

**SUSTAINABLE DEVELOPMENT: A STRATEGY  
THAT REFLECTS THE EFFECTS OF  
GLOBALIZATION ON THE INTERNATIONAL  
POWER STRUCTURE\***

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## I. INTRODUCTION

*All day they've raced round in the heat, at top speeds,  
Unsuccessfully trying to sell Zizzer-Zoof Seeds,  
Which nobody wants because nobody needs.<sup>1</sup>*

The proponents of sustainable development, like the sellers of Zizzer-Zoof Seeds, are racing around unsuccessfully trying to generate public interest in a product that nobody seems to want. The concept of sustainable development refers to balancing economic growth with social and environmental concerns in order to ensure the continual availability of resources for the future.<sup>2</sup> Unlike Zizzer-Zoof Seeds, however, sustainable development is not only needed, it is essential to the long-term viability of society.

To achieve their goal, advocates of sustainable development must use a more progressive strategy than passively relying upon national governments to enforce international agreements and domestic laws. Economic globalization has altered the international power structure, weakening the ability of national governments to solve global problems.<sup>3</sup>

Multinational corporations ("MNCs") have emerged as the dominant global power<sup>4</sup> and therefore should have both the means and the influence to transform sustainable development from a lofty platitude to meaningful implementation. By meeting harmonized development standards, MNCs can make sustainable development an

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1 THEODOR SEUSS GEISELL, DR. SUESS'S SLEEP BOOK (unpaged) (1962).

2 See generally U.N. Conf. On Env't & Dev., Agenda 21, para. 8.7, U.N. Doc. A/CONF.151/6/Rev.1 (1992), reprinted in 4 Agenda 21 & The UNCED Proceedings 119 (Nicholas A. Robinson ed., Oceana Publ'ns 1993) [hereinafter Agenda 21]. Agenda 21 was developed in Rio de Janeiro in 1992, at the United Nations Conference on Environment and Development or Earth Summit. It is a comprehensive plan of action and the global blueprint for sustainable development. *Programme for the Further Implementation of Agenda 21*, U.N. GAOR, 19th Sess. U.N. Doc. A/RES/S-19/2, reprinted in 36 I.L.M. 1639 (1997) [hereinafter *Further Implementation of Agenda 21*].

3 See John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 16 (1998) (observing that because of international competition for capital created by globalization, some countries are unable to address such global problems as environmental degradation and poverty).

4 William Wines et al., *The Critical Need For Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico's Costa Grande and Elsewhere*, 26 DENV. J. INT'L L. & POL'Y 453, 500 (1998).

integral part of the international community. Their cooperation will not occur, however, without motivation.

MNCs can be motivated by expanding the disclosure requirements of the U.S. Securities and Exchange Commission's ("SEC") to include all three components of sustainability: economic prosperity, social equity and environmental protection. Fearing lost profits due to adverse publicity, MNCs would adopt sustainability standards to demonstrate compliance with the new SEC disclosure requirements.

The SEC currently requires financial disclosure or corporate financial transparency.<sup>5</sup> Information about a company's social and environmental impact, or social transparency, can also be required if the information is in the public interest or for the protection of investors.<sup>6</sup> The U.S. government can generate the requisite interest by initiating a public education program to convey an understanding of the importance of sustainable development.

Through public education the government can address its traditional obligation to protect societal values. This educational approach will also enable the United States to fulfill its commitment to the implementation of sustainable development.<sup>7</sup>

Part I of this article reviews the history of sustainable development and the general acknowledgement of a global failure to implement sustainable practices. Part II analyzes why the recent global redistribution of wealth and power has caused international agreements to fail to bring about sustainable development. The North American Free Trade Agreement ("NAFTA")<sup>8</sup> and the conditions at the border between the United States and Mexico are cited in Part III as an example of the ineffectiveness of international agreements at controlling corporate conducts.

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5 Securities Act of 1933 §§ 7, 10, 15 U.S.C § 77g (1994) (outlining the SEC disclosure requirements).

6 Sections 7 and 10 of the Securities Act of 1933 and section 12(b) of the Securities Exchange Act of 1934 empower the SEC to require information "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. §§ 77g, 77j, 781(b)(3) (1994).

7 PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, A NEW CONSENSUS FOR PROSPERITY, OPPORTUNITY AND A HEALTHY ENVIRONMENT FOR THE FUTURE 71-72 (1996) [hereinafter A NEW CONSENSUS].

8 North American Free Trade Agreement, *done* Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993).

Part IV offers the solution of altering international corporate behaviors by exposing MNCs to more intense public scrutiny. The means of effectuating this solution, including the development of harmonized standards and public education, are discussed in Part V. This article concludes that the solution proposed comports with recognized principles of international environmental law, including state sovereignty,<sup>9</sup> the “polluter pays” principle,<sup>10</sup> the duty to cooperate,<sup>11</sup> and the right to development.<sup>12</sup> This solution is effectuated via existing governmental systems and mechanisms and requires no new legislation. This article proposes an effective means of translating sustainable development from academic discourse to significant action.

## II. SUSTAINABLE DEVELOPMENT: MANY WORDS, LITTLE ACTION

Anyone who has managed personal finances understands the concept of sustainable renewable and nonrenewable resources. If money in one’s checkbook lasts from paycheck to paycheck one has sustainable renewable resources. The ability to maintain one’s lifestyle through retirement without a regular paycheck evidences sustainable nonrenewable resources.

Sustainable development is analogous. Consumption must equal production in order to maintain both capital and natural resources.<sup>13</sup> Put simply, sustainable development means living within one’s means, assuring that economic growth protects and preserves both current and future social

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9 State sovereignty gives nations the right to exploit their own resources in accordance with their own environmental policies. Stockholm Declaration of the United Nations Conference on the Human Environment, Principle 21, June 16, 1972, *reprinted in* 11 I.L.M. 1416, 1420 (1972) [hereinafter Stockholm Declaration]; Rio Declaration on Environment and Development, Principle 2, June 13, 1992, U.N. Doc.A/CONF.151/5/Rev.1, *reprinted in* 31 I.L.M. 874, 876 (1992) [hereinafter Rio Declaration].

10 The “polluter pays” principle expresses the policy that polluters should bear the environmental costs of their activities. *See* Rio Declaration, *supra* note 9, at 879.

11 Nations have a duty in international matters to act in good faith and in a spirit of cooperation. *See* Stockholm Declaration, *supra* note 10, at 1420–21; Rio Declaration, *supra* note 9, at 880 (declaring states and people shall cooperate in fulfillment of the Declaration and further development of sustainable development).

12 States have a right to exploit their resources pursuant to their own developmental policies. *See* Rio Declaration, *supra* note 9, at 876.

13 *See* David Hunter et al., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 134–35, 138 (1998).

welfare and environmental resources.<sup>14</sup> Although the concept of sustainable development is easily understood, it is not practiced with the frequency necessary to achieve its goals.<sup>15</sup>

At the 1972 Stockholm United Nations Conference on the Human Environment, the world was at a point in history when it recognized the necessity of harmonizing environmental protection with social and economic goals in order to satisfy current and future human needs and aspirations.<sup>16</sup> At the 1992 Rio Conference, the world was again at a defining moment in history, still needing to implement sustainable development.<sup>17</sup>

In 1997, despite the urgency expressed at Stockholm and Rio, the United Nations General Assembly concluded that global conditions in respect to sustainable development had worsened since 1992.<sup>18</sup> In May 1999, the President's Council on Sustainable Development ("PCSD") found humanity still facing the "unprecedented challenge" of creating a life-sustaining earth.<sup>19</sup>

Sustainable development has not moved beyond the words expressed in various documents because of a failure to acknowledge what the World Commission observed in the 1987 Bruntland Report: those responsible for managing natural resources are institutionally separated from those managing the economy.<sup>20</sup> Recommendations couched in terms of a traditional framework of national governance that merely recognize the adverse social and environmental impacts of globalization are unlikely to succeed. Unless strategies for sustainable development take into account the effects that economic globalization has had on the international power structure, the documents will never be more than words expressing good intentions.

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14 See Dernbach, *supra* note 3, at 7.

15 *Id.* at 3–4 (observing that in the five years after Agenda 21, countries were slow in change and sustainable development was worse off).

16 Stockholm Declaration, *supra* note 10, at 1417.

17 Agenda 21, *supra* note 2, at 1.

18 See *Further Implementation of Agenda 21*, *supra* note 2, at 1643; see also Dernbach, *supra* note 3, at 3.

19 PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, *TOWARDS A SUSTAINABLE AMERICA: ADVANCING PROSPERITY, OPPORTUNITY, AND A HEALTHY ENVIRONMENT FOR THE 21<sup>ST</sup> CENTURY*, Preface, (1999).

20 Paulette L. Stenzel, *Can NAFTA's Environmental Provisions Promote Sustainable Development?*, 59 ALB. L. REV. 423, 430–431 (1995).

## III. CHANGES IN THE GLOBAL POWER STRUCTURE

Decisions made in corporate boardrooms impact world economic, social, and environmental conditions far more than international agreements.<sup>21</sup> The emergence of a global economy has eroded national borders that were fundamental to the national exercise of power.<sup>22</sup> Government deregulation and privatization have further reduced national governments' traditional powers.<sup>23</sup> This restructuring relies on market mechanisms rather than government to solve social and environmental problems.<sup>24</sup> Globalization has promoted economic growth, but impeded regulation. The global financial marketplace created by globalization has moved beyond the control of any government or regulator.<sup>25</sup>

Traditional methods of regulation are no longer effective. State sovereignty limits extraterritorial enforcement of domestic laws.<sup>26</sup> Trade sanctions against non-compliant countries cannot be used because the criterion "national origin" has lost meaning.<sup>27</sup> Similarly, the International Court of Justice arbitrates international disputes,<sup>28</sup> not disagreements involving corporate entities.

Competition for MNC capital and a fear of corporate flight discourage countries from enforcing domestic regulations.<sup>29</sup> The mobility of MNC capital facilitates industrial relocation to countries with less stringent and less costly regulations.<sup>30</sup>

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21 See generally *When Corporations Rule the World: An Interview with David Korten*, MULTINATIONAL MONITOR, Jan./Feb. 1996, at 25–26 [hereinafter *Interview with David Korten*] (explaining that corporations use money to affect legislation and promote their interests in environmental, wage, union, and trade agreements).

22 See generally DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS* 371 (1998). By the early 1990's, national governments had retreated from the "commanding heights" of power and allowed the forces of the economic markets to govern. See *id.* at 12.

23 See *id.* at 13.

24 *Id.* at 355.

25 See Roger C. Altman, *The Nuke of the 90's*, N.Y. TIMES, March 1, 1998, at 34.

26 See Stockholm Declaration, *supra* note 10, at 1420; see also Rio Declaration, *supra* note 9, at 876.

27 See YERGIN & STANISLAW, *supra* note 22, at 370.

28 See generally Vienna Convention on the Law of Treaties, May 23, 1969, art. 66(a), 1155 U.N.T.S. 331, 348.

29 See, e.g., Daniel Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265, 273 (1997).

30 See *id.* at 269.

Governments depend on and support MNC interests, and will not risk losing this source of capital by strictly enforcing environmental regulations or labor laws.<sup>31</sup>

The global economy has not only increased the power of MNCs, but also the competition they face.<sup>32</sup> No longer shielded by protective regulatory systems that provide protection against competition<sup>33</sup> companies argue for lower domestic standards that conform to the norms of their foreign competitors.<sup>34</sup> Investor demand for maximum short-term return on investment forces MNCs to sacrifice human and environmental concerns for increased profits.<sup>35</sup> Money spent to improve working or environmental conditions reduces profits, making a responsible MNC vulnerable to being driven out of the market by less responsible competitors that focus solely on short-term financial gratification.<sup>36</sup> MNCs no longer have an incentive to be socially responsible members of a community, absent allegiance to any one community.<sup>37</sup>

Having replaced national governments in the global power scheme,<sup>38</sup> MNCs must become responsible members of the global community and exercise their power in ways that support public welfare.<sup>39</sup> Because MNCs, unlike national governments, are able to transcend national boundaries, they are likely in a better position to globally address the multiple goals of sustainable development. Corporations, however, operate solely in their own self-interest and have no inherent

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31 Dernbach, *supra* note 3, at 97 (explaining that governments are so beholden to economic interests in unsustainable activities that they are unwilling or unable to make necessary changes).

32 YERGIN & STANISLAW, *supra* note 22, at 371.

33 *See id.*

34 *See* Sanford E. Gaines, *Rethinking Environmental Protection, Competitiveness, and International Trade*, 1997 U. CHI. LEGAL F. 231, 250 (1997).

35 *See Interview with David Korten, supra* note 21, at 25.

36 *See id.*

37 *See id.*

38 *See* Wines et al., *supra* note 4, at 500.

39 *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Transparency*, 112 HARV. L. REV. 1197, 1298 (1999).

morality.<sup>40</sup> In today's corporate-driven global marketplace, "power without accountability invites abuse."<sup>41</sup>

Adam Smith, the father of classical economics, cautioned that self-interest could drive a free market economy only if human sympathy, competition, and regulation tempered that force.<sup>42</sup> Growth that does not take into account environmental or human concerns cannot be sustained.<sup>43</sup> MNCs compromise their own future by unsustainable development practices.

Globalization is widening the gap between rich and poor<sup>44</sup> and thereby may breed social unrest, threatening the political stability that MNCs rely on to protect their investments.<sup>45</sup> Competition for growth is accelerating depletion of natural resources beyond their ability to regenerate,<sup>46</sup> and if not controlled, will eliminate not only the resources but also the profits from the resources. MNCs will likely suffer if they do not begin to realize that their products have environmental impact.

Sustainable development balances competing interests for the long-term good of society<sup>47</sup> and integrates economic growth with a respect for human rights and environmental protection.<sup>48</sup> By facilitating the implementation of international sustainability standards, countries can reestablish their role as the protectors of public welfare.<sup>49</sup>

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40 Wines, et al., *supra* note 4, at 502 (quoting H.L. Mencken, who stated that "corporations have no pants to kick or soul to damn and by God, they ought to have both.").

41 Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1345 (1996).

42 Wines et al., *supra* note 4, at 515.

43 See David C. Korten, *The Limits of the Earth—Paradigms Lost: The Bretton Woods Vision of Endless Growth is Obsolete*, THE NATION, July 15/22, 1996, at 14.

44 See *id.* at 16 (stating that 350 of the world's billionaires have a combined net worth which equals the annual income of the poorest forty-five percent of the world's population and that "if ecological limits don't doom the Bretton Woods system, growing inequality across the planet will").

45 See *id.* at 14.

46 See *id.* at 16.

47 See Afsin A-Khavari & Donald R. Rothwell, *The ICJ and the Danube Dam Case: A Missed Opportunity for International Environmental Law?*, 22 MELB. U. L. REV. 507, 528–29 (1998).

48 See *Further Implementation of Agenda 21*, *supra* note 2.

49 See Korten, *supra* note 43, at 16 (arguing that both corporations, who have expanded the boundaries of markets beyond national borders, and global free trade agreements, which override national laws, have weakened governments).

Putting these standards into practice challenges the state to redefine the appropriate relationship between government and the marketplace.<sup>50</sup> Impacts to profits motivate MNCs to act. Public disclosure requirements force an MNC to evaluate the long-term business impacts of its current behaviors.<sup>51</sup> As Professor Louis Loss noted, “[p]eople who are forced to undress in public will presumably pay some attention to their figures.”<sup>52</sup> Currently, MNCs have no incentive to look beyond profits; therefore, social and environmental impacts are not part of the business matrix.<sup>53</sup>

MNC executives know that their stewardship of other people’s money is constantly evaluated.<sup>54</sup> Stock prices, reflecting corporate financial management, are available throughout the trading day.<sup>55</sup> Investors make demands based on the information available for their review.<sup>56</sup> If stock prices and investor information reflected compliance with sustainability standards, managers would address this aspect of their corporate operation in order to satisfy investors. Corporate conduct in the area of labor rights and environmental standards should be able to withstand public scrutiny.<sup>57</sup> How profits are generated should be as important as the quantity generated.

#### IV. NAFTA AND THE MAQUILADORA ZONE

The maquiladora zone at the border between the United States and Mexico is an example of MNC conduct that could not stand up to public scrutiny by environmentalists.<sup>58</sup> This area exemplifies unsustainable development created by

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50 See YERGIN & STANISLAW, *supra* note 22, at 362 (discussing the difficulties in trying to shape and redefine the relationship between government and the marketplace).

51 See Lowenstein, *supra* note 41, at 1342.

52 *Id.* at 1344 (quoting LOUIS LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 3 (2d ed. 1988)).

53 See National Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1036 (D.C. Cir. 1979). Petitioners requested increased disclosure in order to increase corporate environmental and social responsibility. See *id.*

54 Lowenstein, *supra* note 41, at 1339.

55 See YERGIN & STANISLAW, *supra* note 22, at 154.

56 See *id.* at 155.

57 See Wines et al., *supra* note 4, at 481–83.

58 See David Voigt, Note, *The Maquiladora Problem in the Age of NAFTA: Where Will We Find Solutions?*, 2 MINN. J. GLOBAL TRADE 323, 327–28 (1993) (detailing environmentalists’ concerns with the maquiladora zone between the United States and Mexico).

MNCs despite numerous international treaties and agreements espousing sustainable development and environmental protection.<sup>59</sup>

Maquiladoras are foreign-owned assembly plants located principally along Mexico's northern border.<sup>60</sup> In 1965, the Mexican government began offering economic incentives to stimulate the economic growth of the border area.<sup>61</sup> Many U.S. corporations opened plants in the border region to take advantage of the reduced taxes in addition to the ease of access to the U.S. consumer market.<sup>62</sup> Maquiladoras import raw materials or component parts into Mexico duty free and then export the finished product back to the country of origin, paying tariffs only on the value added in Mexico.<sup>63</sup>

Mexico achieved its goal of increased foreign investment and regional industrialization, but both industry and the population expanded without a supporting infrastructure.<sup>64</sup> In 1990, the American Medical Association characterized the U.S.-Mexico border area as a "virtual cesspool and breeding ground for infectious disease."<sup>65</sup> MNCs benefited financially not only from the tax incentives, but also by exploiting the people and the environment.<sup>66</sup>

In 1983, the United States and Mexico initiated their first significant attempt to improve border conditions.<sup>67</sup> The two countries signed the Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area ("the La Paz Agreement").<sup>68</sup> The agreement itself

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59 See *id.* at 332-36.

60 *Id.* at 323 n.1 & 324-25.

61 See Abelardo L. Valdez, *Expanding the Concept of Coproduction Beyond the Maquiladora: Toward a More Effective Partnership Between the United States and Mexico and the Caribbean Basin Countries*, 22 INT'L LAW. 393, 397 (1988); see also Voigt, *supra* note 58, at 324 n.8.

62 Kelly L. Reblin, Comment, *NAFTA and the Environment: Dealing with Abnormally High Birth Defect Rates Among Children of Texas-Mexico Border Towns*, 27 ST. MARY'S L.J. 929, 935 (1996).

63 See Voigt, *supra* note 58, at 323 n.1, 324.

64 Elizabeth A. Ellis, Note, *Bordering on Disaster: A New Attempt to Control the Transboundary Effects of Maquiladora Pollution*, 30 VAL. U. L. REV. 621, 629-30 (1996); Michael A. Fallek, Comment, *Trouble on the U.S.-Mexico Border: The Mysterious Anencephaly Outbreak*, 31 TEX. INT'L L.J. 288, 300-01 (1996).

65 Fallek, *supra* note 64, at 301.

66 See Wines et al., *supra* note 4, at 481.

67 See Voigt, *supra* note 58, at 332-33.

68 Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the

is one of general cooperation.<sup>69</sup> Specific concerns were to be addressed through the addition of formal annexes.<sup>70</sup> Five annexes were added,<sup>71</sup> but the conditions along the border subsequently worsened.

Between 1986 and 1991, the number of workers the maquiladoras employed expanded from 250,000 to approximately 400,000 and the number of maquiladoras increased from 800 to roughly 1800.<sup>72</sup> Rapid industrialization continued without adequate infrastructure, thereby straining the region.<sup>73</sup> Untreated wastewater flowed in open ditches through the overcrowded rural slums known as *colonias*, creating hazardous living conditions.<sup>74</sup> Although the La Paz Agreement required that maquiladoras return hazardous wastes they produced to the United States for disposal, few companies complied, choosing the cheaper means of illegal dumping.<sup>75</sup>

Such improperly disposed waste and wastewater contaminated rudimentary drinking water supplies.<sup>76</sup> A high incidence of a birth defect, anencephaly, was attributed to mothers' ingestion of water contaminated by the maquiladoras.<sup>77</sup> Further, air quality was impaired by the release of toxic air pollutants.<sup>78</sup>

In 1992, the United States and Mexico again tried to address the maquiladora problem through the Integrated Environmental Plan for the Mexico-U.S. Border Area ("Border Plan").<sup>79</sup> The Border Plan was finalized in 1992, and resulted

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Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 10,827, 22 I.L.M. 1025 (1983).

69 See Voigt, *supra* note 58, at 333.

70 *Id.*

71 *Id.* Annex I pertained to wastewater treatment, Annex II to hazardous waste disposal, Annex III to transborder shipments of hazardous waste, Annex IV to air pollution caused by copper smelters, and Annex V to urban air pollution. See *id.* at 333-36.

72 Fallek, *supra* note 64, at 295; Mauro F. Ruiz, *The North American Development Bank: For Cleanup or Profit?*, 20 HOUS. J. INT'L L. 555, 560 (1998).

73 See Ellis, *supra* note 64, at 630.

74 See Voigt, *supra* note 58, at 328 & n.26.

75 See Stenzel, *supra* note 20, at 445.

76 See Voigt, *supra* note 58, at 327-28 & n.24.

77 *Id.* at 328 & n. 27. Infants with anencephaly are born with missing or incomplete brains. *Id.*

78 See *id.* at 329.

79 Integrated Environmental Plan for the Mexican-U.S. Border Area (First Stage, 1992-1994), U.S. Env'tl. Prot. Agency, Doc. No. A92-171 (1992).

in an expansion of the La Paz Agreement.<sup>80</sup> The Border Plan was criticized as being largely symbolic and merely a “plan to do a plan.”<sup>81</sup>

True to this prediction, in June of 1998, nine binational work groups from the Border Plan released a framework document.<sup>82</sup> The document announced that the work groups were still developing indicators to track the effectiveness of the border environmental policy.<sup>83</sup>

Fear that the conditions along the U.S.–Mexico border would worsen because of NAFTA<sup>84</sup> resulted in concessions to environmental and labor concerns. NAFTA’s preamble includes a commitment by the United States, Canada and Mexico to promote sustainable development and strengthen the development and enforcement of environmental regulations.<sup>85</sup>

To further assure the passage of NAFTA, the signatories negotiated two side agreements, the North American Agreement on Environmental Cooperation (“NAAEC”)<sup>86</sup> and the North American Agreement on Labor Cooperation (“NAALC”).<sup>87</sup> The NAAEC reaffirms the Stockholm and Rio Declarations and commits the parties to the promotion of sustainable development through supportive environmental and economic policies.<sup>88</sup> The NAALC promises, *inter alia*, improved working conditions and living standards as economic productivity increases.<sup>89</sup>

NAFTA and the side agreements were regarded as an important symbol of changing attitudes and recognition of the need to integrate economic and environmental elements

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80 John J. Kim & James P. Cargas, *The Environmental Side Agreement to the North American Free Trade Agreement: Background and Analysis*, 23 ENVTL L. REP. 10,720, 10,722 (1993).

81 *Id.* at 10,723 (quoting former Sierra Club Chairman Michael McCloskey).

82 *Air Pollution Primary Focus on Action on U.S. Mexico Border Bilateral Study Says*, 21 INT’L ENV’T’L REP. (BNA) No. 13, at 623 (June 24, 1998).

83 *Id.*

84 See Reblin, *supra*, note 62, at 936

85 NAFTA, *supra* note 8, Preamble.

86 North American Agreement on Environmental Cooperation, *done* Sept. 8–14, 1993, *reprinted in* 32 I.L.M. 1480 (1993).

87 North American Agreement on Labor Cooperation, *done* Sept. 8–14, 1993, *reprinted in* 32 I.L.M. 1499 (1993) [hereinafter NAALC].

88 NAAEC, *supra* note 86, at 1482.

89 NAALC, *supra* note 87, at 1502.

with public participation by citizens.<sup>90</sup> NAFTA was hailed as the “most environmentally sensitive . . . free trade agreement ever negotiated anywhere.”<sup>91</sup> It was the first recent major trade agreement to place free trade in the context of the goal of sustainable development.<sup>92</sup>

The Commission for Environmental Cooperation (“CEC”) was created by the NAEECC and was charged with reviewing the effectiveness of the agreement within four years of its entry into force.<sup>93</sup> In 1999, more than five years after the agreement entered into force, the CEC completed an analytic framework for assessing the environmental effects of NAFTA.<sup>94</sup> After extensive peer review, a final report will be prepared summarizing the review.<sup>95</sup> After this report is prepared, the CEC will consider options for additional work in this area.<sup>96</sup>

Various private entities have not been so constrained in evaluating the social and environmental side effects of NAFTA.<sup>97</sup> By 1995, two years after NAFTA was signed, the number of workers employed near the border region had increased by twenty percent to approximately 700,000.<sup>98</sup> Further, the number of maquiladoras had increased to close to three thousand.<sup>99</sup> This growth was unaccompanied by any appreciable improvement in housing, sanitation, education,

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90 See Stenzel, *supra* note 20, at 451, 456.

91 *Id.* at 426 (quoting former EPA Administrator William K. Reilly).

92 See Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 380 (1994).

93 NAAEC, *supra* note 86, at 1485. The NAALC mirrors the NAAEC, creating a Commission for Labor Cooperation (CLC) with duties and powers identical to those of the CEC. See NAALC, *supra* note 87, at 1504–07. This article will only discuss the CEC.

94 COMMISSION FOR ENVIRONMENTAL COOPERATION, ASSESSING ENVIRONMENTAL EFFECTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA); AN ANALYTIC FRAMEWORK (PHASE II) AND ISSUE STUDIES 1999 iv (1999).

95 *Id.*

96 *Id.*

97 See *NAFTA's Broken Promises: The Border Betrayed*, Pub. Citizen's Global Trade Watch, Jan. 1996, at 1, available at <http://www.tradewatch.org/pctrade/nafta/reports/enviro96.htm> (Aug. 28, 2000) [hereinafter *Border Betrayed*] (citing a study conducted by Washington D.C.-based Public Citizen, who conducted interviews with more than one hundred different sources regarding how NAFTA was affecting public health and the environment of the U.S.-Mexico border area).

98 *Id.* at 4.

99 See *id.* at 68.

or hospitals.<sup>100</sup> MNCs continue to operate in a manner that would never be condoned in the United States.<sup>101</sup> Environmental and labor abuses are both prevalent in the region.<sup>102</sup>

Fifty million gallons of raw sewage and waste continues to flow daily from maquiladoras into neighboring Mexican towns and American *colonias*.<sup>103</sup> Efforts to track the quantity of hazardous waste generated and disposed have proven unsuccessful because of a lack of accurate information relating to the quantity of hazardous waste that is generated and disposed in Mexico.<sup>104</sup> Air pollution from “unscrubbed” coal plants and increasing vehicular traffic remains a critical problem.<sup>105</sup>

In addition to increasing environmental problems, the maquiladoras’ continued presence on the U.S.–Mexico border has contributed to numerous employment inequalities. Maquiladoras consistently engage in illegal employment practices, primarily flagrant sex discrimination.<sup>106</sup> Income inequality has increased, as evidenced by a decline in income between 1986 and 1996 in all but the upper decile, where it increased by fifteen percent.<sup>107</sup> Maquiladora workers’ hourly wages decreased from \$2.61 in 1994 to \$1.80 per hour in 1995.<sup>108</sup> Increases in the global labor force have reduced school enrollment, assuring continued inequality.<sup>109</sup>

The CEC is authorized to impose trade sanctions to penalize a NAFTA signatory that persistently fails to enforce

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100 See *id.* at 28–29.

101 See, e.g., Stenzel, *supra* note 20, at 445.

102 See *Border Betrayed*, *supra* note 97, at 6–7, 32–33.

103 *NAFTA Fails to Protect the Environment-Critics*, Greenwire, Sept. 28, 1998, LEXIS, News Library; see also Voigt, *supra* note 58, at 327–28.

104 Danielle Knight, *Toxic Waste Problems on U.S.-Mexico Border*, INTER PRESS SERVICE, June 25, 1998, LEXIS, News Library.

105 See *Border Betrayed*, *supra* note 97, at 13.

106 Thalif Deen, *Companies Violate Rights of Pregnant Workers*, INTER PRESS SERVICE, Dec. 29, 1998, LEXIS, News Library (quoting Executive Director of Human Rights Watch Regan Ralph).

107 Nancy Birdsall, *Globalization and the Developing Countries: The Inequality Risk*, Statement at the Overseas Development Council’s Conference “Making Development Work” (Mar. 18, 1999), in *LINKAGES JOURNAL*, May 28, 1999, at 16.

108 *Border Betrayed*, *supra* note 97, at 32.

109 See Birdsall, *supra* note 107, at 17 (citing the permanent effects felt in Mexico caused by increases in the child labor force and decreases in school enrollment).

its environmental regulations;<sup>110</sup> however, sanctioning Mexico for the conduct of an MNC would seem contrary to the “polluter pays” principle.<sup>111</sup> Additionally, the process is unnecessarily time-consuming and convoluted.<sup>112</sup> For example, it would take at least 755 days from the initiation of a complaint to the imposition of a trade sanction.<sup>113</sup>

The North American Development Bank (“NAD Bank”) was created by the NAAEC with the goal of making polluters pay,<sup>114</sup> but in reality, operates to the contrary. The agreement establishing the NAD Bank specifically states that infrastructure projects should be financed by the private sector and operated and maintained through user fees paid by polluters.<sup>115</sup> The NAD Bank’s funding requirements focus on private investors and preclude loans to entities that are poor credit risks.<sup>116</sup> Consequently, the impoverished *colonias* cannot qualify for NAD Bank loans.<sup>117</sup>

The first project completed, a wastewater treatment plant, serves an industrial park, but not the surrounding community.<sup>118</sup> Private companies received public funds for a facility that should have been built years ago with corporate monies.<sup>119</sup> Contrary to the “polluter pays” principle, the polluters are the only ones benefiting. MNCs continue to profit from the favorable trade conditions and from exploiting the citizens and their environment.<sup>120</sup> Because the maquiladora system is the mainstay of the Mexican economy,<sup>121</sup> the Mexican government lacks the incentive and

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110 See NAAEC, *supra* note 86, at 1483–84.

111 Compare Rio Declaration, *supra* note 9, at 879, with NAAEC, *supra* note 89, at 1483–84.

112 See Housman, *supra* note 92, at 417.

113 Joseph F. Dimento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT’L ENVTL. L. REV. 651, 736 (1998).

114 Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 18, 1993, U.S.–Mexico, 32 I.L.M. 1545, 1547 (1993).

115 *Id.*

116 See Ruiz, *supra* note 72, at 578–79.

117 See *id.* at 585.

118 See Danielle Knight, *Border Settlements Left Out of Development Plans*, INTER PRESS SERVICE, June 22, 1998, available at 1998 WL 5987878.

119 *Id.*

120 See Reblin, *supra* note 62, at 935.

121 *Id.*

bargaining power to control the environmental and social effects of the MNCs.<sup>122</sup>

Despite its failure to foster sustainable development, NAFTA is an economic success and viewed as a model to guide other trade agreements.<sup>123</sup> Similar agreements are proposed for Chile, Africa, the Middle East, and the Pacific Basin.<sup>124</sup> This expansion of trade is especially worrisome in Asian countries that are renowned for some of the worst abuses of labor welfare.<sup>125</sup>

Although the Clinton Administration intends to link all free trade agreements with guarantees of labor rights and environmental protection,<sup>126</sup> this promise does not ensure a meaningful outcome. The NAFTA package and the maquiladora region illustrate that merely reciting the mantra of sustainable development does not secure a healthful environment or human rights. Anticipated gains from trade and investment entice countries to agree to concessions solely to placate environmental and social critics.<sup>127</sup> Unless governments find a way to control economic growth and corporate exploitation, unsustainable development will spread ineluctably throughout the world.

#### V. EXPANSION OF THE SEC'S DISCLOSURE REQUIREMENTS

In the United States, the SEC's mandatory disclosure or financial transparency requirements promote corporate financial morality.<sup>128</sup> In order to trade on the U.S. stock exchanges, corporations must routinely report a wide range of financial data.<sup>129</sup> Public exposure prevents improper

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122 Karen Vossler Champion, *Who Pays for Free Trade? The Dilemma of Free Trade and International Labor Standards*, 22 N.C. J. INT'L L. & COM. REG. 181, 225-26 (1996) (noting "the Mexican government's tendency toward lax enforcement of their laws," the lack of labor regulation of the Mexican informal sector, and the "suspiciously close relationship" between the Mexican government and labor unions).

123 Stenzel, *supra* note 20, at 425, 479-80.

124 *See id.*; Jack I. Garvey, *AFTA after NAFTA: Regional Trade Blocs and the Propagation of Environmental and Labor Standards*, 15 BERKELEY J. INT'L L. 245, 246 (1997).

125 *See* Garvey, *supra* note 124, at 247.

126 *Id.* at 246.

127 *See id.* at 255.

128 *See* Williams, *supra* note 39, at 1222-23.

129 *Id.* at 1207. Four categories of disclosure are required: initial disclosure when new securities are issued, quarterly and annual reporting, proxy disclosure prior to the annual shareholders' meeting, and disclosure in

monetary transactions from becoming established business habits.<sup>130</sup> Comparable reporting or social transparency is needed to govern MNC practices pertaining to the other two elements of sustainable development: human rights and environmental protection.

Using market forces to efficiently accomplish government goals is not a new concept. The SEC statutes<sup>131</sup> were enacted after the stock market crash in 1929.<sup>132</sup> Large corporations wielded the country's economic power but lacked an accompanying sense of public responsibility and business ethics.<sup>133</sup>

Rather than using extensive regulation, Congress sought to improve corporate ethics with the least possible interference to honest business.<sup>134</sup> Public accountability was aimed at restoring a sense of fiduciary and social obligation to moral corporate conduct, replacing a goal of individual gain.<sup>135</sup> Supreme Court Justice Louis D. Brandeis elucidated the philosophy behind this policy: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."<sup>136</sup>

Similarly, disclosure can promote sustainable development by causing MNCs to improve their human rights and environmental behaviors. The SEC can require disclosure that promotes the public interest or protects investors and is related to the purposes of the SEC statutes.<sup>137</sup>

Litigation between the Natural Resources Defense Council ("NRDC") and the SEC established that social

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conjunction with extraordinary corporate events such as a merger or the sale of the business. *Id.*

130 *See id.* at 1222.

131 Seven statutes comprise what is commonly called "the securities laws." The two statutes that address disclosure requirements are The Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1994), and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78ll (1994). *See Lowenstein, supra* note 41, at 1340.

132 *See Williams, supra* note 39, at 1223.

133 *Cf. id.* at 1224-26 (describing market manipulation and other instances of wrongdoing by corporate officers and investment bankers).

134 *See William O. Douglas & George E. Bates, The Federal Securities Act of 1933*, 43 YALE L. J. 171, 195 n.137 (1933).

135 *See Williams, supra* note 39, at 1241.

136 *Id.* at 1212 (quoting LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (1914)).

137 *See* 15 U.S.C. § 78l(b)(1) (1994); 15 U.S.C. § 77j(c) (1994).

transparency is within the scope of disclosure authority contemplated by the federal securities regulations.<sup>138</sup> The court reasoned that because corporate environmental and equal employment opportunity practices may have economic impacts, disclosure of this information is within the public interest and protects investors.<sup>139</sup>

Investors surveyed as part of the litigation believed that information regarding corporate social practices would act as an early warning signal, alerting them to the economic viability of their investments.<sup>140</sup> Disclosure would serve to focus management's attention on corporate behaviors that could cause future financial liabilities and potentially impact the sustainability of profits.<sup>141</sup> Although the court ultimately deferred to the SEC's rulemaking discretion,<sup>142</sup> the cases confirmed the SEC's latitude to tailor securities disclosure to changing conditions and investor needs.<sup>143</sup>

From its inception, the SEC system was conceived as a continual process of matching business standards to changes in the economic system.<sup>144</sup> Today's business standards should reflect the far-reaching consequences of globalization. Additionally, worldwide urgency to implement sustainable development and an increased number of investors relying on sustainable investments justify a renewed look at expanded disclosure. The success of financial disclosure ensures that social transparency will be an effective mechanism to promote global sustainability.

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138 *Natural Res. Def. Council (NRDC), Inc. v. SEC*, 389 F. Supp. 689 (D. D.C. 1974); 432 F. Supp. 1190 (D. D.C. 1977); 606 F.2d 1031 (D.C. Cir. 1979). In 1974, the court held that the SEC had not complied with statutory procedural requirements in denying the NRDC's petition that sought disclosure of environmental and equal employment opportunity information. The case was remanded to the SEC with directions to comply with the applicable rulemaking procedures. 389 F. Supp. at 693. In 1977, on appeal after remand, the SEC had complied with proper rulemaking procedures, but the court held that the SEC's decision not to require the requested disclosure was "arbitrary and capricious." 432 F. Supp. at 1212. On appeal in 1979, the court acknowledged that the SEC had broad discretionary power in deciding what disclosure to require. The court ceded to the judgment of the SEC not to require expanded environmental and social disclosure. 606 F.2d at 1062.

139 432 F. Supp. at 1212.

140 See 606 F.2d at 1038 & n.4.

141 See *id.* at 1040.

142 *Id.* at 1055-56.

143 See Williams, *supra* note 39, at 1263.

144 See *id.* at 1227 n.154 (quoting the Report of the Commission on Interstate and Foreign Commerce, H.R. Rep. No. 73-1383, at 3 (1934)).

The SEC system has produced an economically strong, highly stable market. No other nation's system evokes the same investor confidence in market integrity that encourages trading and operates as an incentive to be listed on the U.S. stock exchanges.<sup>145</sup> Growing companies seek to go public in order to take advantage of the available capital.<sup>146</sup>

Although many companies are not listed, those that are listed represent the preponderance of corporate capital.<sup>147</sup> Companies that avoid disclosure by being traded outside of the U.S. markets realize a reduction in their pool of potential investors and a lowering of share price.<sup>148</sup> It follows that augmented disclosure requirements would not likely alter this dynamic. MNCs will find it advantageous to circumscribe their conduct to conform to investor expectations not only because of a shallow preoccupation with corporate image, but also because of a real concern for corporate profits.<sup>149</sup>

## VI. EFFECTUATING THE SOLUTION

### A. *Harmonized Sustainability Standards for Social Transparency*

To ensure that disclosure is meaningful, international sustainability standards need to be developed. Standards help articulate the goals of sustainable development and measure progress toward its attainment.<sup>150</sup> Effective

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145 See Lowenstein, *supra* note 41, at 1340–41.

146 See *id.*

147 See *id.* at 1340.

148 See Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498, 2622 (1997).

149 See Gaines, *supra* note 34, at 269.

150 See Helene Genot, Dan Tarlock, and Dixie Lee Laswell, *Dean Fred F. Herzog Distinguished Lecture Series Presents: The Current Global Environment Outlook: How Is Industry Doing in Meeting the Rio Declaration Goals*, 32 J. MARSHALL L. REV. 289, 306 (1999) [hereinafter *Global Environment Outlook*] (“[I]n order for any legal system to operate, you must have standards against which conduct can be judged to decide if it conforms or not and whether to impose sanctions.”); see also William Prince & David Nelson, *Developing an Environmental Model: Piecing Together the Growing Diversity of International Environmental Standards and Agendas Affecting Mining Companies*, 7 COL. J. INT’L ENVTL. L. & POLY 247, 297 (1996) (observing that a group of U.S. businesses, the Global Environmental Management Initiative, are pursuing “total quality in environmental management” and have developed an environmental self-assessment program to be used by companies to measure progress toward sustainable development).

standards are objective,<sup>151</sup> precise, exclusionary, and globally consistent.<sup>152</sup>

Objectivity enables investors to make meaningful corporate comparisons when choosing among competing investment opportunities.<sup>153</sup> Precision provides clarity in measuring and reporting progress toward sustainable development. Additionally, investors can not make informed judgments nor can MNCs direct their activities using standards that are vague or lacking in substantive requirements.

Upward harmonization precludes lowering standards in a “race to the bottom.”<sup>154</sup> Global consistency allows MNCs to adopt one standard of operation for all corporate facilities. This eliminates unpredictability and allows efficient reporting and a methodical analysis of global impacts.<sup>155</sup> The convergence of standards across all national jurisdictions also eliminates any competitive disincentive to comply.<sup>156</sup>

Market competition forced MNCs to voluntarily adopt the International Organization for Standardization ISO 9000 (“ISO 9000”) series of international product quality standards.<sup>157</sup> ISO 9000 is a quality management system consisting of internationally harmonized quality control standards.<sup>158</sup> Voluntary standards harness market forces rather than using direct government regulation.<sup>159</sup> Because the standards are voluntary, the risk of profit loss, rather

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151 See *Natural Res. Def. Council v. SEC*, 432 F. Supp. at 1208 (U.S. District Judge Charles Richey analyzing how the SEC’s previous findings that investors do not have access to “objective information concerning the environmental practices of corporations” makes the SEC’s dismissals of expanded disclosure alternatives seem irrational).

152 See *Global Environment Outlook*, *supra* note 150, at 304–305.

153 See *e.g. id.* at 310.

154 A “race to the bottom” is a race from desirable levels of sustainable development to increasingly lower levels that are chosen in the face of competition or the lowest common denominator. This race may result in short-term economic gain, but welfare losses will reduce the net gain, leaving society worse off. Esty & Geradin, *supra* note 29, at 273–74.

155 *But see* Donna Solen, Note, *ISO 14000 Emerging International Environmental Law*, 10 FLA. J. INT’L L. 275, 282 (1995) (discussing incentives to avoid universal standards in order to allow flexibility and to avoid civil and criminal liability).

156 See Esty & Geradin, *supra* note 29, at 290.

157 See Genevieve Mullet, *ISO 14000: Harmonizing Environmental Standards and Certification Procedures Worldwide*, 6 MINN. J. GLOBAL TRADE 379, 386–87 (1997).

158 *Id.* at 387–88.

159 See *id.* at 386.

than the risk of legal enforcement, drives corporations toward ISO compliance.<sup>160</sup> The ISO 9000 registration is an internationally recognized symbol of quality assurance and a condition of doing business.<sup>161</sup>

Environmentally aware MNCs not only comply with the standards themselves, but also require their suppliers to demonstrate compliance.<sup>162</sup> Those suppliers in turn pass on the demand to their suppliers.<sup>163</sup> The demand continues throughout the supply chain,<sup>164</sup> creating a self-perpetuating market requirement.<sup>165</sup>

Market forces can accomplish the goals of sustainable development through a similar self-perpetuating system. A SEC imperative for environmental and social disclosure would provide a competitive incentive for MNCs to develop sustainability standards. MNCs that excel at attaining those standards should have a demonstrable competitive advantage over companies that merely report compliance with less demanding national regulations. When MNCs are confronted with unavoidable demands, they investigate creative strategies for meeting those demands at the lowest possible cost.<sup>166</sup>

An example of a creative and efficient means of meeting a regulatory mandate was the United States tuna producers' response to the Marine Mammal Protection Act ("MMPA").<sup>167</sup> To avoid the by-catch killing of dolphins, the MMPA limits the use of purse seine nets.<sup>168</sup> Mexico refused to comply, resulting in a protracted international legal dispute.<sup>169</sup>

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160 See *id.* at 392.

161 *Id.* at 388.

162 See *id.* at 392.

163 See *id.*

164 See *id.*

165 See C. Foster Knight, *Voluntary Environmental Standards vs. Mandatory Environmental Regulations and Enforcement in the NAFTA Market*, 12 ARIZ. J. INT'L & COMP. L., 619, 626 (1995) [hereinafter *Voluntary Environmental Standards*].

166 Gaines, *supra* note 34, at 265.

167 Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1421 (1994 & Supp. IV 1999).

168 16 U.S.C. § 1371 (a)(2)(B).

169 Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73, 100–08 (1999) (discussing the results of the GATT dispute panel settlement in response to Mexico's disagreement with the MMPA); see also *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991) (affirming a preliminary injunction of importation of tuna from Mexico).

In order to assure their competitive advantage despite the increased cost of complying with the Act, United States tuna producers implemented the “Flipper” dolphin-safe labeling program and public information campaign.<sup>170</sup> This strategy effectively eliminated the non-compliant Mexican tuna from the U.S. market.<sup>171</sup> The program was implemented to appease U.S. consumers, who demanded dolphin-safe tuna.<sup>172</sup>

In developing disclosure standards, the SEC balances the value of the information sought against the burden on reporting companies.<sup>173</sup> A self-regulatory organization, the Financial Accounting Standards Board (“FASB”) usually writes the SEC’s financial disclosure rules;<sup>174</sup> however, in the NRDC cases, the SEC indicated that developing its own environmental and social guidelines would be cost-prohibitive.<sup>175</sup> The court responded by directing the SEC’s attention to the availability of outside advice regarding the costs and feasibility of developing such guidelines.<sup>176</sup> Today, outside advice is readily available; numerous accounting and reporting systems already exist.<sup>177</sup>

The Social Accountability 8000 (“S.A. 8000”) standard is a system developed by the Council on Economic Priorities Accreditation Agency.<sup>178</sup> Analogous to the ISO 9000 series, it is a uniform, auditable, third-party verification system for labor practices that sets out specific corporate social accountability requirements.<sup>179</sup>

ISO also has a 14000 series of environmental management standards that were spurred by Rio’s Earth Summit conference.<sup>180</sup> ISO 14000 is similar to the European Union’s regulation for Eco-Management and Audit Schemes

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170 *Voluntary Environmental Standards*, *supra* note 172, at 633.

171 *Id.*

172 *Id.*

173 NRDC v. SEC, 432 F. Supp. at 1205.

174 Lowenstein, *supra* note 41, at 1342.

175 NRDC v. SEC, 432 F. Supp. at 1206.

176 *See id.* at 1206.

177 *See infra* notes 185–192 and accompanying text.

178 Williams, *supra* note 39, at 1304 & n.515.

179 *See id.* at 1304.

180 *See Voluntary Environmental Standards*, *supra* note 172, at 622; *see generally* Solen, *supra* note 162 (discussing the formation and the business and environmental implications of the ISO 14000 series).

(“EMAS”).<sup>181</sup> Both systems emphasize sustainability objectives, focusing on pollution prevention, not abatement.<sup>182</sup>

There are two critical differences between the two schemes. EMAS requires the release of environmental performance audits to the public,<sup>183</sup> while ISO 14000 does not.<sup>184</sup> Additionally, ISO 14000 does not require an external audit, while EMAS does.<sup>185</sup> Practical application of the ISO 14000 system demonstrates why both public reporting and an independent audit are preferable.

Mexico recently introduced its own voluntary environmental audit program to encourage maquiladoras to improve their environmental performance.<sup>186</sup> A “clean industry” certification can be obtained by an outside audit or by an internal audit using a company’s own personnel.<sup>187</sup> An inherent flaw in relying on a company’s self-certification was illuminated at Met Mex Penoles, a metallurgical maquiladora.<sup>188</sup> Although Penoles was participating in Mexico’s voluntary audit program,<sup>189</sup> the company was found to have contaminated the residential area surrounding its plant with lead, damaging the health of more than 2,500 people.<sup>190</sup>

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181 See Solen, *supra* note 172, at 278.

182 See *id.* at 279 (explaining that EMAS seeks to “promote continual improvement in the environmental performance of industries” through sound environmental policies and systems); see also *id.* at 282 (noting that the United States was responsible for inserting the terms “pollution prevention” into the ISO 14000 requirements).

183 *Id.* at 279.

184 See *id.* at 283.

185 See *id.* at 283–84. Both ISO 14000 and EMAS promote improvement in environmental performance through environmental management systems. *Id.* at 276, 278–79. The common system components of the two systems are a corporate environmental policy; a site review; an environmental program for the site management, including employee education; site audits; and a reassessment of objectives based on the performance review. See *id.* at 279, 285–86.

186 See *Mexican Enforcement Official Urges Maquiladoras to Conduct Voluntary Audits*, 20 INT’L ENV’T REP. (BNA) No. 23, at 1043–44 (Nov. 12, 1997).

187 *Id.* at 1044.

188 Pilar Franco, *Lead Poisoning Rears its Ugly Head*, INTER PRESS SERVICE, May 17, 1999, available at 1999 WL 5948667.

189 *Voluntary Environmental Standards*, *supra* note 172, at 628 n.34.

190 Franco, *supra* note 188.

Audits by a disinterested third party are essential to ensure the integrity of an audit system.<sup>191</sup> Objective public disclosure is also a key element.<sup>192</sup> Many MNCs spend more money cleaning up their environmental image than cleaning up the environment.<sup>193</sup> For example, Chevron Corporation spends \$5,000 per year on a butterfly protection program at a polluting California refinery, and spends \$200,000 producing an ad to tout the program as evidence of the corporation's social concern.<sup>194</sup>

The SEC is currently internationalizing its disclosure standards.<sup>195</sup> Now would be an opportune time to fuse social and environmental accountability with financial disclosure to create a comprehensive system of reporting on corporate progress toward sustainable development. The use of self-perpetuating management system standards has the advantage of ensuring global results.

#### *B. Public Education for Sustainable Development*

Public education is essential to effectuate corporate disclosure of sustainable development information because the SEC can act only in the public interest or to protect investors.<sup>196</sup> The public can act in its enlightened self-interest and demand sustainable development only if it is first enlightened.<sup>197</sup> Integrating social, economic and

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191 See Neil Gunningham & Darren Sinclair, *New Generation Environmental Policy: Environmental Management Systems and Regulatory Reform*, 22 MELB. U. L. REV. 592, 606 (1998) (noting that self-regulation without the influence of an outside party likely will be ineffective due to self-interest and emphasizing the importance of an objective audit in an environmental management system).

192 *But see* Keith M. Casto & Tiffany Billingsley Potter, *Environmental Audits: Barriers, Opportunities and a Recommendation*, 5 HASTINGS W. NW. J. ENVTL L. & POL'Y 233, 234 (1999) (noting that there is currently a disincentive in the U.S. to disclose the results of environmental audits because of the risk that firms will open themselves up to civil and criminal liability).

193 See Gina Neff, Greenwash, THE NATION, Nov. 3, 1997, at 50 (reviewing JOSHUA KARLINER, THE CORPORATE PLANET: ECOLOGY AND POLITICS IN THE AGE OF GLOBALIZATION (1997)).

194 *Id.*

195 See, e.g., Int'l Disclosure Standards, Exchange Act Release No. 34,41936, 64 Fed. Reg. 53,900, 53,901 (Oct. 5, 1999) (announcing that the SEC is revising its existing foreign issuer integrated disclosure system to incorporate the international disclosure standards of the International Organization of Securities Commissions).

196 See *supra* note 7 and accompanying text.

197 See Dernbach, *supra* note 3 at 20.

environmental elements into investor education is a means of effectively educating for sustainability.<sup>198</sup>

Investor education is also an opportunity for the government to generate societal norms not only for saving and investing,<sup>199</sup> but also for sustainability.<sup>200</sup> Government can reassume a proactive leadership role in shaping and protecting the future of society by inculcating desired values and cultural norms into an investor education program.<sup>201</sup>

Because the Social Security system has not proven sustainable,<sup>202</sup> the American public is increasingly entrusting savings to pensions, individual savings, and personal investments.<sup>203</sup> It is in the government's interest that these investors are successful in obtaining an alternate means of financial sustainability for their retirement. The world is facing the upcoming challenge of financing everyone's retirement as the "Boomers" strain pension and health care systems.<sup>204</sup>

When saving for retirement, investors need to look at long-term savings, not short-term profits. Investing in a company whose growth is not sustainable is contrary to this goal. Sound investment decisions are based on an understanding of the critical linkages among economic, social, and environmental growth.<sup>205</sup> Investment education is needed to provide the public with this knowledge.

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198 See A NEW CONSENSUS, *supra* note 7, at 73.

199 See James A. Fanto, *We're All Capitalists Now: The Importance, Nature, Provision, and Regulation of Investor Education*, 49 CASE W. L. REV. 105, 147 (1998) [hereinafter *We're All Capitalists*].

200 See A NEW CONSENSUS, *supra* note 7, at 62.

201 See, James A. Fanto, *Investor Education, Securities Disclosure, and the Creation and Enforcement of Corporate Governance and Firm Norms*, 48 CATH. U. L. REV. 15, 27 (1998) [hereinafter *Investor Education*] (recognizing the current investor education materials typically focus only on saving, investing, and avoiding investment fraud, rather than on corporate governance norms).

202 See, e.g., *We're All Capitalists*, *supra* note 199, at 112–13 (noting that the strain to be placed on the Social Security system by the Baby Boomers is likely to put the viability of the entire program in jeopardy).

203 See *id.* at 114 & n.26.

204 YERGIN & STANISLAW, *supra* note 22, at 387. The numerous children born in the two decades after World War II, the "Baby Boomers," will begin retiring in 2010 with an expected longevity greater than any previous generation. See *We're All Capitalists*, *supra* note 199, at 112.

205 Cf. A NEW CONSENSUS, *supra* note 7, at 73 ("Educating for sustainability promotes . . . an understanding of how [traditional academic] disciplines relate to each other and the to concepts of environmental quality, economic prosperity, and social equity.").

The SEC already has educational programs in place to enable investors to use available disclosure information to assess corporate financial integrity.<sup>206</sup> Increased public reliance on investment necessitates increased corporate transparency in order to promote continued market stability.<sup>207</sup> The SEC would be politically embarrassed if a lack of consumer education contributed to a market disaster.<sup>208</sup> The SEC could readily extend its current educational program to include alerting the public to potential impacts of corporate social and environmental behaviors on investments.

Public education, via mandatory corporate disclosure, empowers the public to create and enforce corporate norms.<sup>209</sup> In determining appropriate corporate norms, investors should know at what social cost profits are being generated.<sup>210</sup> Disclosure enables the public to discern if corporations are complying with these norms.<sup>211</sup> Investors can then collectively refuse to deal with a norm violator.<sup>212</sup> A corporate norm violator is far more effectively penalized by investors' selling their shares or by a consumer boycott than by government regulation.<sup>213</sup> Investors thus become responsible stewards of the nation's financial, social, and environmental resources.<sup>214</sup>

Because investor education is a critical skill for social survival, sustainability education should be part of school

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206 See *We're All Capitalists*, *supra* note 199, at 156 (noting the SEC's Office of Investor Education and Assistance prepares consumer pamphlets, conducts an investor education campaign, and otherwise generally increases contact between the SEC and individual investors).

207 See YERGIN & STANISLAW, *supra* note 22, at 389.

208 See *We're All Capitalists*, *supra* note 199, at 157.

209 See *Investor Education*, *supra* note 201, at 24.

210 See Williams, *supra* note 39, at 1201.

211 See *Investor Education*, *supra* note 201, at 22.

212 *Id.* at 23.

213 See generally *id.* at 24; see, e.g., Tom Lavell, *Union Carbide Seeks Disposal Of Unwanted MIC*, INTER PRESS NEWS SERVICE, Dec. 18, 1984, LEXIS, News Library (reporting that Union Carbide's stock lost one-quarter of its value in the two weeks following the leak of a chemical at its Bhopal, India plant that killed approximately 2500 people); Jon Frandsen, *Nike's CEO Outlines Steps to Improve Working Conditions at Overseas Plants*, GANNET NEWS SERVICE, May 12, 1998, available at 1998 WL 5627235, (reporting that, as a result of public pressure brought on by boycotts and news stories alleging that its shoes are made in Asian sweatshops, Nike decided to implement better working and safety standards).

214 See *Investor Education*, *supra* note 202, at 32.

curricula. Learning to defer present consumption to meet later goals prepares students to be responsible members of society.<sup>215</sup> Understanding the relationships that exist among economic, social, and environmental issues is a part of sustainable development education.<sup>216</sup> Like other subjects, sustainability education can be adjusted to students' ages and reinforced throughout their school years.<sup>217</sup>

An effective public education program will enlighten the public as to the need for sustainability. To protect their interests as both investors and citizens, the public can request that the SEC augment disclosure requirements to include social and environmental information in addition to the currently required financial data. Corporations and the public then become mutual advocates of sustainable development.

## VII. CONCLUSION

The solution this article proposes is a realistic approach to achieving sustainable development. Expanding SEC disclosure requirements to include social transparency integrates existing recommendations for achieving sustainability with an acknowledgement of globalization's effects on the international power structure. This approach combines social, economic, and environmental goals into measurable standards. It then provides an effective means of attaining those standards that involves the participation of all segments of society.

This proposal comports with the basic premise of government reinvention, that government should work better and cost less. It takes advantage of systems and mechanisms already in place and requires no legislation to implement. The use of market-based incentives to accomplish a government objective is also more efficient. Industry does not spend years studying how to study a problem.

Improving MNC behavior norms through social transparency not only accelerates progress towards sustainable development, but also produces results that follow recognized principles of international law. SEC-imposed disclosure addresses transboundary corporate conduct without offending state sovereignty. Voluntary

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215 See, e.g., *We're All Capitalists*, *supra* note 199, at 110.

216 See *A NEW CONSENSUS*, *supra* note 7, at 74.

217 See *We're All Capitalists*, *supra* note 199, at 138.

mitigation of extraterritorial environmental damage by the responsible MNCs accords with the “polluter pays” principle.

Because of the self-perpetuating nature of the standards suggested, and in order to enhance corporate image, MNCs may provide financial and technical support to smaller companies and communities in developing countries. Such assistance reflects a duty to cooperate. With improved corporate morality, developing nations will be subject to less exploitation, allowing them to develop and compete in the global economy without human and environmental sacrifice.

The Programme for the Further Implementation of Agenda 21 asks that all countries formulate national strategies for sustainable development by 2002.<sup>218</sup> Adopting the global strategy suggested in this article enables the United States to reassume its role of world leadership and fulfill its Agenda 21 commitments. Although this strategy will not accomplish sustainable development in a femtosecond, it is an effective start at transforming sustainable development from a lofty platitude to meaningful implementation. The United States can seize *this* defining moment to bring the hope of a sustainable future to the world.

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<sup>218</sup> *Further implementation of Agenda 21*, *supra* note 2, at 1645.