

would like to tell you about. It's the small landowners, the farmers who cannot farm their wetlands, the retirees who could not put their properties to economic use by building a home for retirement, the small timber lot owner who cannot cut down a few trees.

RF:

Let me make a very quick point about *Ehrlich* in possible rebuttal to what Jim said. There is a strong issue in Ehrlich regarding estoppel, vis-a-vis Mr. Ehrlich. Mr. Ehrlich was involved in trying to change

the city's decision, which was initially to deny the rezoning that he had requested. Ehrlich then tried to negotiate something that would allow for a payment by him of money, in exchange for the request.

In light of a whole line of California case law, most recently *Hensler v. City of Glendale*, I think there is a substantial likelihood that the Supreme Court could resolve the issue against Mr. Ehrlich on those estoppel and waiver grounds, without the need to get to the more substantive issues.

The New NAFTA Environmental Institutions

Moderator:

Mark Spalding (**MS**), Chair, International Environmental Law Committee, California State Bar

Speakers:

Greg Block (**GB**), Director of Legal Dept., Commission For Environment Cooperation
Raul Hirojosa (**RH**), Prof. of Urban Studies, University of California at Los Angeles

MS:

We're going to talk today about the three institutions created by the NAFTA. The CEC, which is The Commission For Environment Cooperation, the BECC, which is the Border Environmental Cooperation Commission, and the NADBank, which is the North American Development Bank. We want to be as practical as we can be about how you can use them.

Background

This is the NAFTA text, 900 pages of legalese. Along with this you need a couple of volumes of tariff schedules to let you know when the particular tariff you are concerned with is going to expire or be reduced. This is the Environmental Side Agreement, 30 pages. And this is the agreement that created the BECC and the NADBank, also about 30 pages. So as you can see, NAFTA was a trade process and not primarily an environmental process.

Earlier this summer Mark Stern and I, he's a PH.D. candidate at UCSD, did a study for the CEC on the predictions during the NAFTA debates back in 1991 and 1992, on what effects would the trade agreement have on the environment. These fell into six main categories: natural resources, sectoral issues (such as energy and agriculture), public health issues, and macroeconomic issues (such as businesses choosing to relocate because they thought

they would have an easier time in Mexico.) However, an overwhelming majority of the predictions fell into two categories: border issues and legal issues. The border issues necessarily resulted from the many horror stories from the maquiladora industries: illegal dumping, and babies born without brains in Texas. All these stories came out during the NAFTA debate. The BECC the NADBank are the answer to that category of issues.

The second, the area with the most predictions of how the trade agreement would effect the environment, was what we categorized as legal. And I think this stemmed from, if nothing else, the Tuna Dolphin Case. There was a public outcry, particularly among environmental NGOs, that the International Trade Panel from the General Agreement on Tariff and Trade (the GATT) had basically overruled a US environmental law, The Marine Mammal Protection Act and said we couldn't legislate how tuna was caught on the open sea outside of our jurisdiction. Although that decision was never adopted, because the U.S. wouldn't allow it to be, it became a central part of the NAFTA debate. The main environmental side agreement which created the CEC is in part to answer that criticism. It did not necessarily deal with that particularly case, but there was an attempt to protect U.S., Mexican and Canadian environmental laws from outside attack. Particularly attack from one of the other two parties. But, what we did not realize was that the attack was going to come from our own back yard and part of our own Congress'. Interestingly, two of the cases that have already been brought before the CEC relate to our U.S. Congress actions to deregulate or defund U.S. environmental laws.

The Environmental Side Agreement

The side agreement that creates the CEC, does a number of things. But the two key things that you

want to think about are the ability to request investigations and the ability to complain about lax enforcement of environmental laws. If a U.S., Mexican or Canadian citizen feels that environmental law in California is not being enforced, they can go to the CEC in Montreal and say "this isn't being enforced." And if the other two parties agree to allow this to go forward. The complaint goes forward.

The other Side Agreement, which is the BECC and the NADBank Agreement, created two institutions. NADBank was created to finance environmental infrastructure projects within 62 miles of the US Mexico Border (on either side). This financing must relate to water, waste water treatment and solid waste disposal. The NADBank also includes a "Domestic Window" to finance adjustment in the instance of job loss or other sorts of financial disruptions as a result of the trade agreement. The Domestic Window is 10% of the NADBank's money.

The BECC is a certification body for the NADBank and other financial institutions. In order to borrow money from the NADBank, you first have to get your project certified by the BECC. And the BECC has just this summer gone through a lengthy public process to adopt eight criteria relating to finance, economics, environment, health, sustainable development, physical feasibility, etc. that you must show that your project can meet in order to request NADBank financing.

Greg Block who is the Director of the Legal Department of the CEC in Montreal and has taught Comparative Environmental Law in Mexico. Before that was an environmental law practitioner in San Francisco. Raul Hinojosa is the intellectual father of the NADBank concept. He is a professor from UCLA's Urban Studies Department. And has been active in the creation and the implementation of the NADBank.

GB:

Thank you Mark. We are very interested in getting beyond the message that we are up and running, which was our message from about January through May. We're on to the next message, which is we are actually doing concrete things. I'd like to address a couple of those things today.

Our Council consists of three environmental Ministers or their functional equivalent, (in case of the U.S., Administrator Browner.) Last week the Council met in Oaxaca for two days. Other delegations had been there two days earlier negotiating and putting the final touches on some of the announcements the Council was going to make.

We were a bit wary going into the discussions. It's a new organization. There are issues of turf. There are questions of eroding concepts of notions of traditional sovereignty versus the now rather tired cliché that pollution knows no borders. The two bump-up against each other pretty often. It is very easy to talk about regional cooperation. It is very difficult to sit down at a table and agree on regional action plans for phasing out certain toxic/biocumulative substances, but they did it. The three Ministers have an extraordinary synergy between them, and they negotiate very hard. There were two or three hours of very difficult negotiations at the table. However, at the main press conference that followed the in-

camera session, one saw a great solidarity among the three Ministers.

I am quite pleased with the success of this effort so far. They are really understanding for the first time how they can use this new institution to further their own national and regional agendas. And, how it can provide concrete development in the areas of human health and environmental protection, that they probably had not anticipated. To list a few, the Ministers' announced in Oaxaca that: 1) they signed a framework agreement for fast track phase out of some specific toxic chemicals and heavy metals. These will come from the list of 12 from UNEP. The Ministers did list PCBs, and each country will develop specific action plans for its phase out in North America within 12 months from January 15, along with three other chemicals be listed on that date.

The Ministers also announced the intention to make compatible and create a North American toxic release inventory. "Make compatible" means to take the existing data which is available in at least two of the three countries (Mexico is developing their TRI currently), and make sure the formats are compatible and that the information can be reported in a uniform way. We at the CEC will somehow make that information available, probably through our own internet home page. There will be a toxic release inventory for the entire region.

They also announced projects on joint implementation of climate change and habitat protection. One will be on migratory song birds. There are a lot of initiatives dealing with water fowl, mainly hunting species, but none relating to song birds. They will undertake a cooperative initiative to develop protocols for protecting song birds in North America.

Some of the announcements and some of the work we've been doing are of particular legal interest. One is transboundary impact assessment. There is language on this in our agreement and it is the only language that specifies a time frame. Within three years, the countries have to develop specific recommendations with a view to agreement. There are different interpretations on what that means. Whether that means negotiating a treaty, a formal agreement, or a view to agreement, meaning taking every step up to that point, it is unclear. However, we have had meetings of senior officials from the three countries and there are discussions now. What should they agree to in the area of notification, access to information, participation of the affected state hearings of the state where the project originates? And mitigation of significant adverse transboundary effects? You could expect something fairly specific from us within about 18 months.

Regarding access to information, our agreement imports the language from Rio on enhancing and promoting access to information held by public authorities. We will have a matrix with criteria that would be used to measure ease of access, legal rights to information, timeliness of information, and so forth. We can begin that next year. We will make recommendations and feature things that are working in one area that have regional applicability.

There are two articles in our Side Agreement which are quite innovative, if untested. They invest the Secretariat with a good deal of independence.

More than most secretariats in other international commissions. Quite frankly, they cause a degree of discomfort among our Council and Parties, although they're strongly behind the language in the agreement. It's going to take time to develop a record on the application of these articles. Ultimately, the public will determine if they are effective or not.

One is Article 13, which enables the Secretariat to prepare a report on any matter within the scope of our annual program. This year, we had a very wide ranging (probably too ambitious) annual program. Next year, we will be scoping it down to about 20 projects. One report that we did undertake was prepared after Audubon and two NGOs in Mexico brought to our attention the death of between 20 and 40 thousand migratory waterfowl in Guanajuato at the Silva reservoir. It's a Regional concern because these waterfowl come through Mexico, pass through the United States, and spend their summer in Canada before heading back down. Thousands of them didn't get off the reservoir and nobody quite knew why. The Secretariat panel of 12 or 13 experts included one or two from each Government, some NGO experts, toxicologists, wildlife disease experts and so-forth. They got together to determine the cause of mortality.

Our report was prepared and delivered to the Council on Friday, October 13th. The Council now, under the Agreement, has 60 days within which to make the report public. It requires consensus not to make the report public; another novel feature. In this case the Ministers immediately agreed upon receiving the report to make it public.

The reports contain specific recommendations that are now being reviewed by the Joint Public Advisory Committee, a body of 15 members that serve from each of the countries. They will make recommendations based on the recommendations in the report, specific actions that the Council may take. Thus, Article 13 is an area for potential involvement for folks who would like to bring to the attention of the Secretariat an event or something that's going on that has serious regional implications. The Secretariat, of course, can also undertake an Article 13 report on its own initiative.

The other Article, which some of you are already quite familiar with, is Article 14. Any citizen and any entity can allege that one of the three parties is failing to effectively enforce its environmental laws. There are some threshold criteria in the Agreement. The three parties, with public consultation in each of the three capitol cities, also have developed guidelines on the use of Article 14. We have received two Article 14 submissions. The Secretariat reviews them to see if they have pursued local remedies, if harm has been alleged, and some other factors, such as whether or not there's a pending legal, or judicial or administrative proceeding which would freeze any action that we might take. We then make a recommendation to the Council, again the three Ministers, on whether or not a factual record should be prepared. If two-thirds decide that a record should be prepared, then we develop a factual record. What goes into a factual record? There is guidance on some of the kinds of things that go into a factual record, but we have never

prepared one before. So that ought to be a very interesting exercise.

The persistent pattern of failure to enforce environmental laws is addressed by Article 22. Persistent failure to enforce claims have to be brought by a party. Article 22 claims may lead to a monetary enforcement assessment.

We have two pending Article 14 submissions. One filed by Earth Law on behalf of five bio diversity groups, and one of them in Mexico, for the U.S. They allege that the U.S. is failing to effectively enforce the Endangered Species Act because of what is known as the Hutchinson Rider, a rider that rescinded \$1.5 million and precludes the Department of Interior from listing additional species in 1995 or designating additional critical habitat. We received a second submission filed by a number of organizations, but Sierra Club Legal Defense Fund wrote the petition, of which I have copies. It is very well drafted petition on which we have not yet reached any decision. It raises the question whether the salvage timber logging recession bill results in a failure to effectively enforce a U.S. environmental law in that area. In the Earth Law matter we have rendered an "opinion letter," although we did not really know what to call it. We're not a judicial body, we're not even quasi-judicial. We're a little uncomfortable with the analogies that everybody immediately draws to the U.S. court system. But for lack of a better term, we refer to it as "an opinion letter."

RH:

I find it ironic that Article 14 is being used first to protect U.S. environmental compliance, which is the opposite of what the Republicans were suggesting was going to be the result of this, and Democrats for that matter.

As Mark said, I was the originator of the idea for the North American Development Bank in 1991 as part of an ongoing research project of mine, having been born in Mexico and raised in the U.S., regarding how we understand relations between rich and poor Countries. In what ways can we develop organization strategies for new pathways towards sustainable development across rich and poor countries. The NADBank actually came out of ongoing research we did about U.S., Mexico integration that said that institutions had to be put in place that were going to make resources available in a fundamentally new way, distributed in a fundamentally new way. These resources must be directed towards the particular communities on both sides of the border; continue, with or without NAFTA, to pay the cost of ongoing integration, and effect comprehensive environmental strategies that not only deal with their local needs, but also with a continental agenda.

The original proposal for the NADBank called for a forty billion dollar institution. Forty billion dollars may ring in people's heads now that the U.S. is spending that much on bailing out Mexico after the peso crisis. What we were suggesting is that you needed an institution of this size if you were going to take integration seriously, like the European cases of Spain, Portugal, Greece and Ireland. We suggested that this was the size of investment that you would

need for this upward conversion. And to avoid some of the exchange rate problems if you were going to try to sustain integration on short term capitol flows. Nevertheless, we got three billion dollars.

What has been created as a three billion dollar institution is clearly unique in the North America context of a development bank. It is completely out of the mold of the World Bank or the Inter-American Development Bank, both institutions in which I have worked considerably, particularly the community participation and information access procedures and the certification procedures that have to be undergone before any resources can be made available by the NADBank.

We have within the BECC a procedure whereby projects go through an Advisory Committee and then a Board of Directors for certification. These projects have to be submitted in public applications. Once a project does get certification, then it goes to the NADBank, at which point there is another Advisory Committee that we forced to be created. Actually we are still fighting with treasury, but we got President Clinton to sign an executive order that says that we take another bite at the apple at the NADBank through the Advisory Committee before anything actually gets funded. Now this is completely unprecedented in any institution like the World Bank. So, for people that are interested in those sort of global issues, the NADBank is really very interesting.

Having created the NADBank and the BECC one thing that we knew was still going to be needed was the process for providing technical assistance (and financing for technical assistance) to local communities on both sides of the border so that they can actually apply for this financing. That money is not available in the appropriations right now. We fought very hard to get essentially the capitalization of the Banks, that's the biggest chunk, the three billion dollars commitment between the U.S. and the Mexican Government. But what was missing clearly was some form of financing for this pre-project development. So we created an entity, a group of NGOs, where we have received from a variety of sources money that we are now making available in the form of grants to local communities to hire people probably like yourselves, as well as other necessary technical experts to be able to pull together the application procedure, as well as the overall plan that would be required for the NADBank.

I have now moved back to UCLA to the Urban Planning Department, which includes a center called the Center for North American Integration and Development. I encourage you all to get in touch with the Center if you are interested in working with communities along the border, as well as the non-border communities. We have also developed a Web site at the Center, and now we are developing one for the BECC and the NADBank. We are trying to work with both institutions to establish a list of people who can provide different types of services to these organizations.

I'll finish by telling you a couple of stories of where we are right now with people that have gone through the procedure for certification. The BECC, as Mark was saying, has over the summer come up with their

final criteria, which is available on-line on our Web site but will be available on the BECC site with an application. They have received at this point 19 applications. Two applications have been certified, both for wastewater treatment facilities. Those were projects that were already very much advanced before the NADBank and the BECC were created. What we now are working on is a couple of communities starting from scratch. We are concentrating on little communities that usually do not get the attention, and do not have the financing to draw the large corporations that may be interested in a project. Just having a process whereby communities can begin to have access to financing makes the difference. The NADBank will provide the cheapest possible financing that's available. It's AAA rating allows more financing in a region that has been incapable of getting any financing at all. This has an incredible energizing effect on local governments and local community groups. Even interest in the private sector has really come together. What has really been difficult is getting the environmental expertise to help plan the projects, and then help with the creation of financial plan, and, of course, the forms that have to be filled out.

I should also mention that, in addition to the border work, we have now created as part of the NADBank something called a "domestic window." This is going to be headquartered in Los Angeles. There's going to be one office in Los Angeles and one in Mexico. The point of the "domestic window" is to allow financing for non-border communities in both countries, if there is a demonstration of some form of negative impact as a result of ongoing US/Mexico integration. The main center includes an ongoing tracking system. The Labor Department also has a similar program for trade adjustment assistance related to NAFTA. We have established a whole project for that. So I'll just end with that, saying that this is another area where local communities are going to be needing a great deal of help, particularly in the form of technical assistant for economic development projects.

MS:

What questions do you have about these institutions? We can see if we can answer some of them, and have a discussion.

Audience:

Question about the CEC. How do you choose what you're going to look at? How are the enforcement issues being selected?

GB:

It's very clear in the documents that the parties do not want to create a super-national body with regulatory authority. It was enough in terms of the touchy topic of sovereignty that they had what people regard as sanctions in the monetary enforcement assessment provisions in the Agreement. The cooperative enforcement priorities are spelled out in the Agreement. For example, there's a permanent standing committee now on enforcement cooperation on which the three parties' senior enforcement officials participate. They set their own priorities.

This year the staff is developed and will present to

the Counsel its 1996 work plan. The governments have already prioritized four areas. We have a comparative data base on the Internet of the laws of three countries, and link to other data bases, such as Cornell. You can hypertext directly into those without knowing where you are. Information is one area of priority that the governments have established. Another one is habitat protection generally—that's the song bird initiative I mentioned. The third is climate change. And the fourth area, energy efficiency.

So those are the governments' priorities. The Joint Public Advisory Committee will tell us their priorities. In our Washington, D.C. meeting, there were 200 members of the public there. For four hours they spoke to the Ministers and gave them advice on what the priorities should be for next year. We will be providing that in some record form on the Internet as well, for anyone who is interested.

Audience:

What's being done in respect to developing an expertise necessary to operate, maintain and eventually repair and replace the projects that will be funded through the NADBank?

RH:

Unfortunately the BECC has got a very tight budget. There is approximately a million dollars available for technical assistance. That is mostly in-house technical assistance. I think about a total of \$150,000 would be in the form of grants. We've got about \$1.6 million that we're giving out in the form of these grants. At this point we are trying to create a

network of people with an interest and an expertise in the projects. The Internet strategy that we are pursuing is that every single organization that we help, every community that we help (we actually work with the NGOs), we give them computers, and do the networking. We have the consultants on an ongoing on-line basis available to other organizations. We're trying to build up human capital for that type of ongoing work. But it is not part of a explicit work plan.

MS:

Your question has been addressed indirectly in that one of the criteria for BECC to certify a project is that there is an adequate plan for operation maintenance and in the long term feasibility of the project. Which means who ever brings it to the table for certification has to prove that there's some method of doing that. But that doesn't answer where the money is going to come from.

Audience:

How does NADBank establish the environmental criteria when deciding to fund something?

RH:

It's actually the BECC that has to certify the projects. There was a big fight over what was going to be included in of what the NADBank could fund. Basically the agreement is that you have these three priorities for at least the first year: wastewater, water and the solid waste. Then there is the clause "And related matters." What does that "and related matters" mean? We fought a lot about that in the criteria. The Legislative intent is very clear, this was going to be funding for broader sustainable development in projects. Therefore, it did not only have to do with just funding a wastewater treatment facility. For example, in Arizona, we are taking a comprehensive water reuse and economic development approach to how you create the wastewater treatment plant.

I think that the challenge is going to be putting together proposals. Innovative proposals involving the broader visions of sustainable development. Bringing them to the BECC first, and then to the NADBank. The NADBank is primarily a financial institution. That's the way that the current directors of the NADBank see themselves. They are taking a very green eye shade approach. Is this thing going to get repaid? We will see how this all evolves. It's a very political process. So it's really in the hands of people to be very creative, both at the initial stages of the proposal concept, as well as the financial engineering of how you put together the project.

MS:

The actual certification criteria document we talked about earlier is about 30 pages and includes the application forms for BECC certification. In there are eight criteria areas that you must demonstrate you meet in order to get certified. And that's the best place to look to know how the BECC is going to decide what is or what is not environmentally sound. This document is available on the Internet or direct from the BECC.

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