecting investors against "expropriation" states that: "No Party shall directly or indirectly nationalize or expropriate an investment...or take a measure tantamount to nationalization or expropriation..."⁴⁷ Unlike previous trade and investment agreements, which require the backing of national governments who then file complaints in state-to-state dispute settlement, the NAFTA investor-to-state dispute mechanism enables corporations to file suits directly and actually seek monetary compensation.

Ethyl's suit claims that Canada's MMT ban will dramatically hurt their manufacturing and sales, as well as damage their corporate reputation. The \$251 million in damages they are suing for contains not just losses from Canadian sales but for the "chilling effect" the ban will have on other nations.

⁴⁰ "Gasoline Additive Called Threat to Human Health," *Southam News*, April 20, 1996

⁴¹ "Ethyl Sues Ottawa Over MMT Law," *Globe and Mail*, April 5, 1997.

⁴² "Canada Can't Stain Ethyl's Name Further," Pioneer Press (op-ed), September 9, 1997

⁴³ In 1996, MMT was added to all of the gasoline sold in Canada with the exception of Chevron products sold in British Columbia. "Gasoline Additive Called Threat to Human Health," *Southam News*, April 20, 1996.

⁴⁴ "Ethyl Sues Ottawa Over MMT Law," *Globe and Mail*, April 5, 1997.

⁴⁵ *Id.*

⁴⁶ "Gasoline Additive Called Threat to Human Health," *Southam News*, April 20, 1996.

⁴⁷ NAFTA Article 1110.

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Indeed, under NAFTA section 1110 Ethyl submitted an intent to sue six months prior the official approval of the MMT ban claiming that the *mere debate* of MMT-related health risks constituted "a measure tantamount to" expropriation because of the alleged damages to Ethyl's reputation.

Ethyl's lawyer on the case, Toronto-based Larry Appleton, author of the reference book "Navigating NAFTA," calls this NAFTA provision the "Pay the polluter principle."⁴⁸

This is of course in stark contrast to NAFTA's environmental side agreement. Under the environmental side agreement companies can not be sued-- not by citizens or governments. Only governments can initiate cases resulting in sanctions, and only after a "persistent pattern of failure...to effectively enforce" environmental laws. This dispute process has many hurdles and relies on two of the three governments approving any claims. It is not surprising that there has not been a single case under the environmental side agreement to come close to the point of economic sanctions. It should be noted that even if there were to be economic sanctions under the environmental side agreement, damages are capped at \$20 million and are to be paid by the government-- not the polluter.

In recent years corporations have increasingly used so-called SLAPPs["Strategic Lawsuits Against Public Participation"] to harass and intimidate environmental and other citizen activists. The NAFTA dispute resolution mechanism raises this tactic to a new level which could subvert legislative process and undermine citizen influence over democratically-elected governments. Moreover, governments could be newly burdened to pay monetary compensation when they wish to pass public health, environmental, labor or other laws that corporations can argue impair the broad rights granted to them under NAFTA's investment chapter.

B. Metalclad Corporation Files Second NAFTA Environmental Challenge

Another example of how NAFTA provisions can undermine environmental regulation is provided by the latest NAFTA environmental challenge brought by California-based Metalclad Corporation. Metalclad set out to build a toxic waste dump in Mexico in San Luis Potosi despite opposition from local residents. When the government of the Mexican State of San Luis Potosi blocked Metalclad from operating the hazardous waste treatment facility and declared some involved land to be an environmental preserve, Metalclad filed a \$50 million lawsuit under NAFTA.⁴⁹ Metalclad claims under NAFTA's investment chapter that the Mexican government should compensate it for the \$90 million it expected to earn if the plant had been allowed to operate.⁵⁰

3. NAFTA Rules Used to Stall a Planned EPA Ban of a Carcinogenic Fungicide.

Within a year after NAFTA went into effect, U.S. and foreign chemical and agribusiness

⁴⁸ "Paying the Polluters?" *McCleans*, August 1997.

⁴⁹ "Metalclad Suit is First Against Mexico Under NAFTA Foreign-Investment Rules", Joel Millman, *Wall Street Journal*, October 14, 1997.

⁵⁰ "Metalclad Suit is First Against Mexico Under NAFTA Foreign-Investment Rules", Joel Millman, *Wall Street Journal*, October 14, 1997.

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companies cited the agreement to oppose an EPA plan to ban all products containing residues of a fungicide called Folpet.⁵¹ As is standard practice, EPA was seeking comment during a review of "orphan" food residue tolerances for a chemical no longer allowed to be used in the United States. Use of Folpet was banned in the United States because of its carcinogenicity and its registration was pulled in 1988. When EPA asked for comments as to why any Folpet food residue tolerances should be maintained, it received numerous agribusiness and chemical company petitions.

One filing after another stated that under NAFTA (and the WTO,) the United States is not allowed to have food standards stronger than allowed by NAFTA absent the United States meeting a certain scientific showing.⁵²

Yet, one reason why Folpet's registration was pulled in 1988 was the unwillingness of the company producing it to provide EPA with the data required under U.S. pesticide laws to prove it safe. Thus, without the industry's scientific information, the EPA is not able to meet the NAFTA (or WTO) requirements.⁵³

Initially, EPA's proposal to ban all products containing Folpet residues was stalled to allow for negotiations with Folpet's producer over obtaining the needed data. After two years, without action to implement the ban, EPA announced termination of import residues of Folpet, but only for the commodities to which industry had not objected.⁵⁴ Action on the long list of other foods now being imported into the U.S. containing Folpet residues is still stalled.

Promise 5. Guarantees to Protect and Promote Labor Rights in Mexico

A. Protection and Promotion of Labor Rights -- BROKEN

To address the concerns of a Democratic Representative who has fought to ensure that the United States considers human and labor rights records in determining a country's trade status, President Clinton promised to use existing trade law to take action "if Mexico's action or policies deny internationally recognized workers' rights..." Not only did the Administration not fulfil its promise -- which required issuance of an executive order -- but it since has taken steps in its fast track proposal to ensure that neither President Clinton nor any future president has the authority to do so. The Member supported NAFTA on the basis of the promise.⁵⁵

In a letter to this Member, President Clinton pledged to use "Section 301," a long-standing U.S. trade law that provides for sanctions against countries the U.S. determines have violated trade obligations, to sanction labor rights abuses in Mexico. To do this, the President pledged to issue an executive order expanding a definition in Section 301 because Section 301 only has somewhat vague language about "unfair trade

51 Revocation of Folpet Tolerance, OPP-300363. Notice at 59 Fed. Reg. 61859 (December 2, 1994.)

52 See e.g. Filing to Folpet Docket by Makhteshim Chemical Works, December 19, 1994, prepared by David Weinberg, Weinberg, Bergeson & Neuman, Washington, D.C. (On file at Public Citizen.)

53 See e.g. Filing to Folpet Docket by Sierra Club Legal Defense Fund, April 7, 1995. (On file at Public Citizen.)

54 40 CFR 180 published July 17, 1996.

55 "Pelosi to vote for NAFTA -- Clinton's Letter Was Key Factor," Susan Yoachum, *San Francisco Chronicle*, November 3, 1993.

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practices" and worker rights. President Clinton committed to issuing an executive order defining "unfair labor practices" to include violation of internationally recognized labor rights.

At the time, many trade experts noted that NAFTA's provisions effectively eviscerated Sec. 301's future enforcement. By November 8, 1993, the Congressional Research Service had issued a legal opinion that the use of Section 301 promised by President Clinton to enforce labor rights would be banned under NAFTA, a concern raised to the Administration and dismissed by the Administration before the promise was made.

Indeed similar language in the GATT-WTO was successfully used to back the U.S. off of use of unilateral Section 301 trade measures in the Kodak case against Japan. Ironically, part of the Clinton Administration package for farm State Senators relies on the exact, same, dead, mechanism of Section 301 procedures applied to agriculture. President Clinton sent his promise letter at the end of October 1993. Now, almost four years later:

- The promised Executive Order -- to make violation of internationally recognized workers' rights actionable under Section 301 -- was never issued.
- Neither Section 301 nor any other trade or other policy mechanism has been used by the U.S., despite growing labor rights violations in Mexico under NAFTA.
- In fact, the fast track proposal tabled by the Clinton Administration in early October 1997 specifically eliminated the negotiating objective on "unfair labor practices" that had existed in the Reagan-Bush fast track.⁵⁶ Elimination of this fast track provision would affirmatively restrict future presidential action in this area. Thus, not only did the Administration not fulfil its promise, but it has taken steps to ensure that neither President Clinton nor any future president has the authority to do so.

As recently reported by the *Wall Street Journal*,⁵⁷ proponents and opponents of increased labor and human rights protection both agree that labor rights protection and/or enforcement in Mexico under NAFTA has not been improved by NAFTA's labor side agreement or the new public attention NAFTA put on the issue. Since NAFTA, violence against Mexican workers trying to organize unions has increased, as has mass firings of suspected union organizers at Maquiladora assembly plants.

B. Promise to Increase Mexican Wages in Line With Increases in Productivity -- BROKEN

In 1993, in order to obtain votes for the passage of NAFTA, the Clinton Administration also frequently cited the a promise they had obtained from Mexican President Carlos Salinas de Gortari that minimum wages in Mexico would rise with increases in productivity. The New York Times wrote at the time that Mr. Salinas' pledge, announced publicly in August on the day that the labor side agreements was signed, was seen as "crucial to getting the pact past a worried United States Congress" and that "the pledge has become a key part of President Clinton's efforts to sell the pact," citing a speech in which Mr. Clinton said, "for the first time in history, a government [that of Mexico] has committed itself to raise the minimum wage as its economy

⁵⁶ See 1988 Fast Track at Sec. 1101(b)(7).

⁵⁷ "NAFTA's Do-Gooder Side Deals Disappoint: Efforts to Protect Labor, Environment Lack Teeth," *Wall Street Journal*, October 15, 1997.

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grows, thereby raising the wage structure throughout the country."⁵⁸

Contrary to this pledge, however, not only have minimum wages not risen along with productivity increases in Mexico, they have moved in the opposite direction.

- Between 1993 and the first quarter of 1997, productivity in Mexican manufacturing rose by over 38% while real hourly wages for production workers fell 21%.⁵⁹
- The national average minimum wage fell by 20.43% during the first four years and nine months of NAFTA.⁶⁰

Promise 6. Labor Side Agreement to Ensure Enforcement of Domestic Labor Laws

In 1993, the Clinton Administration negotiated the labor side accord to NAFTA, known as the North American Agreement on Labor Cooperation, (NAALC) which stated among its objectives that it would "promote compliance with, and effective enforcement by each Party of, its labor law."⁶¹ Indeed, in October 1992 then-candidate Clinton had warned that if NAFTA failed to include enforceable labor standards, multinational corporations could take advantage of "their ability to move money, management, and production from a high-wage country" to a low-wage country.⁶²

Outcome: NAFTA Labor Side Agreement a Useless Flop

Three years later, the *Wall Street Journal* reports that "**both supporters and opponents of NAFTA agree that the side agreements have had little impact, mainly because the mechanisms they created have no enforcement power.**"⁶³

The labor panels established by the NAALC have only heard six complaints -- five of them concerning Mexico -- and have limited themselves to fact-finding. The *Journal* quotes labor rights groups that tried to use the NAALC process as saying that "at best...the NAALC did little more than create an apparatus for holding public meetings, which are often ignored by employers since the law itself does little to cover abuses."⁶⁴ According to the International Labor Rights Fund, "...in all these cases workers are left with a piece of paper saying, 'you were right.' Not a single worker was ever reinstated, not a single employer was ever sanctioned, no union was ever recognized."⁶⁵

58 "Vague Mexico Wage Pledge Clouds Free Trade Accord," *New York Times*, Anthony DePalma, September 29, 1993.

59 Letter from labor economist Harley Shaiken to Richard Gephardt, June 23, 1997.

60 "Mexican Civil Society Groups Denounce Clinton's Trade Policy," Mexican Action Network on Free Trade, October 28, 1997. Translated by The Development GAP.

61 North American Agreement on Environmental Cooperation, Article 1f.

62 Governor Bill Clinton, "Expanding Trade and Creating American Jobs," speech at North Carolina State University, Raleigh, North Carolina, October 4, 1992. See "NAFTA and Labor Rights," International Labor Rights Fund, in "The Failed Experiment: NAFTA at Three Years," Economic Policy Institute, Public Citizen et al., June, 1997.

63 "NAFTA's Do-Gooder Side Deals Disappoint: Efforts to Protect Labor, Environment Lack Teeth," *Wall Street Journal*, October 15, 1997.

64 "NAFTA's Do-Gooder Side Deals Disappoint: Efforts to Protect Labor, Environment Lack Teeth," *Wall Street Journal*, October 15, 1997.

65 "NAFTA's Do-Gooder Side Deals Disappoint: Efforts to Protect Labor, Environment Lack Teeth," *Wall Street Journal*,

Outcome: US Labor Organizing Undermined

Meanwhile, contrary to Administration promises, NAFTA also has taken a heavy toll on the ability of workers to organize in the United States. A report commissioned from Cornell University's Kate Bronfenbrenner by the Labor Secretariat of the Commission for Labor Cooperation, an institution created by NAFTA's labor accord, concluded that under NAFTA, threats by companies against workers trying to organize a union that the company will close the U.S. plant and move to Mexico have significantly increased. The study, which tracked actual cases nationwide, also found that the rate at which such threats were carried out had tripled under NAFTA.⁶⁶ The Clinton Administration tried to suppress the study, which was featured in the January 27, 1997 *Business Week* and finally released directly by its author⁶⁷.

Outcome: Violations of Workers' Rights In Mexico Continue

Meanwhile abuses of workers' rights continue in Mexico, especially the right of workers to organize free and independent labor unions. Earlier this month workers at the Han Young maquila factory in Tijuana voted overwhelmingly for an independent union and against the government-controlled and company-financed confederation that has never held a meeting of workers. This despite the fact that workers were harassed by company thugs who tried to steal the election with the connivance of local government officials.⁶⁸ Yet despite the overwhelming victory of the independent union, the government has yet to certify the results of the election or recognize the union. Meanwhile the company has threatened to fire all of the employees if the union is recognized.⁶⁹ After the Mexican Labor Board regional chief, Antonio Ortiz, set in motion the legal process for the voting, the company/government union pressured Baja California Governor Hector Teran Teran to dismiss him from his post.⁷⁰

In a similar NAFTA labor commission case, the Communication Workers of America and two Mexican unions tried to make the commission process work for some 900 workers at a Maxi-Switch maquiladora plant in Sonora, Mexico. According to the complaint, beginning in 1995, these workers endured intimidation and harassment, beatings and mass firings in their attempt to unionize. Two years later, they still don't have an independent union, despite the promises of the Mexican government and the remedies provided under the National Administrative Office [NAO] set up by the NAFTA side accords. The NAO agreed to hear the complaint last April in Tucson, Arizona, just the fourth such hearing

October 15, 1997.

66 Kate Bronfenbrenner, Final Report: The Effects of Plant Closing or Threat of Plant Closing on the Right of Workers to Organize, Cornell University, September, 1996, p. 26.

67 Kate Bronfenbrenner, Final Report: The Effects of Plant Closing or Threat of Plant Closing on the Right of Workers to Organize, Cornell University, September, 1996. The Bronfenbrenner study concluded that NAFTA "has created a climate that has emboldened employers to aggressively threaten to close, or to actually close their plants to avoid unionization."

68 "Emergency Alert: Maquiladora Workers Vote for Independent Union -- Fraud Charged in Last Ditch Company Efforts to Sabotage Election," Support Committee for Maquiladora Workers, October 9, 1997.

69 International Complaint Filed Over Tijuana Union Election, David Bacon, Mexican Labor News And Analysis, November 2, 1997.

70 International Complaint Filed Over Tijuana Union Election, David Bacon, Mexican Labor News And Analysis, November 2, 1997.

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scheduled under the side accord process.

Two days before the hearing, the Mexican government agreed to register the independent Union of Maxi-Switch Workers, a requirement under Mexican labor law before workers could vote in their union. The Mexican government also indicated that the workers fired for trying to build a union could make their case at hearings to be held in May. But Maxi-Switch refused to rehire the fired workers, and despite a government order that the company recognize the union and an election be held, nothing has happened.⁷¹

Promise 7. NAFTA Environmental Side Agreement to Ensure Enforcement and Sunshine on Environment -- Enforcement of Domestic Green Laws Through the Commission for Environmental Cooperation (NAFTA Environmental Side Agreement)

The Commission for Environmental Cooperation [CEC] was established under a trilateral NAFTA side agreement, the North American Agreement for Environmental Cooperation [NAAEC], between Canada, Mexico and the United States, to address regional environmental concerns, help prevent potential trade and environmental conflicts and to promote the effective enforcement of environmental law.

Outcome: No Case for Enforcement Has Been Even Accepted for Hearing; CEC Is Fatally Flawed

At the time the NAFTA environmental accord was signed, environmental activists expressed concern that the CEC would have no real enforcement power, and would be limited in its scope from comprehensively addressing issues of trade and the environment -- and indeed, according to the *Wall Street Journal*, "supporters and opponents of NAFTA agree that the side agreements have had little impact, mainly because the mechanisms they created have almost no enforcement power."⁷²

The CEC has the ability, after a lengthy process, to impose limited economic sanctions against governments for failure to enforce their own environmental laws. However, it can only do so where one member state takes action against another. Sanctions are not available where individuals or NGOs take a submissions to the institution. (Submissions by such parties asking for investigative reports can be requested under "Article 14.") To date, the CEC has not made any enforcement nor threatened nor imposed any sanctions.

Relatively few cases have been brought before the CEC because the CEC has simply refused to hear the initial cases asking for environmental enforcement. NGOs that have taken part in the submissions have voiced considerable disappointment with both the process (the denial of hearings for submissions) and the decisions the Secretariat has reached in the few cases it has accepted.

Environmental lawyer Jay Tutchon, who tried to obtain a CEC hearing for a non-enforcement case, said he is "very disappointed" that the CEC has not ordered enforcement or imposed environmental

71 "NAFTA Labor Side Accord Proves Failure of Fast Track Process," AOL News/PRNewswire, October 3, 1997.

72 "NAFTA's Do-Goooder Side Deals Disappoint," *Wall Street Journal*, October 15, 1997.

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sanctions in any of its cases. "Nobody's been caught, so if I were a company or a law breaker, from an enforcement perspective, I'm unaware of anything they've done that's changed anyone's behavior."⁷³

Dawn McKnight of Earthlaw, which brought the logging rider case, said, "I think it's to be expected and is definitely in line with what we saw when the Agreement (creating the CEC) came out. It was very vague, not as strong as it could have been...not having economic sanctions is pretty much what I expected...In the long run, I'd like to see them have some force, but I don't see that happening for a while, as the U.S. might see that as taking away sovereignty, and I can't see Canada and Mexico taking a strong enough stand for economic sanctions."⁷⁴

Mary Kelly, Director of the Texas Center for Policy Studies, noted that "the agreement itself is so weak it doesn't make a difference in environmental protection."⁷⁵ Mary Minette, who, along with Group of 100, took the first non-enforcement Article 13 submission to the CEC for the Audubon Society, agreed that "the side agreement didn't give [the CEC] a lot of power."⁷⁶

Cases Submitted to the CEC to Date and How They Fared

1. Silva Reservoir Bird Die-Off -- Study Only

The first application to the CEC was taken under Article 13 of the Agreement, which allows the CEC Secretariat only to write factual reports on environmental problems and make recommendations to the government in question but not order enforcement. It concerned the case of massive bird die-off in the Silva Reservoir in Mexico during 1994-1995. Although the Secretariat did produce a report, the findings were criticized by one of the environmental group petitioners, the Mexican NGO Group of 100. Group Chair Homer Arijdis felt that the CEC's findings were narrowly focused on the bird die-off and botulism contamination in the water, leaving out human health considerations and known arsenic and other heavy industrial contaminants. "There is a study which demonstrates that the Silva water, independent of the fate of the water birds, is greatly affecting the health of the children living near the reservoir. But we have not been able to get the Commission to respond to those questions about how the reservoir affects human health."⁷⁷

Article 14 of the Side Agreement allows the Secretariat to investigate allegations that a NAFTA member government has failed to enforce one of its environmental laws. Under this provision, the CEC had four cases brought before it in 1996, with another two in the first half of 1997. The CEC is designed so that it can reject even hearing any Article 14 cases. Two of the three NAFTA countries must agree to go forward.

2. Budget Rider -- Application Rejected

73 Interview with Jay Tutchton, April 22, 1997.

74 Interview with Dawn McKnight, lawyer, Earthlaw, University of Denver, Denver, Colorado, April 20, 1997.

75 Interview with Mary Kelly, Director, Texas Center for Policy Studies, Austin, Texas, April 24, 1997.

76 Interview with Mary Minette, Audubon Society, April 24, 1997.

77 Interview with Homer Aridjis, Founder and Artist, Grupo de los Cien, Mexico, June 5, 1996.

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The first Article 14 case was brought on August 30, 1995 by five U.S. and Mexican environmental groups who charged that suspension of U.S. law through a budget bill rider, which defunded parts of the Endangered Species Act, amounted to a failure to enforce a US environmental law.

The focus of the submission was a rider to the "Emergency Supplemental Appropriations ...Act of 1995," signed by President Clinton in June 1995, which cut \$1.5 million from the 1995 budget for the Endangered Species Act. The rider also prohibited the U.S. Fish and Wildlife Service from using other funds to make species and habitat determinations.

The petition to the CEC argued that the rider, "without repealing or modifying the Endangered Species Act Law, effectively halted the habitat and species listing process, depriving federal agencies of their ability to protect endangered species and enforce ESA provisions. The petitioners argued that this amounted to a U.S. failure under Article 14 to enforce U.S. environmental laws." The CEC, however, rejected the application, arguing that "The Secretariat ...cannot characterize the application of a new legal regime as a failure to enforce the old one."⁷⁸

3. The Logging Rider -- Petition Rejected

This case was brought by the Sierra Club Legal Defense Fund petition on behalf of 18 NGOs from all three NAFTA countries. It challenged a logging rider in the 1995 Recissions Act, "suspending enforcement of US environmental laws for a massive logging program on U.S. public lands...The rider, however, erects what may be insurmountable obstacles to citizen enforcement of those environmental laws for the expansive logging mandated or permitted by the rider."⁷⁹

The CEC rejected the petition on grounds that it cannot second-guess legislative acts. Patti Goldman, of the Sierra Club Legal Defense Fund noted that "It's a weakness of the CEC that it wasn't willing to take on the most pressing political issues of our day, such as deregulation and what that's doing to the environment."⁸⁰ Another lawyer who tried to bring a CEC case noted that the CEC is hampered by political considerations: "the first environmental cases came out when Congress was considering the EPA budget. The U.S. budget [for the CEC] flows through the EPA, so there's a continuous series of 'bad timings'...." said Earthlaw's Jay Tuchtton.⁸¹

4. Construction of a Pier at Cozumel - Decision Delayed

The third Article 14 case was brought on January 18, 1996 by three Mexican environmental groups: the Committee for the Protection of Natural Resources, Group of 100 and CEMDA.⁸² The case involved a project to construct a massive cruise ship pier in a protected natural preserve. The project required dynamiting a protected reef. The environmental groups alleged that the pier project violated municipal laws, that the required Environmental Impact Analysis was never completed, and that the Mexican

78 CEC Secretariat Decision, September 22, 1995.

79 Sierra Club Legal Defense Fund, Submission to the CEC Secretariat, August 30, 1995, p.2

80 Interview with Patti Goldman, lawyer, Sierra Club Legal Defense Fund, Seattle, Washington, April 20, 1997.

81 Interview with Jay Tuchtton, April 22, 1997.

82 SEM-96-001, Submission to CEC Secretariat, January 18, 1996

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government failed to enforce its environmental laws and adhere to its procedural requirements in considering the project. Further, the fact that the project is located in a protected natural area means that this area is afforded special protection.

This is the first Article 14 case the CEC has agreed to consider. To date, it has allowed development of a factual record on the case, a step the Mexican government opposed and which it alleged was a decision biased against Mexico. However, because the CEC's process is so cumbersome and it has no enforcement capacity, the project's construction has continued while the CEC develops the factual record. "The process has taken too much time. Cozumel has already taken almost one year to conduct,"⁸³ stated Gustavo Alanis Ortega, Director of the Mexican Center of Environmental Law.

5. Polluted Wetlands in Alberta Province, Canada -- Application Rejected

Canadian citizen Aage Tottrup brought the fourth CEC submission on March 20, 1996. The case alleged that the Canadian and Alberta Governments failed to enforce their environmental laws by allowing wetland pollution in Alberta province that contaminated fish and migratory birds. This was the first case to allege breaches of both local and federal laws. The CEC dismissed this case on May 28, 1996 on the basis that Tottrup had a concurrent case in Canadian civil courts.⁸⁴

6. The Oldman River, Canada -- Application Rejected

This case, brought by Friends of the Oldman River, September 9, 1996, alleged that the Canadian government "is failing to apply, comply with and enforce the habitat protection sections of the Fisheries Act and with the CEAA (Canadian Environmental Assessment Act)" The case concerns a Canadian Department of Fisheries Directive which the group alleged frustrated the intention of the Canadian Parliament and usurped the role of the Canadian Environmental Assessment Act as a planning and decision making tool.⁸⁵ The group also claimed that there are very few prosecutions under the habitat provisions of the Fisheries Act and that the prosecutions that do occur are very unevenly distributed across the country. This conduct, the group argued, resulted in an abdication of legal responsibilities by the Government of Canada in the inland provinces.

Similar to the first two CEC Article 14 submissions, this case concerns an environmental law that was rendered unenforceable for reasons other than a direct breach or repeal. The CEC once again dismissed the case on the basis that, because a concurrent case was running in the Canadian federal court, and that it would therefore be improper for the CEC to decide on matters that might affect the case's outcome.⁸⁶

Dr. Martha Kostuch, of Friends of the Oldman River, was not satisfied with the CEC process. She

83 Interview with Gustavo Alanis Ortega, Mexican Center of Environmental Law, (CEMDA), interviewed by Andrew Wheat, June 5, 1997.

84 SEM-96-002, CEC Registry Of Submissions On Enforcement Matters.

85 SEM-96-003, submission by The Friends of the Oldman River.

86 SEM-96-003, CEC Registry Of Submissions On Enforcement Matters. (In October 1997, the CEC received a new submission on this case.)

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reported that the CEC lacked flexibility in its investigations.⁸⁷ For example, there is no mechanism to hold an investigation pending concurrent court proceedings. Moreover, the CEC has no capacity to stop construction or other action until a decision is reached. (The same problem as in the Cozumel case.) "There ought to be other options than outright rejections or acceptance" of an application, Kostuch said, "and a requirement that factual records be made available to the public."⁸⁸

7. Fort Huachuca -- Application Withdrawn

The next submission, brought on September 9, 1996 by the Southwest Center for Biological Diversity and Dr. Robin Silver, alleges violations of the U.S. National Environmental Policy Act (NEPA) at the Fort Huachuca military base in Arizona. The substance of the claim is that the U.S. Army did not comply with the NEPA requirement to provide a complete environmental analysis of the impacts of expanding the Fort, particularly the effects of expansion on the region's diminishing water supply. In their CEC submission, the applicants allege that "the (U.S.) Army has significantly increased the number of people assigned to Fort Huachuca and this expansion also resulted in a corresponding off-base population...as the population continues to increase, the water demand upon the limited water resources of the Upper San Pedro Valley basin will increase and that increased pumping from the aquifer that sustains the river threatens to dewater the San Pedro and destroy the unique ecosystem that is dependent upon it."⁸⁹

The U.S. government's response to the claims was based on the fact that the applicants had lost a U.S. District court case due to being time-barred in bringing their claim, even though the judge ruled on the merits that the analysis by the Army was inadequate.⁹⁰

In May 1997, the Fort Huachuca application was withdrawn by the Plaintiffs, who decided to request the CEC that proceed with an Article 13 non-enforcement investigation instead. According to CEC staff the investigation will not focus on the base but consider the range of pressures on the water system and possible solutions.⁹¹

8. Hydro-electric Power Plants in Canada -- Canadian Government Objects

The submission made on April 4, 1997 by the Sierra Club Legal Defense Fund and seven other North American Fish and Wildlife NGOs alleges that the Canadian government is failing to enforce the Fisheries Act, and to use its powers under the National Energy Board Act "to ensure the protection of fish and fish habitat in British Columbia from ongoing and repeated damage caused by hydro-electric dams."⁹²

87 Interview with Dr. Martha Kostuch, Friends of the Oldman River, June 16, 1997.

88 Interview with Dr. Martha Kostuch, Friends of the Oldman River, June 16, 1997.

89 SEM-96-004, Submission to CEC Secretariat, SW Center for Biodiversity and Dr. Robin Silver, November 14, 1996.

90 SEM-96-004, CEC Registry Of Submissions On Enforcement Matters.

91 Briefing by Greg Block and Gregory Thomas on San Pedro investigation at National Wildlife Federation, October 29, 1997.

92 Submission to the CEC SEM-97-001.

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The case alleges that B.C. Hydro, which is owned by the Province of British Columbia, builds, owns maintains and operates a system of hydro-electric dams across British Columbia whose regular operation causes consistent and substantial damage to fish and fish habitat. The filing argues that Canada's failure to enforce environmental laws governing hydropower production gives B.C. Hydro an unfair competitive advantage over U.S. hydropower producers. While conservation measures implemented in the U.S. impose some constraints on the ability of U.S. hydropower producers to meet market demands, Hydro is free to operate without these constraints."⁹³

On May 15, 1997, the CEC Secretariat requested the Government of Canada to respond to this submission. On July 21, 1997, Canada responded that a factual record was unwarranted.

9. Dumping of Sewage in the Rio Magdalena, Mexico -- Pending

The Mexican NGO *Comite Pro Limpieza del Rio Magdalena* (Committee for the Cleanup of the Magdalena River), alleges that wastewater originating in the municipalities of Imuris, Magdalena de Kino and Santa Ana, located in the Mexican state of Sonora, is being discharged into the Magdalena River without prior treatment.⁹⁴ The group argues that this practice contravenes Mexican environmental legislation governing the disposal of wastewater.⁹⁵ The Secretariat is now reviewing the Submission in accordance with Article 14(1).⁹⁶

10. Pollution from Hog Farming in Quebec -- Canadian Government Objects

The Canadian NGO *Centre Québécois du droit de l'environnement* alleges that the Province of Quebec has failed to enforce several environmental standards related to water pollution in livestock operations, mainly from hog farms.⁹⁷ Canada responded on September 9, 1997 that it "effectively enforces the Environmental Quality Act and the regulation respecting the prevention of water pollution in livestock operations." The government of Canada contested the necessity of preparing a factual record.

11. Canadian Government Fails to Provide Environmental Impact Statement -- Pending

The Canadian Environmental Defence Fund alleges that the Canadian government has failed to enforce its law requiring environmental impact assessment of federal initiatives, policies and programs. In particular, the petition focuses on the Canadian government's failure to conduct an environmental impact assessment of The Atlantic Groundfish Strategy (TAGS) as required under Canadian law, which the CEDF alleges jeopardizes the future of Canada's east coast fisheries.⁹⁸

93 Submission to the CEC SEM-97-001, summary, p. 3

94 SEM-97-002 Submission by the *Comite Pro Limpieza del Rio Magdalena* to the CEC Secretariat, March 15, 1997.

95 SEM-97-002 Submission by the *Comite Pro Limpieza del Rio Magdalena* to the CEC Secretariat, March 15, 1997.

96 SEM-97-002 Submission by the *Comite Pro Limpieza del Rio Magdalena* to the CEC Secretariat, March 15, 1997. CEC Registry Of Submissions On Enforcement Matters.

97 SEM-97-003, Submission by *Centre Québécois du droit de l'environnement et al* to the CEC Secretariat, April 9, 1997.

98 SEM-97-004, Submission by the Canadian Environmental Defence Fund to the CEC Secretariat, May 26, 1997.

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B. Promise: Trilateral Studies and Public Attention Would Force Better Environmental Enforcement, Practices in NAFTA Countries

In addition to promises that the Environmental Commission would require enforcement of environmental laws, environmental group supporters of NAFTA touted the benefits public exposure of environmental issues through the Commission and its public studies would provide. Part of the CEC was its Environment, Trade and Economy program, whose goal is "to encourage mutual compatibility of trade, environmental and economic policies and instruments within North America."⁹⁹ As part of this project, the CEC was to draft a detailed public report on the effects of free trade under NAFTA on the environment in the three member states.

Outcome: The Single Major NAFTA Environmental Effects Report Jammed

After a major political battle over the scope of the report was settled, the CEC's single major NAFTA environmental impact study due in 1996 remains unpublished. The report was to investigate three specific cases studies: energy use, cattle raising and in Mexico corn growing. The \$150,000 to finance the study was included in the CEC's annual budget, but the three NAFTA governments had not given approval for the work to proceed.¹⁰⁰ The reliance on government approval for all actions is a major structural flaw in the CEC. According to the *New York Times*, the main obstacle to completion and release of the report had been the Mexican government, particularly its Trade Ministry, which fears letting any aspect of the NAFTA process out from under its control, especially anything relating to Mexico's staple crop of corn.¹⁰¹ "If the commission can't get the countries to *study* the environmental impacts of increased trade that's already taken place, how can they ever get them to do anything real about improving standards, which is what they promised in 1993?" asked Dan Seligman of the Sierra Club.¹⁰²

99 CEC public document, CEC website, <http://www.cec.org>.

100 "NAFTA Environmental Lags May Delay Free Trade Expansion," *New York Times*, May 21, 1997.

101 *Id.*

102 *Id.*

