

OPEN BORDERS, BROKEN PROMISES

Privatization and Foreign Investment:
Protecting the Environment
Through Contractual Clauses

GREENPEACE

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**Privatization and Foreign Investment:
Protecting the Environment
Through Contractual Clauses**

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GREENPEACE

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INTRODUCTION

“We are approaching you both in our own and your interest. We aren't making sacrifices, nor are we unduly exploiting you. Of course, we are approaching you on behalf of Western companies, whose interest lies in increasing their markets and in using your cheap labour and raw materials. Some people say that this is a form of neo-colonialism. Certainly, it may look that way, but then it's for you to be strong, to create mechanisms to protect that which you hold dear.”

– A. Frohnmeier, European Commission, DG VII, Brussels¹

There is every reason to fear that Poland faces a future of economic exploitation and further environmental decay as it seeks international capital with which to rebuild its industry and its economy. This paper sets out why this is so, and examines at length the background, commercial outlook and impact on the environment of one major foreign investor in Poland, the Swiss-Swedish transnational corporation Asea Brown Boveri. Finally, it suggests a way to safeguard the Polish environment through the contracts governing privatization sales and other investments that the Polish government makes with foreign corporations, until such time as Poland legislates to control the activities of foreign investors.

THE REALITY OF INTERNATIONAL CAPITAL

“Western companies have money, lots of money. So much money in fact, that they can sign whatever type of contract they choose, build whatever they like, sell whatever they cannot sell elsewhere and even convince us that it's for our own good.”

– M. Suta, Deti Zeme, Pilzno

Foreign investment is of enormous potential benefit to a country like Poland, which has insufficient domestic capital to finance its needs. Foreign banks and corporations can provide capital for improving infrastructure (transport systems, communications, industrial plant, and so on), establishing clean production facilities, providing employment and protecting the environment. However, foreign investment also carries the risk that hazardous or inappropriate technologies and products from the industrialized West will be transferred to the world's most economically and politically powerless countries.

The reality and the scale of this risk have been proven in two of the most notorious and lethal industrial disasters in history – the explosion at a chemicals plant in Seveso, Italy, in 1976, and the devastation caused by pesticide leaking from a factory at Bhopal, Central India, in 1984. Both disasters occurred because hazardous technologies had been exported from an industrialized country to countries where environmental and occupational safety standards were substantially lower, and where any legislation was poorly enforced. The Seveso plant was run by a subsidiary of Swiss-based Hoffman-LaRoche operating in Italy with standards not allowed in Switzerland. The Bhopal factory was run by US-based Union Carbide under conditions unthinkable in the US, and in a community uninformed about and therefore unprepared for the danger posed by the plant.

The involvement of international aid agencies in establishing industry in less-developed countries is no safeguard against the establishment of new plants as deadly as those at Seveso and Bhopal. The World Bank and the General Agreement on Trade and Tariffs (GATT) have shown a willingness to enable polluting industries to shift from the West to the rest of the world – that is, the Third World, Central and Eastern Europe, and the Commonwealth of Independent States.

In the process, the West will get richer and the rest of the world will get still poorer. Western banks, including multilateral development banks such as the World Bank, make profits from interest on loans and credits given to countries that accept industries that migrate to them from the West. And these often involve production systems or products that Western businesses would otherwise have had to dump because of stricter environmental standards in their home countries. By transferring them elsewhere, they can continue to profit from them.

There is also a political dimension to this pattern of investment by the West. The financial debts to Western institutions built up in the rest of the world give the West more *de facto* political and economic control in other countries, notably through International Monetary Fund (IMF) conditions and loans. The rest of the world is thus pushed deeper into debt, poverty, and environmental degradation, while its sovereignty – the ability of nations to decide their own destiny – is eroded.²

THE RISK TO POLAND

“Negotiations cannot be undertaken in secret, without the participation of people, without independent environmental organizations.”

– Inge Perko-Separovic, Green Alliance of Croatia

Poland is particularly vulnerable to dirty investment in at least three ways.

First, Poland's weak economy makes it tempting to import dangerous goods if they are cheap or aid-funded. That they may be unwanted or highly regulated in other countries will be secondary to their low price. (The price is low, at least in part, *because* they are dangerous, unwanted and often illegal in their place of origin.)

Second, Poland's democratic institutions are still developing, and there are still restrictions on public access to information. Those most affected by a proposed investment project are thus excluded from participating properly in the decision-making process. In turn, this means that deals involving dangerous or inappropriate technology are able to go ahead without public knowledge.

Third, non-existent, weak or (most often in Poland) unenforced environmental regulations encourage international corporations and financial institutions to operate double standards. This means that technologies and products that may be banned, withdrawn, severely restricted or unwanted in their home country are easily imported into Poland.

FOREIGN INVESTMENT IN POLAND

“Many of the licences we received from the West in the 1970s caused an increase in our national debt and in pollution. Dirty technologies were transferred here because even then Poland was regarded as a country which would accept everything.”

– Z. Bochniarz, Polish Ecological Club

In 1990 Poland began to restructure its political and economic system, modelling its new institutions on those of the Western democracies. The reforms were welcomed by Western industry and supported by their governments. International development banks and aid agencies committed funds and offered loans and credits to support the Polish transition. By early 1993, State enterprises were being progressively, albeit slowly, privatized, and the main institutions of a capitalist society were in place in Poland.

Poland's industrial plant is renowned for being antiquated and polluting. Initially, the law governing privatization and foreign investment took some measures to protect and even improve the environment; but these were soon repealed. Only very recently has any fresh effort been made to revive environmental concerns in this context. On 26 February 1993, the Ministry of Privatization, the Ministry of Environment, Natural Resources and Forestry, and the Chief Environmental Inspectorate belatedly set up an Interministerial Environmental Unit to address issues arising from the process of capital privatization. Until then, environmental issues had been raised only sporadically, and only by Western advisors wanting to ensure that foreign companies did not inherit any liability for past environmental contamination caused by the old State industries.

Privatization presented a golden opportunity to rebuild Polish industry by “leap-frogging” outdated end-of-pipe pollution control measures – which shift pollution from one part of the environment to another, but do not eliminate it – and establish a new industrial base on the principles of clean production (see box).

THE PRECAUTIONARY PRINCIPLE AND CLEAN PRODUCTION

The precautionary principle puts the burden of proving that a substance will do no harm on the potential polluter rather than on the environment.

In other words, if you take an action – such as creating a substance, whether as a commercial product or as waste – the precautionary principle says that you must show that it will cause no harm, rather than presuming that the Earth is big enough to assimilate any harm. If you cannot show that your action is harmless, then the only option is to prevent it from having any impact on the environment. The most practical way to do this is to avoid taking the action in the first place.

Avoiding industrial processes that have not been proved harmless has come to be known as “clean production” – which is, in other words, the precautionary principle in action.

Clean production uses a minimum of raw materials and energy, uses sustainable resources wherever possible, and avoids or eliminates toxic waste and hazardous inputs and products. Both products and waste from clean manufacturing processes are harmless and recyclable.

But foreign governments and investors have ignored this option. Instead, seeing a market for their consumer goods and cheap labour and production costs for their manufacturing industries, they have pursued short-term policies in Poland, seeking quick, high rates of return on capital. They have failed to invest in long-term projects to clean up and modernize Polish industry, to lay the foundations of a healthy national economy, or to assure the future of Poland's vandalized environment.

In view of the disastrous investments identified in the following pages, and analysed at length in the case of Asea Brown Boveri, environmental issues must once again, and without delay, take their place in Poland's economic and industrial restructuring.

THE ROLE OF GOVERNMENT

"The draft improvements in European legislation [will mean that] the director of the factory himself must prove, prior to starting production, that the technology he intends to use will not be harmful to the environment. This legislation could have the effect of forcing factories using dirty technologies to re-locate outside the EC."

– Phillippe Sands, Centre for International Environmental Law (CIEL), London

Restraints and controls on commercial activity traditionally come from government, enacting legislation and taking appropriate powers to enforce it. Business has not usually considered its effects on the environment in its pursuit of profits except when obliged to do so by government. Whether through inexperience, ineptitude, haste or greed, the Polish government has actually relaxed its defence of the environment against industrial pollution where foreign investors are concerned.

Passing new legislation to re-establish government control over foreign investors and their impact on the environment will take time. But, meanwhile, the Polish government can insist that contracts with foreign investors contain clauses binding investors to environmentally safe practices, and can give the Polish people the rights to participate in the negotiations and to monitor and enforce the responsibilities of the corporations involved. The model contract clauses contained in this paper show that this can be done without interfering unreasonably with the investors' legitimate pursuit of profits.

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INVESTMENT OR EXPLOITATION?

THE NEED FOR FOREIGN CAPITAL

An essential element of Poland's economic and political restructuring programme since the collapse of the Communist regime has been the privatization of the economy – changing it from one owned and operated by the State to one owned and operated by private citizens.

Vast amounts of capital are required to clean up and put new life into Poland's ageing, polluting, State-owned industrial giants. The country's environmental crisis, too, must be tackled urgently. As long ago as 1983 the Polish government identified 27 areas of the country, covering 11% of the land area and affecting 13 million people, that were at risk ecologically. Five of these – in Gdansk, Legnica-Glogow, Upper Silesia, Krakow and Rybnik – have since been declared ecological disaster areas. The waters of the river Vistula are so contaminated that they are unfit even for industrial use.

Clearly, this state of affairs calls for massive, long-term strategic investments to provide new technologies, training and resources to modernize the economy, to improve the quality of life, and to revive the ruined environment. Given the dearth of domestic capital in Poland, with private savings virtually eliminated by hyperinflation in 1989 and the stabilization programme in 1990, the government has been keen to attract foreign capital.

To a limited extent, it has succeeded. Most foreign investment in Poland so far has provided capital for existing companies, creating "joint ventures" that are partly owned by the foreign investor and partly by Polish investors. By the end of 1992, 10,131 joint ventures had been registered in Poland. Their combined contribution to initial share capital totals around US\$700 million. Some 90% of all the companies are engaged in material production: 43% operate in industry; 6.6% in building and construction services; 1.3% in agriculture; 4.3% in transport; 24% in trade.¹

PRIVATIZATION, FOREIGN INVESTMENT AND THE LAW

To attract foreign investors to Poland, the Law Governing Economic Activity Involving Participation of Foreign Companies was passed in December 1988. This let foreign investors establish wholly-owned subsidiaries in Poland and exempted such companies from tax on profits for three years. This "tax holiday" would be extended to six years if the proposed activity was in a business area that had government priority, such as environmental protection. The law was replaced in July 1991 with what is known as the Joint Venture Law.

This allowed foreign investors to transfer full, after-tax profits out of the country, and dropped the need to obtain authorization from the Agency for Foreign Investment (PAIZ) before forming any joint venture. The Privatization Ministry (officially called the Ministry of Ownership Change) took over the responsibilities of issuing authorizations from PAIZ. However, the new law requires joint ventures to be registered only if their activity falls within what the government has deemed to be a strategic business area, or if it concerns a State enterprise. Otherwise, registration with the relevant commercial courts in the local voivodeship (province – there are 49 voivodeships in Poland) is sufficient. No details of any intention to trade in a protected business area need be given.

Today, there is no central agency in Poland with a full list of joint ventures and what they do. The Privatization Ministry has data only on joint ventures that require authorization; but this is only a small number of all joint ventures. The Central Statistical Office (GUS) has information only on joint ventures that are active, but none on those that have registered but have not begun trading. What information is available, then, is both fragmented and incomplete. And Polish government agencies provide figures only after they have processed them – they do not provide the raw data on which they base their official statistics.

For the environment, the new Joint Venture Law differs crucially from the 1988 law in two ways. First, under the 1988 law, a foreign investor could be refused entry to Poland on three grounds, one of which concerned the environment. These constraints have now been dropped. Second, the extended tax holiday for investments in environmental protection has been repealed.

WHERE THE MONEY COMES FROM

The main sources of foreign funding for investment projects in Poland are multinational development banks (MDBs), multilateral and bilateral aid programmes and investment by transnational corporations (TNCs).

“AID” AND INTERNATIONAL BANKS

Poland has borrowed billions of dollars from banks to help to finance its restructuring programme. The international banks most active in Poland are the World Bank, the European Bank for Reconstruction and Development (EBRD) and the European Investment Bank (EIB). They provide loans for specific infrastructural projects subject to technological, banking and bureaucratic conditions. Other banks involved in Poland include the International Finance Corporation (IFC) and Multilateral Investment Guarantee Corporation (MIGA).

In December 1992, the National Bank of Poland estimated that foreign credits amounted to US\$8.6 billion, and that a further US\$6.2 billion were available. Of this total, US\$3.05 billion had been granted by international financial

organizations; the remainder came from 19 individual countries. However, the amount actually disbursed amounts to just US\$2.1 billion.²

All these loans carry conditions. Foreign financial institutions and governments are thus in a position to dictate the terms for restructuring the Polish economy. We shall see how the policies they have pursued for the most part have neither acknowledged the state of the Polish environment nor contributed to its recovery – if anything, they have done the opposite.

THE IMF AND THE WORLD BANK

Poland rejoined the International Monetary Fund (IMF) in 1986, to obtain credits and re-schedule debts. Membership of the IMF is a prerequisite for access to World Bank loans, which are themselves conditional on the results of periodic reviews of the Polish economy undertaken by the IMF. The IMF is well-known for demanding draconian austerity measures when it deems them necessary. In Poland, the IMF's wish to control inflation and restrict budget deficits makes it difficult to encourage domestic economic activity.

By December 1992, World Bank loans to Poland totalled US\$2.6 billion, of which only US\$746.25 million had been disbursed. Of this, US\$18 million – less than 1% of the total – are earmarked directly for environmental protection.³

MULTILATERAL AND BILATERAL AID PROGRAMMES

PHARE is the main multilateral assistance programme of the OECD countries and is co-ordinated by the European Commission. A portion of its funds is appropriated by the European Community and is called EC-PHARE.

By April 1992, about US\$300 million had been transferred to Poland under PHARE. The PHARE Environmental Sector Programme represents a significant portion of the overall funds and is scheduled for three phases.

Foreign credits have also come to Poland through bilateral loans and grant agreements. The largest donors of bilateral aid to Poland are the USA, Sweden and Germany. These agreements always include what are called tied procurement schemes. This means that donor countries provide funds for Poland to buy commodities and technologies strictly from themselves. Funds from these sources are rarely allocated for development programmes that involve sustaining resources or promoting clean production. If a country like Poland were to look for funds for clean technology projects, it would generally be steered towards end-of-pipe technologies, for which funds will more readily be found – because big business has spent more on these technologies, and wants to see a return on its investment.

BIG BUSINESS: TRANSNATIONAL CORPORATIONS

Transnational corporations (TNCs) are enterprises operating in a number of countries and having production facilities outside their countries of origin. Examples of TNCs active in Poland are Fiat, Coca Cola, Asea Brown Boveri, Bayer, Hoechst, Unilever and Procter and Gamble.

The ranking (by size of current investment) of TNCs in Poland is as follows: Fiat (Italy), International Paper Company (USA), Warimpex (Austria), Curtis International (USA), and Asea Brown Boveri (Switzerland/Sweden).⁴

Funding agencies can play a major role in financing TNCs to transfer polluting industries, and TNCs will often organize the funding of such a transfer themselves. In turn, the world's less affluent countries accept hazardous products, technologies and industries in the hope that they will stimulate their economies and lead to improved standards of living. This hope outweighs both the potential risks and the known effects of pollution or (as with pesticides, for example) poisoning. Some governments allow this naive hope to outweigh investment decisions, even though Third World experience has shown that countries that accept hazards suffer more, both materially and financially, than they ever benefit.

PATTERNS OF INVESTMENT

According to the latest available figures (October 1991), money has been invested in Poland as follows from the following international sources:

COUNTRY	INVESTMENTS	PERCENTAGE OF TOTAL
Germany	1446 companies	31.0
USA	394 companies	8.2
Sweden	341 companies	7.1
Austria	312 companies	6.5
Netherlands	274 companies	5.7
France	245 companies	5.1
UK	240 companies	5.0
Italy	221 companies	4.6

A number of CIS and Swiss companies have also invested in Poland, especially Swiss-registered firms ultimately not of Swiss origin. Other tax havens, such as the Channel Islands, the Bahamas, Lebanon and Libya, are also well represented. Because of the difficulty of obtaining complete statistics on trade in Poland, details of these smaller investments cannot be given.

Most of the investments listed above are not large, strategic or long-term. According to the State Agency for Foreign Investment (PAIZ), which was re-established in March 1992 with the sole function of promoting foreign investment, the founding capital for 87% of the joint ventures does not exceed

US\$360,000. In only 3.4% of joint ventures does this capital exceed US\$1.5 million. Janusz Lewandowski, the Minister for Privatization, claims that in total Poland has attracted a paltry US\$700-800 million. Of the joint venture companies registered by April 1992, he believes only 19% are actually active and that of those only 10-20 companies represent serious investors.⁵

HOW FOREIGN INVESTMENT HAS FAILED

All the institutions mentioned above operate in Western countries that maintain often stringent controls over pollution. Few, whether providing "aid" or investing capital, have applied these standards to their operations in the Third World or in Central and Eastern Europe. From information gathered in Poland, it appears that serious investors attempt to improve only the most glaring environmental problems that are at the same time the cheapest to put right – for instance, changing from coal to gas fuel. However, one cannot discern any attempt at fundamental industrial restructuring. Generally the conditions and technologies remain the same, and the only improvements concern the final product or its packaging to enable it to compete in a free market economy.

This section describes how these institutions operate double standards in their investment policies towards Poland.

THE WORLD BANK

The World Bank is notorious for funding environmentally-disastrous projects – which, often as a direct result, turn out to be economically disastrous too. In particular the World Bank has financed the relocation of pollution-intensive industry to the Third World. As steel plants close in the North – as much because of a drop in demand as through environmental legislation – the Bank helps the expansion of steel manufacture in India. When supplies of chemical fertilizers outstripped demand in the USA, the World Bank provided credit so that India could buy them.⁶

In Poland, the promise of World Bank loans to modernize the Nowa Huta steel works in Krakow has enraged both economists and environmentalists. They argue that heavy industry in Poland is over-developed, that the markets for raw steel are shrinking and that the steel works should therefore be closed down and replaced by some entirely new form of economic activity.⁷

Another project in Poland, aimed at restructuring the heat supply industry, is jointly funded by the World Bank (US\$340 million) and the EBRD (US\$50 million).⁸ District Heating Enterprises from five Polish cities decided to buy heating pipes insulated with foam blown with environmentally-friendly carbon dioxide from the Danish firm Loegstoer, selected by competitive tender. Totally

JOINT VENTURES AND MISADVENTURES

POLYSTYRENE PRODUCTION

POLOPREN is a joint venture with the Austrian firm Greiner und Soehne, which produces and processes polystyrene foam. This company serves as an excellent example of the transfer of environmentally destructive technology. The Austrian firm has declared a doubling of production capacity because of "the transfer to Poland of some of its production from Austria and Germany". The company has also protected itself from taking on environmental liabilities resulting from previous contamination. (For further information see chapter 2.)

DISPOSABLE PVC PACKAGING

The joint venture between the French firm Compagnie Générale d'Eaux des Sources and the Polish company Zrodlo Pniewy in Michrow, in the province of Czestochowo, is preparing to start production of PVC bottles for mineral water. Two production lines for PVC packaging are also to be started shortly in Wloclawek.

PVC is one of the most versatile of the plastic materials that now pervade society. It is also the most dangerous in that its manufacture is linked to the production of chlorine, the root of much of today's toxic, persistent and bioaccumulative pollution. Many forward-looking companies and local authorities have started to introduce bans on the use of PVC.

At present, Poland has no legislation to prevent the production of PVC "one-way" disposable packaging, although the new draft law on waste is looking to ban its production. Currently, the only way to stop its manufacture is by the State Hygiene Office (PZH) refusing to certify the produced packaging – a threat that seems not to concern the French investor.

PVC PIPES

The joint venture between the Polish construction company Metalplast in Buk and the Danish firm Nordisk Wavin was founded to transfer new production technology for PVC pipes and metal galvanizing. In the light of the known hazards of PVC and the knowledge that galvanization can be extremely environmentally destructive, it is astounding that the contract reads: "despite the fact that this production is considered to be *environmentally clean*, certain environmental control activities will need to be carried out." [Emphasis added] Besides being a clear paradox, this statement stinks of the "end-of-pipe" mentality.

OKECIE AIRPORT, WARSAW

The joint venture between Polish Airlines (PLL) and the German firm Ilbau GmbH completed the first phase of construction of the international terminal in Warsaw without carrying out the environmental protection works agreed in the contract. Among them were a sewage works, a noise monitoring system and environmentally-safe equipment for de-icing aircraft.

As a result of pressure from the city authorities, the Chief Environmental Inspectorate granted a permit to the airport for a probationary period of one and a half years. Similar environmental problems threaten to stall the opening of the cargo terminal, the catering facility and the fuel depot. Local people have to contend with unregulated exhaust emissions and noise from both heavy goods vehicles servicing aircraft and the aircraft themselves.

PASSING THE ENVIRONMENTAL BUCK

The joint venture Natural Resources Group plc was founded with the participation of the British firm Natural Chemical Products, the Polish companies Organika-Zachem and Polmozbyt, and some Polish citizens. The company produces polyurethanes and polyurethane foam using the factory and equipment of Organika-Zachem. This arrangement means that all the environmental sins of the joint venture, including the lack of a permit to discharge waste water, are paid for by the founding unit, Organika-Zachem. The joint venture is not paying fines imposed for its emissions; its industrial waste is incinerated at Organika-Zachem.

disregarding Poland's signature of the Montreal Protocol (the 1987 international agreement to control ozone-depleting substances), the World Bank objected, stipulating that the credit be used to buy pipes produced using the more "certain" traditional CFCs, which deplete ozone from the atmosphere.⁹

Ironically, the World Bank's Ozone Operations Resource Group (OORG) is currently investigating commercially-available non-ozone-depleting alternatives to CFCs. And in 1993, the Bank changed its policy on the use of carbon dioxide. Following a meeting in Denmark of the OORG with pipe producers and Greenpeace in December 1992, the World Bank accepted the whole range of blowing agents for insulation materials, including carbon dioxide. But five Polish District Heating Enterprises are stuck with pipes made with CFC-blown materials.

THIRD WORLD, THIRD CLASS

Lawrence Summers, who is the World Bank's Chief Economist and is responsible for the 1992 *World Development Report*, has suggested that it makes economic sense to shift polluting industries to the Third World. In a memo dated 12 December 1991 and since leaked from the Bank, Summers wrote: "Just between you and me, shouldn't the World Bank be encouraging more migration of the dirty industries to the LDCs [less developed countries]?"

Summers goes on to justify his economic logic of increasing pollution in the Third World on three grounds.

First, since wages are low in the Third World, economic costs of pollution arising from increased illness and death are least in the poorest countries. Summers thinks that "the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that."

Second, since pollution is still low in large parts of the Third World, it makes economic sense to Mr Summers to introduce pollution: "I've always thought that under-populated countries in Africa are vastly under-polluted," he wrote, apparently without irony.

Third, since the poor are poor, they cannot possibly worry about environmental problems. "The concern over an agent that causes a one in a million chance in the odds of prostate cancer is obviously going to be much higher in a country where people survive to get prostate cancer than in a country where under-5 mortality is 200 per thousand."

TRANSNATIONAL CORPORATIONS, AID AND INVESTMENT

TNCs dominate world trade. Unlike national states, they are not accountable under international law. The 1992 Rio Summit could have remedied this situation, but proposals to monitor international corporate activities were scrapped. Thus, if one country tries to get a legal hold of their TNCs' activities, the TNCs can still continue business through any one of their other foreign affiliates or move elsewhere.

A country that seeks to levy tariffs or taxes or impose environmental liability to pay for environmental costs, may simply send the TNC shopping for a country where it can do business at a lower cost. For example, many US firms in the

electronics, automobile and other industries have moved across the border to Mexico, where they take advantage of low wages and lax enforcement of environmental law.

Poland has already been targeted as a potential new location for this kind of migrant industry. For instance, many Western governments have begun to wind down their support for nuclear power generation. The corporations involved have responded by turning to less-developed countries in the hope of selling them their dubious technology. TNCs such as Electricité de France, Siemens, and Belgatom have all in the past attempted to sell nuclear energy to Poland.¹⁰ More recently, according to two Polish sources, in June 1992 Asea Brown Boveri was discussing the construction of a nuclear power plant with the Polish government, despite Poland's 10-year moratorium on the development of nuclear power.¹¹

LOST OPPORTUNITIES

The hope was – and the desperate need remains – that fresh capital would help to rebuild Poland's environment along with its economy. Instead, the story of foreign investment in Poland is a catalogue of missed opportunities to rectify the mistakes of the past and invest in the country's future – economic, political, social and ecological. Such a long-term strategy would benefit both Poland and its foreign investors far more than current short-sighted policies.

In February 1992, in a bitter speech to the Council of Europe in Strasbourg, President Walesa berated the West for exploiting rather than helping to regenerate Poland's economy. He blamed the West for flooding Poland with consumer goods while failing to invest. "It's you who have profited by the Polish revolution," he said.¹²

GOOD FOR BUSINESS – BAD FOR THE ENVIRONMENT

Most foreign investors have simply seized Poland's market opportunities by importing goods from the West. Trade in food and consumer goods, such as cars, is proving to be the most profitable to private individuals, while international corporations concentrate on slicing out a market in the power, packaging, baby food and detergent sectors.

Even "serious" investors, such as Unilever, Benkiser and Henkel, have not introduced cleaner technologies. These three giants took over many of the State-owned Pollena detergent plants in 1991. This has not resulted in a switch to phosphate-free technology.¹³ All continue to produce detergents containing phosphates. Most of their investment has been in marketing and packaging.

The appearance in Poland of Western packaging systems, such as aseptic carton packaging (e.g. Tetrapak), plastic bottles, and aluminium cans is already undermining the traditional practice of returning and re-using glass bottles. Poland can ill afford an increase in consumer waste, when the legacy of industrial waste looms so large.

ILLEGAL WASTE IMPORTS

Waste was one of the earliest forms of Western "investment" in Poland.¹⁴ Not all the waste brought into the country was declared as such. Importing waste illegally from the West has involved various abuses of the joint venture laws. Here are some of the mechanisms involved:

- A joint venture is founded utilizing a production process requiring the import of materials similar to or identical to the waste that the company wants to import. This provides a convincing reason for the import of waste as far as the customs are concerned.
- A manufacturing process is declared that fails to state that residues will be generated that cannot be recycled.
- When the joint venture is registered, a declaration is made that it will be engaged in waste disposal or recycling, using new, up-to-date technology and processing only Polish domestic waste. Subsequently the modern technology is "forgotten" and imported waste is processed.
- Finally, there is the possibility of importing waste that is not immediately recognisable as such, and whose classification as either a raw material or waste depends upon further processes. One typical example concerns the import of scrap metal and old engines. If the engines are clean they can be melted down and recycled. If they are oily and dirty, the wastes remain in Poland.

This kind of abuse can only be controlled through factory inspections. But these are seldom carried out in Poland.

BANNED SUBSTANCES

In February 1990, EC "aid" to Poland took the form of pesticides, worth around US\$60 million. Some of these had been withdrawn, banned, severely restricted or never registered in many Western countries.¹⁵

While the dangers of asbestos are recognized worldwide, Poland has not only permitted the import of products containing asbestos, but actively encouraged this trade. While the duty on importing most building materials was 15%, those containing asbestos were favoured with 5% duty.¹⁶ Asbestos will be banned, however, in Poland from 1997.

END-OF-PIPE SOLUTIONS

Incinerators are being proposed as the environmentally-acceptable solution to the legacy of waste throughout Poland. But incinerating waste simply changes

its form, by concentrating some of the waste into ash, dispersing some into the atmosphere and discharging the rest as less than pure waste water. Incineration creates new compounds that are often more toxic and persistent in the environment than the original waste. In particular, chlorinated wastes, such as PVC packaging, are known to be responsible for dioxin and furan emissions from incinerators.

Nevertheless, a list of 100 environmental protection projects produced in April 1991 by PROMOSZ, a consulting firm in Warsaw, includes no fewer than 10 industrial waste incinerators.¹⁷ Today, four industrial waste incinerators are under construction, while a further eight are currently proposed. In addition there are now 27 proposals, in various stages of negotiation, for the construction of municipal waste incinerators. If all proposed facilities are built, Poland will find itself with a surfeit of incinerator capacity. This will act as a magnet, attracting not only waste-intensive industries but also waste itself. As a prospective member of the EC, and therefore also of the open market in which many categories of "waste" are still considered a commodity, Poland could once again be threatened with becoming Western Europe's dustbin. And, as public opposition to the construction of new incinerators in the West continues to grow, it is clear that Western incineration industries are pushing their unwanted technology east.

Flue Gas Desulphurization (FGD) plants are another Western "solution" to an environmental problem – the effects of burning sulphur-laden brown coal. An inventory prepared by the Environment Ministry¹⁸ of foreign aid projects demonstrates the bias towards this type of end-of-pipe "solution". Investment in alternative cleaner energy sources offers far greater long-term benefit, but projects promoting clean, renewable energy sources have received less than 5% of the aid received for FGD. Funding for these FGD projects totals US\$15.941 million,¹⁹ compared with US\$766,000 of aid funding to transfer know-how on wind power technology.²⁰

PLUNDERING NATURAL RESOURCES

Responding to a World Bank offer of US\$127.2 million to co-finance a "Forestry Development Programme" for the years 1993–1997, the Polish Environment Ministry, in a project proposal prepared in co-operation with foreign experts, has claimed that Polish forests "have to be rejuvenated, because younger stands of trees are healthier than the old ones. The rejuvenation of the forest will be carried out by diminishing the logging age of the trees" and that "Polish forests are excessively dense...Forest conservation logging has to be intensified to 11.5 million cubic metres of timber, as compared to 8 million cubic metres logged currently." The Ministry also proposes to double resin extraction. The World Bank has expressed very positive opinions about the programme.²¹

However, NGOs in Poland, including the Polish Forest Society (PFS), a body of forestry experts, have criticized this programme as one that “threatens to turn Poland into a logging colony”. The PFS claims that “the project...is not environmental development, but a dangerous programme of exploitation...and its plans could cause the devastation of resources dictated by market forces.... The increase in exploitation of the forests seems to be the guarantee for getting the credit.... Attention should be paid to the danger to Polish forests when the control over the utilization of the forest is in the hands of a foreign firm and this control is overseen by the creditor, namely the World Bank.”²² Following enormous criticism from Polish NGOs, the proposal was re-drafted. However, environmentalists are still dissatisfied with the project.

A Polish NGO report succinctly summarizes all these trends – the opportunist repackaging of out-dated products, the waste imports, the appearance of substances banned elsewhere, the outmoded methods of “cleaning up” the environment and the exploitation of Poland’s natural resources – in concluding that Polish government policies “are threatening to transform the country into the ‘external sector’ of the West European economy – a source of under-priced resources, raw materials and a sink for environmentally unsound technologies and products.”²³

THE INEPTITUDE OF THE POLISH GOVERNMENT

Foreign investment does not naturally flow to protecting the environment. But the Polish government has progressively distanced itself from safeguarding the country’s environment and the long-term future of its economy. The liberalization of foreign investment legislation in 1991 not only abolished the right to refuse an investment proposal on environmental grounds but also removed positive incentives for clean investment. In dissolving the central regulator of foreign investment, the government hampered access to information and so weakened enforcement of environmental legislation.

Environmental issues have been brought into the privatization process only by foreign investors afraid of becoming liable for costs of cleaning up existing environmental damage.

Allowing State-owned enterprises to be partitioned to suit investors has compounded existing environmental problems. In general, the “clean” profitable component of the enterprise has been taken over by the private sector, leaving the debts and “dirty” part in public ownership. For example, Asea Brown Boveri has bought only selected, more modern parts of the State enterprises Dolmel in Wroclaw and Zamech in Elblag, namely those operating Asea Brown Boveri’s own previously imported machinery. The State has retained the oldest, most polluting plant at the sites.

CONTRACTS NOT CONTAMINATION

If it is truly to aid the causes of economic development, social progress and ecological health, new industrial development in Poland must embrace both clean production and meaningful public participation in decisions affecting foreign investment and the environment.

Western institutions have shown that they cannot be relied upon to ensure clean investment and environmentally sustainable development in Poland. Clean investment is not on their agenda. On the contrary, it serves their interests better to promote the transfer of dirty technologies and products.

SEVEN STEPS FORWARD

In the absence of national law or international or multilateral treaties to prevent "dirty" investment, the Polish government has to legislate to protect Poland's environment. Since it could be years before strong laws are in place, joint-venture contracts could be used meanwhile to achieve this end.

Greenpeace has identified seven principles that should be integral to privatization and foreign-investment contracts, and that will promote clean production and environmental democracy. They are:

1. The Right to Know
2. Public Participation
3. Environmental Audits
4. Strict Liability
5. Environmental Impact Assessments
6. Education and Training
7. Legally Binding

These criteria have been drawn up to ensure that Western investment in Poland does not contribute further to environmental degradation by perpetuating systems that have failed in the West. In order to enable Polish authorities to apply these criteria immediately and effectively, Chapter Three puts them in legal language, in the form of contractual clauses.

The descriptions of these criteria that follow include a note of the contrasting reality that Poland suffers today – underlining the urgency of the need for either legislation or binding agreements with foreign investors.

THE RIGHT TO KNOW AND PUBLIC PARTICIPATION

The Need: The absence of freedom of information and public participation in decision-making is contrary to the spirit of democracy and representative government. The Polish people must have access to environmental information in order to participate in investment and development decisions. Provisions must also be made to allow the people genuine participation, through comments, hearings and grievance procedures.

The Reality: Obtaining reliable information in Poland can be difficult, if not impossible. Prior to democratization, there was no lack of concern for the

environment in such devastated areas as Katowice. There were even extensive scientific reports on environmental damage. However, most were locked away in government files. Polish law may have allowed only 2mg/kg of lead in food, but when it was discovered that an average of 42mg/kg of lead was present on the leaves of garden vegetables in the city of Krakow, nobody but the scientists and a few bureaucrats were aware that the law was being violated.

Even today things are little better. When the Joint Venture Law of 1991 dissolved central control of foreign investment, it also removed a central source of information, which has since been far more difficult to acquire. This matter has already been discussed (see "Privatization, Foreign Investment and the Law", page 5). Of further concern is the fact that state authorities, both central and regional, likewise have no access to information, which renders any enforcement of contractual provisions impossible.

The awareness that contracts negotiated with foreign investors were public knowledge would put pressure on Polish negotiators to reach agreements that were fair and that benefited the Polish economy, environment and people.

ENVIRONMENTAL AUDITS

Environmental audits are systematic examinations of the interactions between any business operation and its surroundings. They should be undertaken at least once a year and should cover all the enterprise's interactions with the environment, compliance with regulations and a review of the firm's policy and management systems in areas such as product planning, choice of raw materials, waste management and discharges. Environmental audits can play a key part in replacing processes that use hazardous substances with clean production alternatives.

The Need: Environmental audits should be mandatory for operations and technologies being transferred to Poland. They should be submitted as part of the environmental impact assessment. Audits should continue to be undertaken regularly after businesses have been established.

The Reality: Audits actually undertaken in Poland are strictly liability audits. They are generally carried out for potential investors who want to establish if any liabilities arise from past contamination at the site that they are looking to purchase. These are really site assessments, undertaken to determine what it will cost to restore the site to an acceptable standard.

Audits have been carried out on a case-by-case basis in capital privatization. Generally these are undertaken at the request of the potential investor and to a large degree are financed by him. There are two types of procedure: one for large enterprises being privatized and one for medium-sized. A full audit is generally made for the large enterprises. For medium-sized enterprises only an

inventory is made of the environmental situation, without a full analysis of ground water and soil contamination and other environmental factors.

However, there are no statutory environmental audit procedures or standards, and the results of liability audits are confidential.

The Ministry of the Environment is currently preparing guidelines for environmental auditing firms being privatized, but it is unclear whether the Ministry of Privatization will make the guidelines a mandatory part of the pre-privatization assessment.²⁴

STRICT LIABILITY²⁵

The Need: Strict civil liability for personal injury or loss of life, property damage, and damage to the environment should be imposed on all investors, in order to hold them accountable for their decisions. The term "investors" here implies the enterprise, its affiliate and any lending institution that has an interest in a given investment project.

The Reality: The sole legal basis for raising the question of environmental liabilities is the broad interpretation of the privatization law, which requires the value of an enterprise to be assessed prior to its sale.

It has been claimed that some foreign investors have protected themselves from environmental liability for the site they purchased by inserting disclaimers in contracts, thus transferring liability to the State Treasury. The Treasury's chronic shortage of funds virtually guarantees that government action to clean up the contaminated sites concerned is postponed indefinitely.

However, the Ministry of Privatization is no longer allowed to give such open-ended environmental indemnities to would-be investors when negotiating the sale of an entire enterprise. If the site assessment reveals extremely high or uncertain liabilities, the Ministry of Privatization negotiates with the potential investor to share the environmental liability. But, in practice, the inexperience of the Polish negotiators tends to favour the private investor.

Foreign companies often bypass the Ministry of Privatization and its constraints and deal directly with the Ministry of Finance or the Ministry of Industry and Trade. The Ministry of Finance is allegedly granting indemnities to Fiat and General Motors for the purchase of the State motor companies FSM and FSO respectively.²⁶ Apparently, the Ministry of Finance agreed that Fiat should be released from paying environmental fines and levies.²⁷ The Ministry of the Environment objected, and the Ministry of Finance then agreed to pay environmental fines on behalf of Fiat. Such convoluted arrangements mock the traditional commercial principle of *caveat emptor* ("Let the buyer beware") and serve only to pass the bill, ultimately, to those least able to pay it – the Polish people.

All other transactions (such as joint-venture investments) are negotiated case-by-case, with no formal guidelines on resolving liability issues. Allegedly, some contracts negotiated with Western investors, such as the International Paper Company in their purchase of the Kwidzyn Paper Company, contain no mention of liability. However, when negotiations concern the liquidation of a State-owned enterprise or founding joint ventures, it is impossible to discover how the issue of liability is resolved. Because some 80% of privatizations are handled by the 49 voivodeships, obtaining this information is formidably difficult.

The environmental inspectorates, both central (PIOS) and regional (WIOS), which are responsible for enforcing compliance, have not been informed of the legal environmental obligations contained in the contracts handled by the voivodeships. This renders enforcement impossible. It is hoped that the newly established Interministerial Environmental Unit, whose specific mandate is to resolve environmental issues arising from privatization, will address this crucial issue.

ENVIRONMENTAL IMPACT ASSESSMENTS²⁸

The Need: An environmental impact assessment (EIA), should be undertaken by an independent external consultant, with the full consultation of the public and regulatory bodies in Poland, prior to accepting any investments. The EIA should list all raw materials, intermediates, products and wastes, and should provide safety data sheets for all substances used. In this way, the EIA would identify possible adverse environmental consequences prior to project approval, and would allow clean production alternatives to be considered.

Where the investment entails fitting existing industrial plants with pollution control devices, the EIA should consider avoiding the expensive "bandage" approach and implementing clean production alternatives instead.

The Reality: EIAs became compulsory in assessing investment projects in July 1990 by executive order of the Ministry of Environmental Protection. This order specified the types of project subject to EIA and the guidelines for the EIA procedure. Investment projects of particular potential harm to the environment must undergo an EIA before an authorization is issued.

The EIA has to be commissioned and paid for by the investor. This EIA is then reviewed by an independent body, the Environmental Impact Assessment Commission, established by the Ministry of the Environment. The Environment Ministry has regard to the opinion of the EIA Commission when considering a given investment project.

The EIA Commission consists of 75 specialists in a number of disciplines. Representatives of local authorities, the local community and NGOs are involved in the review process. However, in view of the voluntary nature of the Commission, it is able to review only some 20 projects annually.²⁹ Some of the results are published in the Commission's quarterly bulletin.

New environmental regulations, currently in the pipeline, are likely to strengthen the role of the EIA. It will cover large-scale development plans, policies and programmes. Regional independent EIA Commissions are also likely to be established.

EDUCATION AND TRAINING

The Need: Clean investment in Poland can only be assured by meaningful public participation in investment decisions. Public and local regulatory authorities can most effectively police and counteract dubious investment proposals and operations. In order to do this competently, the general public, industry and local enforcing authorities all need to be provided with training in: environmental impact assessment procedures, environmental audit procedures, environmental law, liability law, and clean production technologies. Training programmes should be funded by international bodies, but must be independent of industry or government control to insure against a conflict of interest.

The Reality: Some training programmes financed by foreign sources have begun in Poland. Norway and the EC have provided funds for public and professional education in these areas. And in 1991 the Polish Ministry of the Environment, utilizing a World Bank loan, launched a training programme in environmental auditing. At present, the Polish division of the European Association of Environmental and Resource Economists is providing this training using a team of qualified specialists, trained by the Danish-Swedish joint venture, COWIconsult-VBB VIAK.³⁰

While the very existence of these programmes is encouraging, the demand for environmental lawyers, economists and consultants far outweighs supply.

LEGALLY BINDING

The Need: All the above principles must be written into international, national, local and contractual law. Poland must take the lead in Central and Eastern Europe by introducing legislation that ensures clean investment. It should also lobby the governments in the region to do likewise. Meanwhile, in the absence of national legislation to ensure clean investment, Poland should require all privatization contracts to achieve this end.

By inserting these clauses into all forms of contracts with both foreign and domestic investors, public access to information and community participation in decision-making will be legally guaranteed. This will allow a delegation of central government responsibilities to those most affected by an investment proposal.

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Chapter Three
FREEDOM UNDER THE LAW

It is clear from the preceding chapters that in general foreign investors in Poland are doing far more to worsen the country's environmental crisis, to undermine its economic position and to plunder its resources, than they are doing to improve them. Legal and economic constraints must be placed on foreign investors in Poland to ensure that they achieve clean production, contribute to cleaning up the environment and to improving other aspects of the quality of life in Poland, promote public participation in their activities, and safeguard other democratic principles.

As noted in the Introduction, placing constraints on economic activity is typically the job of government, carried out through legislation and regulations imposed on industry. This "regulatory" approach, however, takes a long time to put into practice. New laws and regulations must be drafted, debated and passed. These efforts are inevitably mired in politics and, in Poland as elsewhere, thwarted by a misconception that strong environmental regulations must wait until after the economy is strengthened.

There is also the likelihood that legislation will follow Western patterns of pollution control – typically, superficial "end-of-pipe" solutions. No Western country has yet achieved sustainable development, and copying Western approaches to the environment will not solve Poland's problems, economic or environmental. The only sure way to achieve that goal is to "leapfrog" the West economically and ecologically, by adopting clean production policies and technologies.

This chapter proposes that all privatization sales and other investment contracts could be used immediately as tools to protect the environment, achieve clean investment and promote democracy. The chapter offers model clauses that should be included in joint venture contracts and that promote specific environmental goals.

Contract provisions like these will encourage a more democratic society, because they permit citizens to learn about and participate in the negotiation of privatization contracts, and to monitor the environmental effects of the buyer's economic activities. Public information about the economic decisions of governments and private enterprise that affect the environment is a vital element in building a culture of public accountability.

THE PUBLIC NATURE OF PRIVATIZATION

In privatizing State-owned enterprises, the government is selling public property that has been owned and operated (in theory at least) for the good of citizens and society. In contrast, business transactions in the West usually involve agreements between private parties about rights to private resources.

Before converting public properties to private ownership, the government should place certain public-welfare safeguards on the company's future operations. (This principle underlies much Western law regulating commercial activity.) Citizens should be given a contract right (as third party beneficiaries to enforce those rights later against the company). From this point of view, the privatization process is not merely an economic transaction, but a social transaction, and the privatization contract is not merely a private contract, but a social contract. The buyer is granted certain rights by the State and in return owes certain responsibilities. The government must not only protect its own economic position as the seller of property, but must also act as the guardian of public health and welfare.

The key to maintaining public rights in these transactions is (1) to empower the government, particularly the Ministry of the Environment, to negotiate strong environmental provisions in the contracts and (2) to empower the public with certain rights to participate in the negotiations and to monitor and enforce the public responsibilities of the corporation. As shown by the model contract provisions that follow, this can be done without interfering unreasonably with the profitability of the activities. If such requirements would make continued operation uneconomic, the overall social costs of the activity probably outweigh its benefits, and serious consideration should be given to discontinuing the activity altogether.

CONSISTENCY WITH WESTERN LAW AND BUSINESS PRACTICE

Addressing environmental questions in the context of a business transaction is neither new or extraordinary to Western entrepreneurs. Since the early 1980s, in the US and many Western European countries, virtually all business agreements, including those for mergers and acquisitions of companies, purchases of industrial property, or significant loans for purchasing real estate, have reflected some environmental concern, if only because companies face enormous costs in cleaning up the environment if they are found liable for contamination. Many businesses now routinely include detailed environmental requirements in their contracts, including (a) clear rules for allocating liability for cleanup of past, present or future environmental damage or violations of environmental laws, as well as (b) certifications (that is, binding assurances) to a buyer or investor that they are in compliance with all environmental regulations and standards.

In addition to negotiating detailed contracts to assign environmental responsibilities, companies sometimes undergo extensive environmental audits as part of the transaction process. These audits are designed to identify potential future, present and past environmental liabilities associated with the facility before it is sold.

In short, Western companies are generally accustomed to negotiating environmental matters. They will not walk away from a business transaction simply because the other party wants to discuss environmental protection. To many Western companies, environmental liabilities and standards are just additional costs of doing business that can be discussed and negotiated just like any other business-related matter. The key is that Western companies will want as much certainty about their environmental liabilities and responsibilities as possible. If potential investors know what their environmental responsibilities are, they can better calculate the probable return on their investment, and thus the appropriate price to offer for an enterprise. Where there is no certainty, the investor cannot make the necessary calculations.

One method for investors to reduce the environmental uncertainties surrounding a business transaction is to undertake an environmental audit or other investigation of the enterprise's current and past operations as well as the development history of the property. If an investor can be convinced through such an investigation that there is no historical environmental contamination then it will be more willing to accept stronger or more uncertain contractual provisions.

The second method is to define environmental responsibilities clearly in the contract. A contract that is clear – even one that places all obligations on the foreign investor – may in some circumstances be more appealing to the investor than a contract that is completely silent about environmental obligations. The latter contract does not help the investor to determine what future costs will be.

APPEALING TO SELF-INTEREST

Companies can sometimes be convinced that acceding to stronger environmental provisions in their contracts is in their own self-interest. For example, buyers will often benefit greatly from a thorough environmental audit and may not even mind paying for it, if that is the best way to ensure a high quality audit. Voluntary adoption of progressive environmental safeguards can also put a company in a better competitive position in the long term because environmental standards will undoubtedly continue to tighten over time. This is particularly true in Central Europe, especially as the region moves towards integration into the European Community.

In addition, companies are becoming more interested in marketing themselves as “environmentally friendly”. If a company agrees to strong environmental provisions, which in turn are made public, it can reap valuable public relations benefits. The good will from being perceived as an environmental leader (and conversely the bad reputation of being labelled environmentally damaging) are extremely important considerations for corporations, especially those that sell products directly to the public (as opposed to those that produce raw materials or other products sold primarily to other companies). Clean investment companies and those that deal more openly with the public can benefit from the

dramatically increasing consumer demand for environmentally sound products. A similar appeal to self-interest may persuade government officials who have to answer to their electorates.

Many businesses are also discovering that there is a competitive advantage in environmentally sound production. Reducing wastes often corresponds to increased production efficiencies and reduced needs for raw materials. As these trends continue, the competitive advantage will rest with the company that makes clean production investments early and directly, without first going through a series of end-of-pipe changes. This approach avoids repeating Western mistakes and ensures increased competitiveness into the next century.

WHO NEGOTIATES THE CONTRACTS?

Government has a dual responsibility in privatization. The government is not only the "seller" of the property or enterprise – with the duty to sell it at the highest possible price – but is also the guardian of other elements of public welfare, including health and the environment.

These dual responsibilities may conflict. Therefore, the government's role in the privatization process should be split. No single entity can be expected to act both as a seller – with the mandate to maximize the funds received for the Treasury – and as the guardian of the people's health and environment. While one governmental entity negotiates for the highest price, another entity or entities must have the authority and responsibility to represent other aspects of the public's interest in how these public resources are transferred to private hands and how they will be operated afterwards.

The governmental entity best able to ensure that the environment is adequately protected is the Ministry of the Environment. This (and the ministries concerned with such things as public health and worker safety) should be given the authority to negotiate environmental provisions like those outlined in the model contract clauses suggested in this chapter. In that way, the government will not forfeit its responsibility to protect all aspects of public welfare by giving all power and responsibility to the Privatization Ministry – which is also saddled with the seller's responsibility of maximizing the purchase price.

The model contract provisions in this report are intended to provide the government agencies responsible for the environment with terms that will help them secure the best deal for the environment, while leaving the strictly commercial negotiations to a separate ministry.

ADVANTAGES AND DISADVANTAGES OF THE CONTRACT APPROACH

THE BENEFITS

This "contract" approach offers an enormous potential for protecting Poland's environment. Although contracts can never entirely replace strong regulations, an approach that supplements regulation with contracts is significantly easier, more flexible and more immediately responsive than an approach that relies only on regulatory reform. More specifically, the use of contractual provisions can provide the following advantages in protecting Poland's environment:

- Contract provisions can be (and in Western corporate transactions frequently are) more creative and innovative and more protective of the environment than are regulatory or legislative standards. They not only can act to prevent the damaging activities of enterprises, but can also require positive environmental benefits (e.g, creation of a park, publication of data, education of local citizens).
- Using contract provisions to protect the environment can allow regulators to keep pace with privatization and foreign investment instead of lagging behind waiting for the slower regulatory or legislative process.
- Strong environmental provisions in privatization contracts will affirm the public nature of the privatization process and the government's critical role in safeguarding public health, promoting democracy and protecting the environment.
- Contract provisions can lead to stronger legislation, as certain environmental norms are accepted in more and more contractual provisions. In a sense, contracts can act as demonstration projects for general environmental standards.
- Contracts may result in more and faster changes "on the ground" because environmental norms result from a negotiation in which all parties have reached agreement, as opposed to being imposed from above.
- A business that breaches a contract provision on the environment brings adverse attention to itself by demonstrating that it not only pollutes but breaks promises as well.

THE LIMITATIONS

Although the use of environmental clauses in business contracts should undoubtedly be expanded, regulators and others must also understand the approach's limitations. As noted above, the creative use of contracts can be important, but can never substitute for strong environmental laws and

regulations, active enforcement and an informed and vigilant nongovernmental community. Major limitations on the power of contracts include:

- Contracts already presume that the basic investment decision is acceptable and thus the use of contractual provisions will never effectively confront the issue of the inherent value of the investment or business decision itself.
- Contracts are born out of compromise, and thus may not establish the best standards for environmental protection. (Of course, legislation and regulations also result from compromise – frequently compromise involving several parties). This can lead to particularly harmful results if the negotiating parties do not have equal bargaining power. This risk underscores the need to have the environment ministry and the public take full part in the negotiations; only in this way will all legitimate interests be represented in the privatization process.
- Enforcement of contracts depends primarily on the parties to the contract. Except in cases of privatization, both parties to a transaction are typically private enterprises, with little incentive to protect the environment unless environmental damage happens to threaten profits. Environmental NGOs and other public-interest NGOs may have limited ability to enforce any contract clause directly and may have to rely instead on public pressure against the contracting parties.
- Customarily, many or all terms of business contracts are kept secret to minimize the information available to competitors. This limits the role third parties or the public can play. This does not have to be the case, however; certain aspects of any contract could be made public without economic injury to the companies involved.

THE MODEL CONTRACT PROVISIONS

This section discusses various contractual provisions that, if incorporated into investment agreements, would promote clean investment and environmental protection. In each section, the proposed provision is discussed in the context of the various transactions to which it would typically be relevant. For the most part, the model contract language is tailored to the negotiation of joint venture contracts in the privatization of manufacturing enterprises – but the basic concepts underlying the provisions are applicable to all business transactions.

The contract provisions are intended to serve as a starting point for negotiations. Some private investors may agree to virtually all of these provisions as written. In every case, however, negotiators should rely on local attorneys to ensure that the contracts are drafted so as to satisfy business and contract laws of the relevant country.

Although the model contract provisions will be applicable with minor modification to most types of transactions, they generally assume that:

- an industrial enterprise is being privatized;
- there is substantial investment from a foreign company, either through full ownership or through joint venture with a domestic company;
- the government is willing to take an interventionist approach to promoting clean investment and protecting the environment by authorizing the Ministry of the Environment to negotiate the environmental provisions.

The latter assumption reflects the fact that it is impossible for one governmental agency to be both the seller and an adequate guardian of public health and welfare, as noted above. These conflicting interests should be both independently and vigorously represented. The Ministry of the Environment can draw on its greater environmental expertise to negotiate often complex environmental provisions.

The model contract provisions reflect the steps necessary for achieving clean investments, as identified by Greenpeace International: the public's right to know and to participate; the need for environmental audits (including waste prevention audits); strict liability; environmental impact assessment; compensation; enforcement; standard-setting; "life-cycle" responsibility; and the precautionary principle.¹

A: GENERAL DEFINITIONS

"Clean Production Methods" means those production or industrial operations, technologies and systems that avoid or eliminate the generation of hazardous wastes and hazardous products through changes in: (a) the selection, extraction and processing of raw materials; (b) the conception, design, manufacture or assembly of the product; (c) the transport of all materials; (d) the end-use of the product in households or industry; and (e) the reuse or recycling of the product at the end of its useful function.

"Environmental Claim" means any claim, action, cause of action, investigation or notice (written or oral) by any person or entity alleging potential liability arising out of, based on, resulting from or otherwise relating to: (a) the presence, or release into the environment, of any Substance of Environmental Concern or (b) circumstances forming the basis of any violation, or alleged violation, of any Environmental Law.

"Environmental Information" means all environmental audits, environmental impact assessments, monitoring data relating to or estimates of the presence, release, discharge or emission of Substances of Environmental Concern, and any other data, video, tape recordings or other information relevant to assessing the impact on public health or the environment from activities contemplated under this Agreement. All Environmental Information made available to the Public must be made in the local language.

“Environmental Laws” means all applicable international treaties, agreements or standards, and all applicable national or local laws, regulations or standards in any country where a Buyer operates a similar facility, and any conditions included in any permit or other governmental authorization, relating to pollution or protection of human health or the environment (including, without limitation, laws and regulations relating to emissions, discharges, releases or threatened releases of Substances of Environmental Concern, or otherwise relating to the manufacture, processing distribution, use, treatment, disposal, transport or handling of Substances of Environmental Concern).

“Environment Ministry” is the environment ministry and/or any other governmental agency vested with the authority and responsibility of defending public health and the environment in the privatization process.

“Facility” means any facility, property or corporation being privatized or otherwise transferred under this agreement.

“Substances of Environmental Concern” means all chemicals, pollutants, contaminants, wastes, toxic substances, hazardous substances, petroleum or petroleum products, and any other substance or material that has the potential to harm public health or the environment.

“Seller” is the privatization ministry or other government agency authorized to negotiate and agree to the privatization or other transfer of the enterprise, facility or stock in question.

“Buyer” is the purchaser or acquiror of the enterprise, facility or stock in question.

“Public” includes all persons, government institutions, associations or juridical persons.

COMMENT

These definitions are intended to be used with the model contract provisions, as part of the contract. Most of the definitions should not be unreasonable to Western business, as they are based closely on standard environmental provisions used in Western transactions or on developing international or national environmental norms. The unique aspect of the definitions is the inclusion of the laws of any country where the company has similar operations within the definition of “Environmental Laws”. As is discussed further with respect to other provisions below, this ensures that companies do not take advantage of any lower environmental standards that may exist in Poland.

B: THE PUBLIC'S RIGHT TO KNOW

B(1) Buyer shall make this Agreement available to the Public for comment at least twenty days before the Closing Date. Buyer can withhold certain information from this agreement, if the information (a) can reasonably be deemed to be a trade secret or otherwise proprietary information and (b) is not relevant for assessing the human health or environmental hazards of the operations or activities contemplated under the Agreement.

B(2) Buyer shall make all Environmental Information available to the Public upon request, as soon as possible after such information is generated or acquired by the Buyer.

B(3) Buyer shall allow any member of the Public reasonable access to the Facilities to take samples of any waste stream or discharge or release into the environment from any Facility, so long as (a) the sample is used only to assess the potential public health or environmental affects of the activities of the Facility, and (b) the Buyer is allowed to take split samples simultaneously and is given copies of any reports resulting from the samples taken by the Public.

B(4) All information made available to the Public under this agreement shall be made available in the local languages.

COMMENT

Paragraph B(1) will, but really should not, provoke much controversy. It allows information in the contract to be maintained a secret only if it both qualifies as a trade secret and is not relevant to assessing environmental or public health risks. This gives environmental protection precedence over the protection of trade secrets. The timing of the release of the agreement is also important, because it will allow the public time to comment on the agreement before the transaction closes. This may provide an opportunity for modifying or preventing undesirable transactions.

Western companies, which are used to working in a cloak of secrecy, will at first react negatively to the thought of publicizing a major joint venture or other agreement. The initial opposition can be overcome by asking the buyer to outline exactly what parts of the final agreement they would not want to make public and to negotiate them on a case-by-case basis. For example, buyers may want to keep secret the price and other financial information of a sale (although arguably important for the public to know), because making it public may harm the buyer and seller in other negotiations for similar facilities. Moreover the price and financial information is probably not important for protecting public health and the environment.

Paragraph B(2) will be very controversial, as it provides virtually no exception to allow companies to keep Environmental Information secret. Several ways to negotiate this provision may be (1) to narrow the definition of Environmental Information (to, for example, only that information required to be made public under any Environmental Law in any other country of operation or any information that will pose an immediate threat to public health or the environment) or (2) to make the Buyer provide the information only to the Environmental Ministry. The provision could also be broadened by requiring corporations to generate certain information (like data on toxic releases as required under US law). For both paragraphs B(1) and B(2), the negotiators may need to agree on specific language about how to provide public access to the information (e.g., a certain number of days' notice or an agreement to keep the files organized, etc.)

Although paragraph B(3) is not normally included in Western business transactions, it is justified by the theoretically public nature of the privatization process and the lack of current monitoring and enforcement capabilities available to the Polish Ministry of the Environment. Any concern about interference in the operations of the facilities can be addressed in more specific language about providing reasonable notice and access for taking the samples. The companies will not be unfairly disadvantaged, because they will be given an opportunity to take split samples and to refute any test results. Corporate concerns about trade secrets and proprietary information should be met by (i) the requirement that the data only be used for assessing public health threats and (ii) the argument that trade secrets should never be given preference over the protection of public health or the environment.

C: PUBLIC PARTICIPATION IN INVESTMENT DECISIONS, NEGOTIATIONS AND PERFORMANCE

C(1) At least once every year after the Closing Date, the Buyer shall hold a public meeting at or near the location of each Facility. Prior to the public meeting the Buyer shall make available to the Public upon request (i) written results of its Annual Environmental Audit, including the Clean Production and Energy Audits, required under Paragraph E, (ii) a written environmental impact assessment for any new or additional activities contemplated in the next year, (iii) a Comparative Environmental Audit under Paragraph F if one has been required in the last year, and (iv) any other Environmental Information relevant to assessing the public health or environmental hazards of an activity. Information under subparagraphs (i)—(iv) shall be made available not less than one month before the scheduled public meeting so that the Public will have time to evaluate this information. The Public shall be given the right to submit written comments regarding the above information and to make oral comments at the annual public hearing. The public meeting shall be advertised by whatever method is reasonably necessary to ensure that knowledge of the meeting is widely distributed in the local community near the Facility. The

Buyer shall respond in writing to all written or oral comments made under this paragraph within one month of receiving such comments.

COMMENT

This provision is not typical for Western business transactions, but, like the other ones involving the public, it is justified by the public nature of privatization. Moreover, the private sector needs to act affirmatively in ensuring democracy in Poland. Because the government institutions are not yet adequately developed to allow public participation in such processes as rulemaking, permitting and licensing, these procedures should be incorporated in the contract provisions.

C(2). Where there is a corporate Board of Directors constituted in Poland and authorized to make policy decisions overseeing the operation of the Facility, the Buyer shall place on the Board of Directors a member of the Public, permanently living near the Facility and with no direct or indirect financial interest in the Facility, and one non-management employee. Where there is no corporate Board of Directors constituted in Poland, the Buyer shall create an Advisory Panel, the majority of which shall be made up of members of the Public, permanently living near the Facility and with no direct or indirect financial interest in the Facility, and non-management employees. The Advisory Panel, which will meet at least bi-monthly, will advise the top management of the Facility and the corporate Board of Directors. Members of the Public to serve under this provision shall be elected by the community in which the Facility is located. Non-management employees to serve under this provision shall be elected by vote of the Facility's non-management employees.

COMMENT

This provision ensures that local communities and employees will have some representation and voice within the top level of management. Such internal control over corporations may be one of the most effective means for increasing corporate responsibility towards communities and workers. However, this type of close co-operation – particularly in the form of an Advisory Panel – can be manipulated so that the members are co-opted and become nothing more than a public relations ploy. Negotiators of an agreement may also decide to include greater detail about exactly what the role of the outside members to the board should be. The provision could be written to require that a certain percentage of the Board or Panel always be members of the Public or non-management employees.

In the US the chemical industry's "Responsible Care Programme" already provides for the establishment of Community Advisory Panels.

D: INITIAL ENVIRONMENTAL AUDIT: AS A CONDITION OF CLOSING

D(1). Not less than five days prior to the Closing Date, the Buyer shall have prepared, submitted to the Seller and the Environment Ministry, and made available upon request to the Public an Initial Environmental Audit, which (i) is satisfactory in scope, form and substance to the Seller and the Environment Ministry and (ii) is prepared by an independent, competent and qualified engineer approved in advance by the Seller and Environment Ministry. The Initial Environmental Audit shall (i) identify and quantify the presence or release of any Substance of Environmental Concern, (ii) identify any violations of any Environmental Law, and (iii) describe Buyer's plan for eliminating any risks to public health or the environment and any violations of Environmental Laws.

COMMENT

Western businesses should be familiar with the concept of an audit and unlikely to resist it. This provision is based very closely on requirements that Western banks impose on borrowers before lending money to purchase an industrial facility or property. Environmental audits are also frequently required by buyers in Western transactions as a way to minimize their environmental liabilities.

Initial environmental audits are established practice in Western transactions, and buyers and sellers often negotiate who will pay for the audit, who will oversee it, and who will have control over the results. Typically, the seller in the West is asked at least to make representations and warranties that there are no environmental liabilities and no current violations. In order to make these representations, the seller usually must undergo an environmental audit of some sort. In the West, these audits are usually conducted by a team of independent lawyers and engineers. Buyers will sometimes insist on selecting, paying for, and controlling the environmental audit, because this allows them to ensure everything is done correctly. Given the limited financial resources available to the Polish government, it will be justifiable in most cases to shift the costs of the Initial Environmental Audit to foreign investors.

More problematic to Western businesses will be the idea of making the audit available to the public. Typically, audits are simply one of the many mechanisms used to transfer knowledge and information from the seller to the buyer, before the Closing Date (that is before the buyer actually purchases the facility). Making this information available to the public, like other provisions outlined here that open up the process to the public, is supported by the public nature of the privatization process and the need to support democracy through facilitating greater public participation in the private sector. In addition, the Polish government is justified in asking to make Initial Environmental Audits available to the public because the country's environmental problems pose such

a major public health risk and because basic environmental information has been (and still is) so difficult to obtain in recent decades.

It should be noted that there are several different ways to handle the Initial Environmental Audit. Many of them are not substantially weaker than the provision above and may in some circumstances be stronger. First, the language presented above relies heavily on the Environment Ministry to ensure that an adequate Environmental Audit has been completed (although note that it is also in the Buyer's own self-interest to find out exactly what environmental problems exist before the final Closing Date). Alternatively, the contract could provide a more detailed recipe of the contents of the Environmental Audit either in an appendix or in the provisions themselves.

E: ANNUAL ENVIRONMENTAL AUDIT

E(1). Not less than once a year every year after the Closing Date, the Buyer shall have prepared, submitted to the Environment Ministry, and made available upon request to the Public an Annual Environmental Audit, which (i) is satisfactory in scope, form and substance to the Environment Ministry or its local designee and (ii) is prepared by an independent, competent and qualified engineer approved in advance by the Environment Ministry or its local designee. The Annual Environmental Audit shall (i) identify and quantify the presence or release of any Substance of Environmental Concern, (ii) identify any violations of any Environmental Law, (iii) describe Buyer's plan and timetable for achieving zero discharge of persistent toxic chemicals over time and eliminating any other risks to public health or the environment and any violations of Environmental Laws, and (iv) identify any changes, positive or negative, since the last Annual Environmental Audit that could be relevant to evaluating the public health or environmental hazards of activities at the Facility.

E(2). As part of every Annual Environmental Audit required under Paragraph E(1), the Buyer shall include a Clean Production Audit. The Clean Production Audit shall (i) provide data regarding the amount, type and disposition of all wastes and pollution, including hazardous wastes and pollutants, generated at the Facility, (ii) provide a plan and timetable for the adoption of Clean Production Methods, for minimizing the production and generation of all wastes and pollutants, and for eliminating all hazardous wastes or pollutants generated or released by the Facility. The Clean Production Audit shall also include a discussion of possible Clean Production Methods, including for example technical and operational changes and product substitutions, that will reduce waste or pollution at the Facility and an explanation of why the Facility has not yet adopted such Clean Production Methods.

E(3). As part of every Annual Environmental Audit required under Paragraph E(1), the Buyer shall include an Energy Efficiency Audit. The Energy Efficiency Audit shall (i) provide data regarding the amount of energy consumed at the Facility, and (ii) provide a plan and timetables to minimize energy

consumption at the Facility. The Energy Efficiency Audit shall include a discussion of alternative technologies, operational changes, or product substitutions that could reduce energy consumption at the Facility and an explanation of why the Facility has not yet adopted those technologies or made the operational changes or product substitutions.

E(4). The Annual Environmental Audit, including the Clean Production Audit and the Energy Efficiency Audit, shall be made available to the Public upon request at least one month in advance of the Public Hearing required under Paragraph C(1). The goal of the Annual Environmental Audit is to track the Facility's progress toward reducing risks to public health and the environment by eliminating the generation of hazardous wastes and persistent chemicals; increasing energy efficiency; and minimizing the generation of other wastes and the release of other Substances of Environmental Concern.

COMMENT

The Annual Environmental Audit required under Paragraph E(1) does not raise many more questions than does the Initial Environmental Audits required under Paragraph D(1), except for one major difference. Western business transactions rarely require annual reports of any kind after a transaction is closed. Sellers of property usually have little interest or need to know how the company is operating after they have transferred it. The primary exception is in situations where a bank or other investor has a continued financial interest in the facility's operations or property. It is very common, for example, for bank documents to require disclosure of any changes on the property – such as the release of hazardous chemicals – that might put the bank's security interest at risk. Although there may be a duty to disclose any such release to the bank, there usually is no affirmative obligation to conduct regular environmental audits.

In Poland, such a requirement is justified because the governmental institutions responsible for environmental inspections are not well developed. It will be years before these inspectorates can conduct regular, thorough inspections of a company's operations, as their counterparts in the West do. Investors should thus be required to self-monitor and to report the results. Self-monitoring and reporting are important concepts common to many environmental laws in the West – as, for instance, with the US Clean Water Act, which requires industry to prepare and submit regular discharge monitoring reports.

Many companies are discovering that it is in their own interest to conduct environmental audits of their manufacturing facilities. In fact, many companies now have internal auditing teams that conduct routine internal audits of all facilities. These audits are excellent ways to identify and implement principles of pollution prevention and energy efficiency. Such audits should embody the precautionary principle based on preventive measures through the application of clean production alternatives. This is the approach advocated by many

international environmental institutions, including the United Nations Environment Programme.

Unlike the system recommended in these model provisions, internal audits in the West are almost always kept secret from the government and public. In addition to normal claims of "trade secrets" and "proprietary information", companies also argue that these audits are intended to improve company operations. If companies were forced to make all voluntary audits public, they would choose not to do them – basically because of a fear that publicizing the results would force the company to address any problems immediately.

The Clean Production Audit required under Paragraph E(2) emphasizes the need to eliminate all hazardous wastes (i.e. persistent toxic chemicals) and to minimize the generation of other wastes. Much of the information necessary for this audit might be required under E(1) anyway, but this provision requires the company to address specifically its plans to minimize waste and pollution and to move toward zero discharge of persistent hazardous chemicals. The Energy Efficiency Audit required under Paragraph E(3) applies the same principles to energy consumption in an effort to move companies towards reduced energy consumption.

F: COMPARATIVE ENVIRONMENTAL AUDIT

F(1). Within one year of the Closing Date and at least once every five years thereafter, the Buyer shall submit to the Environment Ministry and make available to the Public upon request a Comparative Environmental Audit. The Comparative Environmental Audit shall review Facility operations, practices and activities with similar technologies, operations, practices and activities at other facilities owned or operated by the Buyer no matter what country they are located in. The Comparative Environmental Audit shall (i) identify those technologies, operations, practices and activities that are the most protective of the environment and the most responsive and accessible to the Public, (ii) compare those technologies, operations, practices and activities identified in subparagraph (i) with those currently in use in the Facility, and (iii) explain any differences identified in subparagraph (ii) that could result in less environmental protection or public participation in Poland.

The Comparative Environmental Audit shall also (i) provide data comparing the releases of Substances of Environmental Concern from the Facility and facilities in other countries, (ii) explain any differences, and (iii) provide for the implementation of a plan for reducing releases at the Facility to the same levels achieved at similar facilities in other countries. The Comparative Environmental Audit shall be made available to the Public upon request at least one month in advance of the Public Hearing required under Paragraph C(1).

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is prepared by an independent, competent and qualified engineer approved in advance by the Environment Ministry or its local designee and (ii) is satisfactory in scope, form and substance to the Environmental Ministry or its local designee. The EIA shall (i) identify the presence or release of any Substance of Environmental Concern, (ii) identify any violations of any Environmental Law, (iii) identify any modifications or changes, positive or negative, since the last Annual Environmental Audit that could be relevant to an assessment of the public health or environmental hazards of a Facility or activity.

COMMENT

Environmental impact assessments (EIAs) are widely accepted as critical environmental planning tools all over the world. In fact, over 60 countries and many international organizations, including the World Bank and the European Bank for Reconstruction and Development, have adopted detailed EIA procedures.

Nonetheless, EIAs have never been a part of Western private business transactions, because they are primarily forward-looking devices that are irrelevant to a seller after he or she has transferred the facility in question. In addition, many EIA laws, including the US law, apply only to government actions, not private ones. Still, Western businesses are familiar with EIAs because they must often conduct them in order to obtain a government licence or permit.

As discussed with respect to environmental audits, an alternative way to ensure that the EIAs are sufficiently detailed would be to provide a detailed set of requirements for the EIAs. This might be preferable where there is little confidence that the Environmental Ministry is able or willing to ensure that EIA reports are complete.

The Buyer may object to conducting an EIA for every activity no matter how minimal the effect on the environment. There are several ways to address this problem. The contract provision could require EIAs only when an activity may "substantially" or "materially" damage the environment. "Substantially" is the standard used in the US EIA law and in most of the multilateral development banks' policies. "Materially" is a term frequently used in Western business transactions to reflect financial harm great enough to affect a business decision about the enterprise. Yet another way to address this problem is to require an EIA for all activities, but let the scope and depth of the EIA vary with the degree of environmental impact expected from the activity.

H: JOINT, SEVERAL AND STRICT LIFE-CYCLE LIABILITY

H(1). The Buyer shall be held strictly liable for all Environmental Damages on or off the site arising from any past, present or future operation, activity or

construction at the Facility, regardless of whether the Environmental Damages were caused by accident, negligence, or intentional action. Environmental Damages shall include all damages, incremental or sudden, to the environment, public health, property, natural resources or the health or safety of any member of the Public resulting from the release, use, or presence of any Substances of Environmental Concern on the Facility or otherwise resulting in any way from Buyer's management, use, control, ownership, decommissioning or operation of the Facility.

H(2). The strict liability for all Environmental Damages described in H(1) shall extend to the entire intended and foreseeable life-cycle of the product, including for example Environmental Damages caused by the transport and use of raw materials, the generation and disposal of production wastes, the normal household or industrial use of the product, and the ultimate disposal of the product.

H(3). Liability under Paragraphs H(1) and H(2) shall be joint and several between each Buyer, owner or operator of the Facility.

COMMENT

The issue of liability for existing environmental contamination has generated more attention than any other in environmental debates over privatization. Western companies and development agencies have been pressuring all Central and Eastern European governments to clarify the liability rules and, if possible, to encourage Western investment by accepting all liability for existing environmental damage. This position is simply untenable; there is no reason why environmental liabilities for existing contamination should not be negotiated like any other cost of the transaction. True, there may have to be a reduction in the purchase price of the facilities if the buyer accepts environmental liabilities, but this may be preferable to everyone including the buyer. Money contributed to environmental cleanup will improve the value of the property purchased.

Paragraph H(1) imposes strict liability on the Buyer – that is, liability regardless of whether the Buyer is at fault or not – for all environmental damages associated with the facility. Paragraph H(3) imposes joint and several liability on the Buyer. The concepts of joint and several and strict liability for environmental damages are perhaps best known from CERCLA, the US Superfund law that holds current and past owners and operators jointly liable for cleaning up any hazardous substances on a site.²

Imposition of joint and several and strict liability for environmental damages makes sense in Poland. Either the government or the companies will have to bear the costs of rectifying environmental contamination. Lacking capital, the Polish government must rely at least partly on private sources of capital or environmental cleanup will not occur for decades. When faced with the same

question, the US Congress decided that industry – in particular, companies that were responsible for the contamination or that, as current owners, would benefit from the cleanup – was the best choice to pay for the cleanups. Although CERCLA has proved to have serious administrative problems,³ the law has succeeded in increasing private industry's responsibility and concern for environmental contamination.

Moreover, Poland's regulatory systems are not yet highly developed. The contract can and should be used as a means for imposing strong liability rules. The provisions proposed here are not significantly stronger than those imposed by Western statutes, regulations or case law.

Paragraph H(2) extends strict liability to the entire life-cycle of the product, making companies responsible for the use and ultimate disposal of their products. Forcing companies to accept "life-cycle" responsibility is a critical step in achieving Clean Production Methods.

I: REQUIREMENT TO SUPPORT LOCAL CONSERVATION, TRAINING OR OTHER EFFORTS

I(1). The Buyer shall place 1% of all annual profits from the Facility in a Community Trust Fund. The Community Trust Fund shall accumulate revenues from all such Facilities in the area, and shall accept additional donations from any other source. The Community Trust Fund shall be used to provide:

- (i) Environmental Training for the Local Population;*
- (ii) Support for local government projects;*
- (iii) City Parks, Greenways or other Conservation Areas;*
- (iv) Scholarships for Local Students in Need;*
- (v) Low-cost housing or other services for the poor;*
- (vi) Any Similar Activity in the Public Interest.*

The Community Trust Fund shall be administered by a Community Trust Fund Board, nominated and elected by local members of the Public. All grants made by the Fund must be approved in an open vote of the Board after an open meeting. The Board's activities shall be open to the public with regular accounting and public hearings.

COMMENT

The use of trust funds is common in Western business transactions, but they are usually used to address some uncertainty over the allocation of money between the buyer and the seller. Rarely is a fund established to benefit a third party (in this case, the public). The public nature of the privatization process as well as the lack of capital currently available for social programmes at the local level,

however, justify adopting such an innovative approach in the contracts. To implement this contract provision thoroughly, the government will have to authorize the creation of the funds, vest them with legal authority and possibly establish a set of standards for their operation.

The Polish government may look to Community foundations, which are becoming increasingly common in the West, as models. The foundations typically provide modest amounts of money to be spent in the best interest of the local community. Corporate tithing is also found in the West, although again it is usually voluntary. The major exception is on government projects in some states or local governments in the USA. The government often requires that 1% of the cost of a project be spent on public art or some other public good. There was a similar practice in Central Europe, where many industrial facilities were required to have public art, but the programme was frequently used as a tool for spreading Communist propaganda on behalf of the State.

The use of this provision should raise one serious concern for environmentalists, however: provisions like this run the risk of allowing companies with harmful investments to bribe their way into a community. Such provisions may also lead to the co-option of the community as it becomes reliant on corporate donations. Such problems should be avoided, however, if all companies are required to donate to a community fund. This will mean that the company will not be able to receive unreasonable benefits from its donations, because it is only doing something every company must do. The companies are thus less likely to be allowed to avoid or delay clean production simply because they are offering the community financial support. It will become a routine part of the corporate/community relationship.

J: ENFORCEMENT

J(1) Notwithstanding any rule of law to the contrary, any party to this transaction, any governmental ministry or any member of the Public can sue in an independent court in Poland or the country where the Buyer's corporate headquarters are located (i) to enforce their rights under the contract, (ii) to obtain injunctive relief entitled them under this contract, or (iii) to seek compensation for any Environmental Damage. Members of the Public and the government have the legal power to bring an action on behalf of the environment generally without alleging specific damage to them personally. Members of the Public who bring successful actions under this contract shall receive attorneys' fees from the losing party to the lawsuit.

J(2) Unless objected to by a member of the Public who is a party to the action, any claim brought under paragraph J(1) shall be submitted to mandatory arbitration.

COMMENT

The crucial part of Paragraph J(1) is that it provides the Public and the Environment Ministries with authority to sue under the contract. Providing enforcement rights to "third-party beneficiaries" is not always allowed under traditional contract law. Most commercial contracts are enforceable only by the parties signing the contract, even if others stand to benefit from performance of the contract's promises. In certain circumstances, however, US courts allow a "third-party beneficiary" to sue a contracting party for enforcement of a contract. If the contract explicitly provides for enforcement by a third party – such as the municipal government of a local community or a person named to serve as a trustee for the natural ecosystem – then the courts will probably enforce it. The parties to the contract probably could, however, later modify the contract so as to terminate either the duties or the rights of third parties to enforce them. The choice of the contract's governing law may be important in this area, because not all countries recognize third-party beneficiary rights – for instance, the United Kingdom. But there may be room to develop third party beneficiary rights in Poland.

Not only does this model contract provision clearly contemplate that third-party beneficiaries will be given full rights to enforce the contract but, given the public nature of the privatization process, the public should be treated like a normal party to the contract (albeit one represented by the government). Moreover, given the limited avenues currently available in Poland for public participation in investment or environmental protection decisions, expanding these contracts to allow public rights may be the only way to promote public participation in the near term. Arguments that the public has given no consideration to the agreement (and thus cannot enforce any provisions in the contract) ignore the fact that the public currently owns the resources being sold, at least under privatization contracts.

Paragraph J(2) requires mandatory arbitration unless a member of the Public who is also a party to the action objects. Arbitration has been increasingly used in the West in international business disputes because it can speed up the pace of decision and because it is usually less expensive. Litigation of a claim regarding an international agreement tends to be even more expensive and difficult than domestic litigation. Courts in one country may not enforce a foreign court's order for the production of evidence, or they may decline to honour a foreign court's judgment. The lack of rules about how to decide which of various courts with overlapping jurisdiction has priority can lead to multiple legal proceedings concerning the same controversy. Litigation is then more costly because of travel expenses for litigants, counsel and witnesses, the need to hire two sets of lawyers, and in many cases the added cost of enforcing the judgment.⁴

For these and other reasons, arbitration is a popular method for resolving commercial disputes at the international level. The parties can specify in the

agreement that all disputes will be taken to arbitration, thus avoiding the risk of forum shopping among various courts and multiple proceedings. They can specify how to choose the decision-maker – choosing, if they wish, from a number of institutions specializing in international arbitration – and they can select arbitration procedures from a number of well-developed, commonly used alternatives.⁵

K: COMPLIANCE WITH ENVIRONMENTAL LAWS

K(1). Except as disclosed in the Section --- of the Disclosure Schedule, Seller is in compliance with all Environmental Laws. Such compliance includes, but is not limited to, the possession by Seller of all permits and other government authorizations required under applicable Environmental Laws, and compliance with the terms and conditions thereof. Except as set forth in Section --- of the Disclosure Schedule, Seller has not received any communication (written or oral), whether from a governmental authority, employee or member of the Public, that alleges that the Seller is not in such full compliance, and, to Seller's best knowledge after due inquiry, there are no circumstances that may prevent or interfere with such full compliance in the future. All permits and other governmental authorizations currently held by the Seller pursuant to the Environmental Laws are set forth in Section --- of the Disclosure Schedule.

K(2). Buyer agrees to operate the Facilities in accordance with (i) all Environmental Laws of Poland, (ii) all applicable environmental standards of the European Community, and (iii) any Environmental Law which is more protective of the environment or more responsive to the needs of the Public that would apply to the Facility if it were located in any other country where it has minimum contacts. Buyer agrees to notify the Environment Ministry in Public of any activities that do not meet the requirements of this paragraph.

COMMENT

Paragraph K(1) is fairly standard language that a Buyer might demand from a Seller in a typical Western business transaction. The provision basically requires complete disclosure of all known current violations of any Environmental Laws. Given the government's role as the Seller, it may not be comfortable to include such a provision in the contract – but from an environmental point of view it is beneficial because it places some of the burden for identifying existing problems with the Facility. The disclosure, as written, only refers to the Environmental Laws of Poland. This, too, is typical of Western business practices.

Because we are assuming that the Buyer is a foreign investor, paragraph L(2) expands the Buyer's obligations to include compliance with European Community standards and the Environmental Laws from any country where the corporation has minimum contacts. Holding the Buyer to the most stringent

standards of other countries of operation is the only way to ensure that foreign investors will meet adequate standards. Another, less stringent alternative, would be to require the company to meet the highest standard of any country in which it has similar facilities. Although this would certainly lead to stronger standards in some cases, it could be unfair in others. For example, where a transnational company is operating a chemical plant in Poland it is unreasonable to expect it to know and understand the applicable environmental laws of another country where it operates only a small, non-manufacturing facility unrelated to chemicals. For this reason, we have added the standard of a "similar facility". Note that some of the same interests in promoting better business practices are reflected in the requirement of Comparative Environmental Audits.

L: IMPLEMENTING THE PRECAUTIONARY PRINCIPLE THROUGH CLEAN PRODUCTION METHODS

The Buyer will implement the Precautionary Principle, by:

L(1) adopting the most Clean Production Methods available;

L(2) taking anticipatory action to prevent or avoid environmental injury or pollution, whenever there is evidence that the operations or activities of the Buyer may pose a risk to public health or the environment, even in the absence of scientific certainty; and

L(3) undertaking any production activity only after demonstrating to the Environment Ministry – through a presentation of evidence that shall also be available to the Public – that the activity will not inflict significant injury on the environment.

COMMENT

This clause includes three expressions of the precautionary principle. It appears that the precautionary principle as a general objective is becoming part of environmental law at both international and national levels, although concrete implementation of the principle is rare.⁶ For instance, the non-binding Rio Declaration on Environment and Development, signed by world leaders at the June 1992 Earth Summit, states that "the precautionary approach shall be widely applied by States according to their capabilities", and that where "there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."⁷ Members of the Organization for Economic Cooperation and Development have also affirmed the precautionary principle.⁸ In Europe, the Maastricht treaty text drafted by the European Community states that Community policy "...shall be based on the precautionary principle and on

the principle that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”⁹

Clause L(1) requires the Buyer to use the the cleanest production method possible – that is, the “best available technology”. In other words, pollution must be reduced to as low a level as possible, even if emissions above that level have not been proven harmful. Domestic regulation in a number of Western countries, including the USA, adopts this type of technology-based standard. In Germany the government has declared that its environmental policy includes a version of the precautionary principle (*Vorsorgeprinzip*).

The World Charter for Nature, a non-binding declaration adopted by the UN General Assembly in 1982, states that activities that “might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used.” In negotiations with potential buyers, the seller could soften the provision somewhat either by adding the phrase “to the extent economically feasible” – thus avoiding the requirement of extremely expensive technology – or by agreeing on specified low-pollution production processes, waste disposal methods, or pollution-control technology.

Clause L(2) requires that an activity be avoided if it poses a risk of significant environmental damage, even if the damage cannot be proved with full scientific certainty. This aspect of the precautionary principle has been hotly debated with respect to global warming and the oil industry; and others, who oppose taking measures (such as energy efficiency) to control global warming, argue that we should not take measures to control greenhouse gas emissions until we are certain that they will cause serious climatic changes. Environmentalists, on the other hand, argue that we have enough preliminary evidence to show that there is a serious risk to the global environment, and that we should act now, especially in the light of how little we know about the global ecology that supports human life. The model clause reflects this latter view that it is safer to avoid the risk of interfering with the complex natural environment that is our life-support system.

Clause L(3) requires that the person proposing to carry out an activity demonstrate that it will not harm the environment. Imposing the “burden of proof” on the person introducing a product or process is standard procedure in Western regulation of foods and drugs: developers of new drugs and food ingredients must carry out extensive tests to prove that they are not harmful to human health. Applying this precautionary concept to environment regulation is innovative, and businesses will probably resist clause L(3)’s version of the precautionary principle. But the burden should be placed up front on the corporation, which is often in the best position to evaluate the activity’s affects on the environment.

M: TRANSFER OF OBLIGATIONS TO BUYER'S SUCCESSORS

M(1) If Buyer transfers an ownership or control interest in the Facility or any part of it to another party (the "Subsequent Buyer"), Buyer shall ensure that the Subsequent Buyer assumes all Buyer's obligations under this Agreement and shall ensure that the Environment Ministry and the Public retain the same rights against the Subsequent Buyer as they have against Buyer under this Agreement. Buyer shall do this by whatever means necessary, including but not limited to including the provisions of this Agreement in the contract between Buyer and the Subsequent Buyer for transfer of ownership.

COMMENT

In market economies, most types of property are freely transferrable. There are few legal limitations on the ability of a property owner to sell or give the property to another person. Thus, it is possible that a Buyer, after owning and operating the Facility for a while, could sell the Facility to another company. To make sure that the Facility remains subject to the strong environmental requirements of the original contract, the Buyer must include the same requirements in the resale contract. It is particularly important that the Public and Public Advocate retain their contract rights, because neither the Buyer nor the Subsequent Buyer are likely to have strong incentives to enforce the strong environmental requirements of the contract.

REFERENCES

1. See *Avoiding Western Mistakes: A Guide to Clean Investment in Eastern and Central Europe*, Greenpeace, November 1991.
2. CERCLA or Superfund is the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.* CERCLA was designed as a comprehensive regulatory scheme for the clean-up of hazardous waste dumps in the US. It required the Environmental Protection Agency to survey all waste sites and compile a list of the most important ones, after which the agency would begin administrative proceedings against the owners and operators of waste sites as well as the generators of the waste found there to seek the costs of cleanup.
3. For instance, decisions about which sites to clean up and how to clean up certain sites have sometimes been irrational. Furthermore, too many resources have gone into long, complex and expensive legal conflicts about who has liability, and not enough into actual cleanup. See John Quarles, "In Search of a Waste Management Strategy", 5:1 *Natural Resources & Envi* 3, 4-6, 46-47 (1990). Such administrative problems in cleaning up past contamination also highlight how much more efficient it is to prevent contamination in the first place.

4. See "Alternatives to Litigation of International Disputes", Steven C. Nelson, 23 *International Lawyer* 187 (1989), pp. 182-192.
5. Steven C. Nelson, *op. cit.*, pp. 193-199.
6. See James Cameron & Juli Abouchar, "The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Environment", 14 *B.C. Int'l L. Rev.* 1, 2 (1991); Daniel Bodansky, "Scientific Uncertainty and the Precautionary Principle", 33 *Env't 4* (Sept. 1991); Lothar Gundling, "The Status in International Law of the Principle of Precautionary Action", 5 *Int'l J. of Estuarine & Coastal L.* 23, 226 (1990).
7. See Principle 15, United Nations General Assembly, Preparatory Committee for the United Nations Conference on Environment and Development, Principles on General Rights and Obligations (Apr. 2, 1992) (UN Doc No. A/CONF.151/PC/WG.III/L.33/Rev.1).
8. See OECD Ministers of the Environment Declaration, OECD Environment Committee at Ministerial Level Communique para 38 (Jan. 31, 1991) ("reaffirm[ing] that the precautionary principle will guide their approach when confronted by threats of serious or irreversible environmental damage, i.e. that lack of full scientific certainty will not be used as a reason for postponing measures to prevent environmental degradation").
9. See Art. 130R(2), European Union Treaty, Final Act of the Conference of Member State Representatives (official text) signed in Maastricht, Feb. 2, 1992, by European Community Heads of State and Government, reprinted in European Report, No. 1746, Feb. 22, 1992 (European Information Service). See also Bergen Ministerial Declaration on Sustainable Development in the Economic Community of Europe Region, para 7 (16 May 1990) ("in order to achieve sustainable development, policies must be based on the precautionary principle").

ANNEXE A

A BRIEF DISCUSSION OF STANDARD WESTERN BUSINESS PRACTICE

In most Western business transactions, the parties openly negotiate their respective responsibilities towards environmental compliance and liability issues. The goal of both parties is to identify the unknown risks and to minimize their own potential liability from those risks. There are generally three mechanisms used to accomplish these related goals: (1) disclosure through representations and warranties; (2) a due diligence environmental audit; and (3) negotiated indemnifications or other contractual allocations of liability and responsibility. Most major corporate negotiations involve all three elements.

Negotiations will result in a wide range of positions. For example, because Sellers are responsible for the completeness and correctness of any representations and warranties, they may try to limit any representation or warranty for environmental concerns. Sometimes they will offer the buyer the opportunity to complete their own environmental audit prior to the closing. This relieves the Seller of the obligation of providing that information directly.

This annexe includes several different examples of typical Western environmental provisions. The provisions come from a variety of sources and illustrate the wide range of outcomes that can result in negotiations. A discussion introduces each of the provisions.

1. DEFINITIONS

The definitions section of any agreement is crucial to understanding the rest of the agreement. The following definitions are taken from model contract language used by a major international law firm representing a variety of transnational corporations. They are not significantly different from the definitions used in the Model Contract Provisions outlined in the body of this report.

"Environmental Claim" means any written or oral claim, action, investigation or notice alleging potential liability for any Environmental Damages, as defined below, arising out of, based on, or resulting from (a) the presence, or release into the environment, of any Substance of Environmental Concern at any location, whether or not owned or operated by Seller or (b) circumstances forming the basis of any violation, or alleged violation, of any Environmental Law.

"Environmental Damages" means any damages related to the deterioration of the environment or public health (including, without limitation, investigatory costs, cleanup costs, governmental response costs, natural resources damages, property damages, personal injuries, fees or penalties).

"Environmental Laws" means all national, federal, local and foreign laws and regulations relating to pollution or protection of human health or the environment (including, without limitation, ambient air, surface water, ground water, land surface or subsurface strata), including, without limitation, laws and regulations relating to emissions, discharges, releases or threatened releases of Substances of Environmental Concern, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of Substances of Environmental Concern.

"Substances of Environmental Concern" means chemicals, pollutants, contaminants, wastes, toxic substances, petroleum and petroleum products.

2. REPRESENTATIONS AND WARRANTIES

Following are two examples of representations and warranties. Together they illustrate the wide range of approaches that may be reflected in Western contracts.

EXAMPLE ONE

This example comes from model provisions used by a major international law firm that represents many corporations in international transactions. These are written as strongly as possible from the Buyer's perspective. They assume, for example, that the Buyer will want to be informed of all environmental information before the Closing.

(a) Except as set forth in Section— of the Disclosure Schedule, Seller is in full compliance with all applicable Environmental Laws, which compliance includes, but is not limited to, the possession by Seller of all permits and other governmental authorizations required under applicable Environmental Laws, and compliance with the terms and conditions thereof. Except as set forth in Section — of the Disclosure Schedule, Seller has not received any communication (written or oral), whether from a governmental authority, citizens group, employee or otherwise, that alleges that Seller is not in such full compliance, and, to Seller's best knowledge after due inquiry, there are no circumstances that may prevent or interfere with such full compliance in the future. All permits and other governmental authorizations currently held by the Seller pursuant to the Environmental Laws are identified in Section — of the Disclosure Schedule.

(b) Except as set forth in Section— of the Disclosure Section, there is no Environmental Claim pending or threatened against Seller;

(c) Except as set forth in Section— of the Disclosure Section, there are no past or present actions, circumstances, conditions or events, including, without limitation, the release, emission, discharge, presence or disposal of any Substance of Environmental Concern, that could form the basis of any Environmental Claim against Seller;

(d) Without in any way limiting the generality of the foregoing, (i) all on-site and off-site locations where Seller has stored, disposed or arranged for the disposal of Substances of Environmental Concern are identified in Section— of the Disclosure Schedule, (ii) all underground storage tanks, and the capacity and contents of such tanks, located on property owned or leased by Seller are identified in Section— of the Disclosure Schedule, (iii) except as set forth in Section— of the Disclosure Schedule, there is no asbestos contained in or forming part of any building, building component, structure or office space owned or leased by Seller, and (iv) except as set forth in Section— of the Disclosure Schedule, no polychlorinated biphenyls (PCBs) are used or stored at any property owned or leased by Seller.

EXAMPLE TWO

The following excerpt is from a Share Purchase Agreement, which the law firm of Altheimer & Gray distributes as "acceptable to the Fund of National Property of the Czech Republic." Potential investors are invited to mark up the form with their additions, so that competing bids can be evaluated. Note that this essentially reflects what is most acceptable to the CSFR National Property Fund. All of the environmental excerpts are included.

Representations and Warranties of the Fund

The Fund hereby represents and warrants to Purchaser that, except as set forth in the schedule concurrently delivered by the Fund to Purchaser and referred to as the "Disclosure Schedule":

* * *

6.6 Litigation. There is no claim, action, suit, proceeding, arbitration, investigation or hearing, pending or, to the knowledge of the Fund, threatened, by or before any court or governmental or administrative agency or authority or private arbitration tribunal, against the Fund involving the transactions contemplated by this Agreement.

3. INDEMNIFICATIONS

Indemnification provisions make explicit the agreed-upon allocation of liabilities. Like other provisions allocating the costs and benefits of the purchase, the Buyers and Sellers negotiate these provisions fully – often with vastly differing results.

EXAMPLE ONE

The following provision comes from the model provisions used by a major law firm for representing a buyer in Western business transactions.

Seller agrees to indemnify, reimburse, defend and hold harmless Buyer for, from, and against all demands, claims, actions or causes of action, assessments, losses, damages, liabilities, costs and expenses, including, without limitation, interest, penalties, reasonable attorneys' fees, disbursements and expenses, asserted against, resulting to, imposed on, or incurred by Buyer, directly or indirectly, in connection with any of the following:

(a) any action, circumstance, condition, or event disclosed in Section— of the Disclosure Schedule;

(b) any pollution or threat to human health or the environment that is related in any way to Seller's or any previous owner's or operator's management, use, control, ownership or operation of the facility, including, without limitation, all on-site and off-site activities involving Substances of Environmental Concern, and that occurred, existed, arises out of, or results from conditions or circumstances that occurred or existed, or was caused in whole or in part, on or before the Closing Date, whether or not the pollution or threat to human health or the environment is described in Section — of the Disclosure Schedule;

(c) any Environmental Claim against any person or entity whose liability for such

Environmental Claim Seller has or may have assumed or retained either contractually or by operation of law; or

(d) the breach of any environmental representation or warranty set forth in Section — of this Agreement.

EXAMPLE TWO

The following was an actual indemnification provision agreed to in a merger agreement in the US. It is chosen not because it is remarkable, but because it illustrates the way in which environmental liabilities are typically negotiated between buyers and sellers. Under the negotiated agreement, the Buyer accepted all liability for pollution caused wholly after the Closing Date, and the parties agreed to split equally the costs of cleaning up all unknown contamination, if any, caused before the Closing Date.

(a) The Buyers agree to indemnify, reimburse, defend, and hold harmless the Sellers for, from and against all demands, claims, actions or causes of action, assessments, losses, damages, liabilities, costs and expenses, including, without limitation, interest, penalties, and reasonable attorneys' fees, disbursements and expenses, asserted against, imposed on, or incurred by any of the Sellers, directly or indirectly, in connection with any pollution or threat to the environment associated with the Purchased Assets or the Business that (A) is not related to the Sellers' or any previous owner's or operator's operation of the Purchased Assets or the Business, and (b) occurs, arises, or is caused in whole after the Closing Date.

(b) The Sellers and the Buyers each agree to pay fifty percent of any assessments, losses, damages, liabilities, costs and expenses, including, without limitation, interest, penalties, and reasonable attorneys' fees, disbursements and expenses imposed on or incurred by either the Sellers or the Buyers or both of them, directly or indirectly, in connection with any pollution or threat to the environment that (i) is related to the Sellers' or any previous owner's or operator's ownership or operation of the Purchased Assets or the Business, (ii) occurred, existed, arises out of conditions or circumstances that existed, or was caused, in whole or in part, on or before the Closing Date, (iii) is not described in Section 5.25 of the Disclosure Schedule, and (iv) was unknown to either the Buyers' or Sellers' managements on or before the Closing Date, but is discovered during the period from the Closing Date to ten years after the Closing Date.

EXAMPLE THREE:

The following provision is excerpted from the Alzheimer & Gray basic contract for proposals submitted to the Czech National Property Fund. Note how the language in Paragraph 13.3(c) provides the Buyer an incentive to conduct an Environmental Audit.

*13.2(a) After the Closing, the Fund shall, subject to Section 13.3, indemnify Buyer from and against any and all claims, losses, liabilities, obligations, damages, costs, and expenses (collectively, "Losses"), resulting from * * * (v) direct, out-of-pocket costs reasonably incurred by the Company following the Closing to clean-up soil and/or ground water contamination in existence as of the Closing Date at the Company's facilities, which clean-up is required in order to comply with applicable environmental law or regulations.*

13.3(b) No amount shall be payable by the Fund pursuant to Section 13.2(a)(v) unless and

until the aggregate Losses indemnifiable by the Fund pursuant to Section 13.2(a)(v) exceed an amount equal to ____ percent (__%) of the Purchase Price (the "Environmental Damage Threshold"), and then shall be payable only to the extent that such Losses exceed the Environmental Damage Threshold.

13.3(c) No amount shall be payable by the Fund pursuant to Section 13.2(a)(v) with respect to Losses resulting from or related to conditions in existence as of the Closing Date which could have been discovered by the conduct of an Environmental Assessment or as to which the Purchaser had knowledge at or before the Closing. [Note: This section may be modified if Purchaser delivers an Environmental Assessment to the Fund prior to signing.]

4. ENVIRONMENTAL AUDITS

Some contract provisions in the West will specifically require environmental audits while others (e.g., Paragraph 13.3(c) in the excerpt above) merely provide clear incentives for an audit. The following language is model language from a handbook on business law used in the US. The provision is for a Loan Agreement between a bank (the lender) and the buyer of a facility (the Borrower). Western banks often exert substantial influence over potential borrowers. Although this provision was taken from a loan agreement, similar provisions frequently appear in Western Purchase Agreements.

Not less than five days prior to the Closing Date, the Borrower shall have caused to be prepared and submitted to the lender, a written report of a site assessment and environmental audit, in scope, form and substance, and prepared by an independent, competent and qualified engineer, satisfactory to the Lender (the Environmental Audit), and dated not more than sixty (60) days prior to the Closing Date, showing the engineer made all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial and customary practice in an effort to minimize liability, such that consistent with generally accepted engineering practice and procedure, no evidence or indication came to light which would suggest there was a release on the property of Substances of Environmental Concern which could necessitate an environmental response action, and which demonstrates that the property and the facility complies with, and does not deviate from, all applicable environmental statutes, laws, rules and regulations, including any licenses, permits or certificates required thereunder. The Environmental Audit shall also demonstrate that the property and the facility does not contain: (i) asbestos in any form; (ii) urea formaldehyde; (iii) transformers or other equipment which contain fluid containing polychlorinated biphenyls; (iv) underground storage tanks; or (v) any other Substances of Environmental Concern. The Environmental Audit shall also demonstrate that the property and facility are not and have not been, the subject of any past, existing or threatened investigation, inquiry or proceeding concerning environmental matters by the Authorities, and that no notice or submission concerning environmental matters has been given or should be given with regard to the property and the facility to the Authorities.

ANNEXE B

ENVIRONMENTAL AUDITS

Environmental audits are common business practice in the West, but rarely are as comprehensive as proposed in this paper. Nevertheless, Western environmental audits offer a starting point for developing a complete audit system. Coupled with the goals of clean production and energy efficiency, the complete audit responds to all concerns of business, government, and the citizenry. Poland and the rest of Central and Eastern Europe have a unique opportunity to learn from and improve on the West's experience to create a comprehensive audit system.

ROUTINE WESTERN BUSINESS PRACTICE

Buyers, sellers and lenders voluntarily perform audits before purchase in the West. An audit can protect the players and their investment or asset from potential liability. An audit also ensures the property and its natural resources are sound, unharmed by toxic or other degradation. The audit should also contain any mention of existing judicial action, or any past violation of environmental laws. In sum, environmental audits can reduce the factual uncertainty facing any environmental investor. Audits are widely recognized as meeting the following objectives:

- Assuring past compliance
- Defining potential or existing liabilities
- Identifying pollution sources
- Describing wastes generated
- Transferring information to buyer
- Tracking compliance costs

Typical elements of a Western audit are listed below. Initial and Annual Environmental Audits should also conform to the existing laws of each individual nation. This checklist should be used as a guideline, adapted to fit the laws of the individual country.

I. INITIAL ENVIRONMENTAL AUDIT

- (1) List all valid and pending environmental permits, variances, consent orders, and other government authorizations; indicate all pending or rejected permits as well; declare status of all permits, variances, etc.; identify all expiration dates, and anything that effects the status of the document.
- (2) Review historical records; analyze past use; review neighbour use and history; take other measures to evaluate the existence of contamination.¹
- (3) Identify and quantify the presence of Substances of Environmental Concern.
- (4) Disclose any violation of environmental regulations, statutes, or laws; include any pending complaints or other enforcement actions, including citizen actions or complaints.

A. AIR QUALITY

- (1) Identify stationary sources of air pollution at the facility, existing air pollution control equipment; include each source that is exempt from permit requirements and why; detail potential of each source to emit Substances of Environmental Concern.
- (2) Catalogue the type and amount of any airborne Substance of Environmental Concern.

B. WATER QUALITY

- (1) Identify the origin of the facility's incoming water, quantity of water used and quality of water.
- (2) Identify each source of water discharge, determine the quality of effluent, the level of each Substance of Environmental Concern in effluent, and the origin of each substance within the facility.

C. WASTE

- (1) List all waste generated at the facility; distinguish hazardous waste, benign waste, and solid waste; detail amount of waste generated and source of each waste.
- (2) List storage facilities for waste before disposal, and plans for disposal.
- (3) Identify all parties involved in the disposal process; include transporters, recyclers, reclaimers, landfills, and treatment facilities.

D. SUBSTANCES OF ENVIRONMENTAL CONCERN

- (1) List all Substance of Environmental Concern used, stored, or generated at the facility; include raw material, fuels, by-products, waste, and recycled matter.
- (2) Disclose any buried storage tanks and contents, PCB transformers, nuclear components, or other environmental threats.
- (3) Ensure that an emergency response plan exists to protect facility employees and the local community in case a large discharge into the environment occurs.

II. ANNUAL ENVIRONMENTAL AUDIT

Some Western companies have instituted regular environmental audits to routinely evaluate the environmental records of the companies. Most of the elements suggested below might be found in an annual audit in the West.

- (1) Amend current status of all permits, variances, consent orders, or interim authorizations.
- (2) Note any new charges, violations, fines, or penalties resulting from decisions over the past year.²

- (3) Evaluate any change in air emission levels or change in concentration of any Substance of Environmental Concern in emissions.
- (4) Evaluate any changes in water use or water discharges; include changes in concentration of Substances of Environmental Concern in water discharges.
- (5) Evaluate yearly change in the amount of each identified waste; include modification of disposal process.
- (6) Provide an inventory of all hazardous substances used, stored, or generated over the previous year.
- (7) Report all releases of Substances of Environmental Concern into the environment.
- (8) Provide a toxic substance release form that identifies the hazardous substances that entered the facility, where they were used in the production process, and whether any amount was discharged or released.³

Although the Initial and Annual Environmental Audits are similar to requirements or voluntary measures undertaken by many companies in the West, Clean Production and Energy Efficiency Audits are still not yet widely accepted. Nonetheless, they are critical tools for moving towards clean production and zero discharge. Much of the information gathered for the Initial and Annual Audits will provide valuable benchmarks for the Clean Production and Energy Efficiency Audits. Both of these audits must cover every activity from the very broad to the very specific – from the factory floor to the office wastebin, washroom and cafeteria.

III. CLEAN PRODUCTION AUDIT

The idea behind clean production methods is to create a “closed” system. Waste should be eliminated or be turned into raw materials and re-entered into the system at the start. The audit will vary depending on the specific operations of the facility. The production process may be broken up into five distinct categories.

A. RAW MATERIALS

- (1) Identify sources of raw materials; indicate whether raw materials are virgin or recycled; detail percentage of each.
- (2) Indicate feasibility of shifting to more environmentally sound suppliers.

B. MANUFACTURING/PRODUCTION PROCESS

- (1) Study efficiency of machinery; present a plan and timetable for upgrading and improving the technology level.
- (2) Indicate the use of any industry-wide standardized component.⁴
- (3) Study the feasibility of introducing more standardized components to the production method and to the industry; emphasize the feasibility of standardizing primary or cornerstone components, and those with the least longevity.

(4) Examine the product's potential for refurbishment, reuse, or recycling; study the feasibility of changing product design to encourage refurbishment, reuse, or recycling.

C. PACKAGING, SHIPPING, TRANSFER

(1) Indicate source and substance of packaging materials; show the ratio of recycled to virgin products; explain why more environmentally sound products are not used.

(2) Outline process of shipping, delivery or transfer of product; study more efficient alternatives.

D. WASTE AND END PRODUCTS

(1) List and describe all end products that have been recycled or used in another capacity; compare levels to unusable waste levels, study ways to increase levels of reusable end products.

(2) Detail any existing mechanisms used to decrease effluent discharge.

(3) Evaluate the effectiveness of zero emissions plans from previous year.

(4) Evaluate the effectiveness of point source discharge reduction plans from previous year.

E. PLAN AND TIMETABLE

(1) Present plan and timetable in each category for reaching cleaner production methods; integrate all plans and timetables into a comprehensive plan, reflecting the interdependence of each part of the process.

IV. ENERGY EFFICIENCY AUDITS

There are many good reasons to improve energy efficiency. Some goals include:

- Reducing cost of energy
- Reducing use of limited natural resources
- Limiting greenhouse gasses
- Increasing technology
- Reducing pollution (e.g., CO, NO, etc.)

The most important first step of the Energy Audit is to detail energy consumption rates and consumers within the facility. Without substantial data the buyer will not be effective in producing a plan to reduce consumption. Some appropriate breakdowns include:

- Daily, weekly, monthly consumption rates
- Percentage of energy allocated for heating and cooling
- Transportation expenditures
- Logical breakdown of the facility into sectors or grids

ADDITIONAL ELEMENTS OF ENERGY EFFICIENCY AUDITS

A. GENERAL AUDIT

- (1) Indicate main energy source, whether in-house, private sector, or public sector generators.
- (2) Indicate any backup or secondary energy sources.
- (3) Compute average BTU per unit of fuel generated; prepare plan and timetable for alternative, higher technology turbines or fuels for in-house generators.
- (4) Detail type and quantity of fuel used to generate energy when applicable.
- (5) Study feasibility of installing alternative, renewable energy sources for facility, both passive and active; present plan and timetable for upgrading to renewable energy sources.
- (6) Indicate level of insulation; present plan and timetable for increasing amount of insulation to best practical levels.

B. SPECIFIC AUDIT

- (1) Describe level of use for high technology products; include use of low input/high output lightbulbs, not-in-use cutoff switches.
- (2) Describe use of restricted flow faucets, low volume toilets, "grey water" use.
- (3) Prepare study of new technologies and innovations from previous year; present a plan and timetable for implementing changes.

Using compiled data, study ways to decrease energy consumption. Examine energy consumption of previous years. Investigate reasons for increase or decrease. Create strategies and explain why elements of the plan have not been implemented yet.⁵

Although buyers may find such a thorough environmental audit burdensome, the benefits of a single audit greatly outweigh any expense of time or cost. The Initial Audit establishes definitively the environmental state of the purchase. All concerned players – government, buyers, and the general public – know exactly the potential environmental threat, if any laws have been broken, and the projected time for cleanup. The Clean Production and Energy Audits inform the government and people which of the newly privatized companies is striving for a cleaner, more profitable operation. The audits also require the purchaser to study its own methods and consumption while developing a plan to lower both. The audits will compel a successful buyer to adopt a better way to do business, and give concerned citizens the power to drive for compliance.

NOTES

1. If the evidence exists to warrant such action, all ground, water, and facilities should be tested for contaminants before the transfer is complete. If contaminants exist, the facility must be cleaned up before transfer, or other appropriate arrangements must be made to fix liability for the cleanup.
2. Such records should then be included in the Annual Report as standard information.
3. Such a report is required for many US facilities by the Emergency Planning and Community Right-to-Know Act. Other statutory requirements in the US force companies to compile and disclose considerable environmental information, including for example accidental releases that could threaten public health, the contents of hazardous waste drums, or the concentration of chemicals in an end-product.
4. Standardization of common parts on an industry-wide basis is an important element of clean production. Standardization facilitates reuse of old parts in new products as well as refurbishment of old products with new parts. The Clean Production Audit should contain mention of efforts between members of a common industry to develop a standardization programme, especially for primary or cornerstone parts.
5. The Plan and Timetables section of the audit should be broken down into at least two parts. The first section should employ the energy consumption data to determine traditional decreases in energy consumption, such as simple conservation. The second part should look towards re-ordering the energy grid or modernizing equipment to use the energy more efficiently. Finally, the last part of the audit must analyze new technologies and adaptations that may best work for the particular facility.

ANNEXE C

ENVIRONMENTAL IMPACT ASSESSMENT¹

I. INTRODUCTION

As part of the privatization agreement, the buyer should be required to conduct an environmental impact assessment (EIA) for any modifications or new investments proposed for the facility. The objective of an EIA is to protect the environment by evaluating all development options for their environmental consequences. To be useful, the EIA must be done early in the project cycle, before any substantial investment occurs. In this way, EIA should identify possible adverse environmental consequences prior to project approval, and ensure full consideration of all alternatives – including a no-development alternative and clean production alternatives.

The EIA process must create a dialogue between the project proponent, the affected communities and groups, and the regulatory authorities. This dialogue is crucial for identifying the whole range of environmental and social issues that should be evaluated in the EIA. Public review and oversight also ensures the accuracy, credibility and legitimacy of the EIA and the ultimate development decision. As a result, modern EIA regimes also must include the public early and often in the process.

The EIA should be conducted according to the following principles:

- The EIA should be conducted by an independent, external consultant, with the full consultation and review of the public and regulatory bodies.
- The EIA must begin as early in the project planning and design cycle as possible, but in any event before any substantial investments have been made in the project.
- The EIA process must be open and transparent, with widespread public involvement and review. It must be independently enforceable through the courts or an administrative procedure.

II. THE EIA PROCESS

Just as important as the final report – perhaps even more important – is the process for conducting an EIA. Only by following an accountable, open process, can project planners ensure that all affected parties are informed of the project and that the best and most complete information is being compiled. The EIA process must include the following steps:

1. Initial Notification and Information Gathering
2. Screening
3. Scoping
4. Analyzing Alternatives and Mitigation
5. Writing and Reviewing the EIA
6. Decision Making
7. Post-Decision Analysis

Public participation and accountability must be ensured in each step. The following requirements and explanation of each step should be applied to all EIAs. These requirements are based closely on the process followed in the US and many other countries.

INITIAL NOTIFICATION AND INFORMATION GATHERING

Initiation of the EIA must occur as soon as possible after the project is first proposed. As part of the initial project notification, private investors must provide the following information:

- (a) Any corporate guidelines for environmental, health and safety practices;
- (b) All relevant environmental, health and safety laws, regulations and standards from the firm's home country and other countries of operation;
- (c) Information on the history and performance of the investors' other existing and closed plants, where similar processes and products are or were used;
- (d) An explanation of all fines, violations, criminal convictions, accidents, consent orders or decrees relating to the firm's operations or products;
- (e) Any data or estimates of pollution emissions or discharges from similar plants; and
- (f) A list of any materials, intermediates, products or wastes, and any information, including material safety data sheets, relevant for evaluating their potential environmental or health impacts.

SCREENING

The project must be screened initially to determine whether any EIA is necessary. Any project with potential environmental or social impacts is subjected to an EIA. Any decision not to conduct an EIA must be made in writing and available to the public. Any interested or affected member of the public must be able to appeal this decision in an independent court or agency.

SCOPING

Once it has been determined that an EIA is necessary, an independent, interdisciplinary EIA team should be assembled and the formal scoping process begins. The purpose of scoping is to identify all reasonable alternatives and important concerns related to the proposed action; provide early identification of areas (including data gathering and research) that will need special attention for full evaluation of their significance; and facilitate consideration of alternatives and mitigation. All affected and interested members of the public must have an enforceable right to participate in the scoping stage; they must be allowed to provide their input into what are the important issues and viable alternatives.

ANALYZING ALTERNATIVES AND MITIGATION

The search for alternative projects or mitigation measures that achieve the same goals as the project with fewer environmental impacts is perhaps the most important part of any EIA process. The generation and evaluation of alternatives and mitigation measures should take place throughout the EIA process, but should begin as soon as the purpose and need for the

proposed action are clarified. This ensures that planning for the proposed action does not bias the evaluation of alternatives (i.e. it is much harder to adopt an alternative if substantial resources have already been spent on the proposed action).

Many EIA laws and policies require analysis of reasonable alternatives to a proposed action, including the option of not proceeding with any action at all (the "no action" alternative). This is considered the heart of EIA because it organizes and clarifies choices available to the decision-maker and presents the consequences of each choice. The alternatives should offer substantive choices and should be given equal treatment in the EIA report. The EIA must include an evaluation of the no action alternative to provide a baseline of information on the future environment for comparing and contrasting the impacts of various alternatives. Identification of the preferred alternative can then be compared to other reasonable alternatives in a meaningful way.

The following is a list of information necessary for generating and evaluating alternatives.

- A clear definition of the purpose and need for the proposed action to identify and delineate reasonable alternatives;
- A description of the proposed action, its potential impacts, and any known related issues;
- The relationship of the proposed action to other known or reasonably foreseeable actions including possible cumulative effects;
- Any policy, programmatic, legal, regulatory or other constraints to the proposed action;
- A list of the alternatives considered during the preparation of the proposal.

If the acceptability of an alternative depends on fulfilling certain mitigation measures, then the EIA must consider all reasonable mitigation measures in the analysis of alternatives and ensure that any mitigation measures are incorporated into the final decision on the proposed activity. Records of decision must identify the mitigation measures and all necessary monitoring and enforcement programmes. These commitments must be included in all subsequent permits or licences.

WRITING AND REVIEWING THE EIA

After a complete draft EIA is developed, it must be circulated for review and comment to the public, nongovernmental organizations, and government agencies, as appropriate. The draft EIA must be complete, including all relevant information about the proposed action. The contents of the EIA report are discussed further below.

Following receipt of comments, the EIA report must be revised to address any substantive concerns and to evaluate any modifications to the action proposed in response to the comments. A final EIA report can then be issued.

DECISION MAKING

After the final EIA report has been issued and reviewed, further decisions on the project can be made. The result of the decision process must be memorialized by publication of a written "record of decision". A record of decision should include a discussion of the alternatives considered, their respective impact on the environment, any mitigation measures required, and the reasons for choosing the preferred alternative. Any decision that is other than the one identified in the EIA as the least environmentally damaging is subject to an appeal to an independent court or agency by affected members of the public.

POST-DECISION MONITORING

After a decision is made to conduct a project, the regulatory agencies must monitor the activities of the project proponent to ensure that all mitigation measures are adequately carried out. Affected members of the public should also be empowered to bring cases for any failure to comply with the mitigation measures or other decisions memorialized in the record of decision.

III. CONTENTS OF THE EIA REPORT

The EIA report must serve several functions; it should:

- document the process of impact assessment;
- serve as a primary information source for those interested in reviewing or commenting on the project;
- demonstrate that all major environmental impacts expected from the project have been analysed;
- present clearly and objectively all alternatives and options to be considered in the decision-making process.

The EIA report is a decision-making document, a technically rigorous scientific analysis of potential environmental impacts, a record of the EIA process and participants, and a source of information for the interested public. Most importantly, the EIA Report must be written clearly in non-scientific terms so that the general public can understand the analysis and conclusions.

To promote uniformity and ensure quality control in the preparation of EIA reports, all EIA reports must conform to the following basic format.²

A. COVER PAGE. A single page listing the responsible agency and co-operating agencies; the title of the proposed action and its location; the name, address, and telephone number of a contact person, a designation of the report as draft or final, a one-paragraph abstract of the EIA report, and the date by which comments must be received.

B. SUMMARY. A summary of the EIA, preferably less than 15 pages in length, that accurately and adequately describes the content of the EIA report. The summary should stress the final conclusions, areas of controversy, and the issues to be resolved.

C. TABLE OF CONTENTS. A list and page number index of the chapters, sections, and subsections in the EIA report, including a list of tables and a list of figures.

D. PURPOSE AND NEED FOR ACTION. A brief statement of the purpose and need of the project, including a description of the proposed action.

E. ALTERNATIVES INCLUDING PROPOSED ACTION. A presentation of the proposed action and all reasonable alternatives in comparative form, exploring each alternative, including the no-action alternative and Clean Production alternatives, and the reason why certain alternatives were recommended or eliminated.

F. AFFECTED ENVIRONMENT. A brief description of the environment of the areas to be affected by the alternatives under consideration. Data and analyses for any given subject area should be commensurate with the importance of the impact in that subject area, with less important material summarized or referenced.

G. ENVIRONMENTAL AND SOCIAL CONSEQUENCES OF EACH ALTERNATIVE. A discussion of the environmental and social impacts of the various alternatives being considered, identifying any adverse environmental and social effects that cannot be avoided if the action is implemented, all possible mitigation measures for reducing the adverse effects, the relationship between short-term uses of the environment and the enhancement of long-term productivity, and any irretrievable or irreversible commitments of resources.

The goal is to identify the least environmentally damaging alternative that satisfies the basic purpose and need of the proposed action. All environmental and social impacts must be considered, including cumulative and indirect impacts – and impacts from the construction and operational phase of the project as well as the impacts from any product (to be manufactured by the project).

H. A CLEAR RECOMMENDATION. The EIA should culminate in a clear recommendation for the least environmentally and socially damaging alternative. The recommendations should be accompanied by a reasoned explanation for the preferred alternative. Any recommended mitigation measures should be included, and any necessary post-decision monitoring and enforcement should be explicitly stated.

I. COMMENTS AND RESPONSES TO COMMENTS. A listing of the comments submitted by reviewing governmental agencies, public and private organizations, and interested individuals. The author of the comment should be identified by name and address. Comments may be paraphrased, and repetitive comments or questions may be listed once and cross-referenced to multiple sources.

The EIA must include substantive responses to all comments. The responses to the comments should either follow the comment directly, or reference the particular comment requiring a specific response. If the response references material already contained in the EIA report, the pertinent page number must be cited.

J. LIST OF PREPARERS. A list of the names and a summary of the professional qualifications of persons who were primarily responsible for the preparation of the EIA report or significant background materials.

K. LIST OF AGENCIES, ORGANIZATIONS, AND PERSONS TO WHOM COPIES OF THE REPORT ARE SENT. A list detailing the agencies, organizations, and persons that have been sent copies of the EIA report, including the addresses of public repositories (libraries, government offices) where the report is available for review.

L. INDEX. A listing of the major components of the EIA report by topic or issue, together with page number references.

M. APPENDICES. Materials prepared in connection with an EIA report that substantiate analyses fundamental to the report, that relate to the decision to be made, and that should be circulated with the EIA report. Material incorporated by reference is generally not included in these appendices.

NOTES

1. EIA differs from environmental audits (see Annex B) in that EIAs are intended to improve development decisions by integrating environmental considerations early in the planning process. Although EIAs and audits are often closely related, EIAs predict future environmental harm; audits identify existing or ongoing environmental harm.
2. This format follows closely that prescribed by the US EIA regulations.

ANNEXE D

SOURCES OF INFORMATION ON PRIVATIZATION, FOREIGN INVESTMENT AND MULTINATIONAL CORPORATIONS

I. INTERNATIONAL GOVERNMENTAL ORGANIZATIONS

The European Bank for Reconstruction and Development

One Exchange Square

London EC2A 2EH

United Kingdom

Tel: (071) 338-6000

Fax: (071) 338-6100

The European Bank, which formally began operations in April 1991, is a major investor in both public and private projects in the region. One of the Bank's major priorities is speeding up the process of privatization. The Bank has an environmental department and an Environmental Advisory Council, consisting of nongovernmental representatives from most borrower countries.

United Nations Centre on Transnational Corporations

Room DC2-1322

United Nations

New York, New York 10017

USA

The UNCTC was formed to advance understanding of transnational corporations, to secure effective international agreements relating to their activities and to strengthen the negotiating capacity of host countries. The UNCTC has published a Code of Conduct for transnational corporate activities and a series of reports on environmental issues relating to transnational corporations. The UNCTC has recently been restructured, and is currently part of the UN Division on Transnationals and Management.

The World Bank

1818 H St., N.W.

Washington, D.C. 20433

USA

Tel: (202)477-1234

Fax: (202)477-6391

European Office

66 Avenue d'Iena

75116 Paris

France

Tel: (1)40 69 3000

Fax: (1)40 69 3066

The World Bank is obviously one of the most influential players in determining the pace and method of privatization in Central Europe. The Bank is currently publishing several policy papers on privatization and the transformation to a market economy.

II. WESTERN NONGOVERNMENTAL ORGANIZATIONS

The Center for International Environmental Law

1621 Connecticut Avenue, N.W.

Washington, D.C. 20009

Tel: 202-332-4840

Fax: 202-332-4865

CIEL is a non-profit, public interest law firm dedicated to protecting the environment and promoting democracy through the development of international environmental law. CIEL provides advice to the Central and Eastern Europe environmental community on a variety of topics, including monitoring privatization, foreign investment and development assistance.

Citizens Clearinghouse for Hazardous Waste (CCHW)

P.O. Box

Falls Church, VA 22040

Tel: (703) 237-2249

CCHW provides training and assistance to citizens investigating corporate environmental activities. It has files on over 120 corporations, and publishes prepackaged "Fact Packs", which contain articles and other relevant material on selected companies.

Corporate Campaign, Inc.

51 E. 12th ST., 10th Fl.

New York, NY 10003

Tel: (212) 979-8320

Corporate Campaign, Inc. helps labour unions and others to develop strategies to challenge corporate practices. It has extensive files on the environmental and social practices of a variety of companies and industries.

Friends of the Earth, International (FOE)

John Hontelez

P.O. Box 19199

1000 GD Amsterdam

The Netherlands

Tel: 31 20 6221369

Fax: 31 20 6275287

Friends of the Earth is an environmental advocacy organization that works in over 40 countries around the world to protect the planet and empower citizens to have a voice in decisions affecting their lives and environment. There is a *Friends of the Earth Magazine* that is published ten times per year. Also available is a quarterly newsletter on ozone protection called *Atmosphere*.

Greenpeace International

Iza Kruszewska
Keizersgracht 176
1016 DW Amsterdam
The Netherlands
Tel: (31) 20 5236555
Fax: (31) 20 5236500

Greenpeace is an international organization dedicated to preserving the earth and all the life it supports. Greenpeace works to stop the threat of nuclear war, to protect the environment from nuclear and toxic pollution, and to halt the needless slaughter of whales, dolphins and other endangered animals.

Multinationals and Development Clearinghouse

Jim Sugarman
P.O. Box 19405
Washington, D.C. 20036
Tel: (202) 387-8030

The Clearinghouse provides activists, governments, and journalists located overseas with information regarding activities of multinational corporations. The Clearinghouse helps people obtain information on individual corporations, industries, products, health and safety regulations, and organizing tactics. The Clearinghouse publishes a magazine called *Multinational Monitor* ten times a year. The Clearinghouse maintains GNET: The Global Network of Activist and Other Organizations – a database of over 1,600 citizen groups, government agencies and individuals from virtually every country whose work concerns the activities of multinational corporations.

National Toxics Campaign Fund

1168 Commonwealth Avenue, 3rd Floor
Boston, MA 02134
Tel: (617)232-0327

National Toxics Campaign Fund conducts general research on transnational corporations, offers strategic assistance on corporate campaign development, and trains local activists in corporate campaign research, media campaigns and grassroots organizing.

Pesticide Action Network (PAN)

North America Regional Center
965 Mission Street #514
San Francisco, CA 94103
(415) 541-9140

The Pesticide Action Network provides information on pesticide production, trade, regulation, and use in many countries, as well as toxicology, safety, training, residues in food and water, and biotechnology. PAN also provides sources and referrals for information on safe, sustainable pest control methods and sustainable farming.

III. CORPORATE INITIATIVES

Center for Environmental Assurance
Arthur D. Little, Inc.
15 Acorn Park
Cambridge, Massachusetts 02140
(617) 864-5770

Arthur D. Little is an international management and technology consulting firm. Its Center for Environmental Assurance conducts environmental management audits for corporations around the world.

Global Environmental Management Initiative (GEMI)
1828 L. Street, N.W., Suite 711
Washington, D.C. 20036
(202) 296-7449

GEMI was formed in April 1990 as a special project of the US Council Foundation, the educational arm of the US national committee for the ICC. GEMI has 21 participants who believe that business, by taking control of its environmental destiny, can spur change from within and create a forum for sharing solutions among industry worldwide.

Responsible Care
Chemical Manufacturers Association
2501 M Street, N.W.
Washington, DC 20037
(202) 887-1100

In 1988, the Chemical Manufacturers Association's Board of Directors adopted the Responsible Care Program. Each of the 185 member companies has pledged to operate according to a set of Guiding Principles, which are aimed at continuously improving the chemical industry in health, safety and environmental quality.

International Chamber of Commerce (ICC)
The World Business Organization
38, Cours Albert 1ER
75008 Paris, France
49.53.23. 28

The International Chamber of Commerce is a worldwide business organization with members in over 110 countries. In 1972, the ICC formed a Commission on Environment, which hosts specialized meetings on environmental management and policy issues. An illustrated catalogue listing over 100 publications is available.

IV. GREEN INVESTMENT FUNDS

Calvert Group
4550 Montgomery Avenue
Suite 1000N
Bethesda, MD 20814

The Calvert Group offers individual and institutional investors a variety of socially and environmentally responsible investment portfolios. The companies are screened for specific criteria and investors can match their own concerns with those of the fund.

The Coalition for Environmentally Responsible Economies Inc. (CERES)
711 Atlantic Ave.
5th Floor
Boston, MA 02111
(617) 451-0927

CERES promotes environmentally responsible economic activity by bringing together the corporate, environmental and investment communities. CERES has developed the Valdez Principles, ten guiding principles of corporate environmental responsibility. The Valdez Principles are intended to help corporations set policy and enable investors to make informed decisions regarding environmental issues.

Eco-Logical Trust 1990
Merrill Lynch, et al.
P.O. Box 9051
Princeton, NJ 08543-9051
Tel: (609) 282-8500

This investment fund consists of the stocks of companies selected for their environmental sensitivity by independent experts on ecologically responsible investing. Certain companies in the portfolio are directly involved in pollution control or abatement, including waste disposal services, environmental engineering and consulting services, cleaning services, and recycling. Others have demonstrated a commitment to the environment in their policies and practices or to developing and marketing products that consumers can use with less harm to the environment.

Interfaith Center on Corporate Responsibility (ICCR)
Energy and Environmental Program
475 Riverside Drive, Room 566
New York, NY 10115
(202) 870-2623

The ICCR is a coalition of 250 Protestant and Roman Catholic institutional investors including national churches, pension funds, health care corporations, and religious communities. ICCR members use their investments to hold corporations socially and environmentally accountable for business decisions and practices. ICCR publishes *The Corporate Examiner* ten times a year. The newsletter examines policies and practices of major

corporations in the following areas: apartheid; military technology; nuclear weapons; minorities and women; alternative investments; energy; environment; and international marketing.

V. ENVIRONMENTAL AUDITING

The Elmwood Institute
P.O. Box 5765
Berkeley, CA 94705

The Elmwood Institute is a non-profit ecological think-tank dedicated to fostering new concepts and values for a sustainable future. The Institute's Global File Project collects, analyzes, and distributes information about successful ecological practices in business and government. Among the reports published is *The Elmwood Guide to Eco-Auditing and Ecologically Conscious Management*, which brings deep ecological principles to corporate management and auditing.

Institute for Environmental Auditing
815 Leesburg Pike
Suite 600
Vienna, Virginia 22182

The institute is an independent group that sets standards for environmental auditing. Their work is relatively mainstream and designed for the US market.

ANNEXE E

RELATED MEANS OF PROTECTING THE ENVIRONMENT

It is important to remember that contract provisions of the kind described in Chapter Three are only one set of tools in the larger array of legal instruments necessary to achieve clean production. While contracts can be very useful in promoting a healthier environment and sustainable development, they must be supplemented by other methods. This section surveys the other types of legal methods that will be necessary to supplement the proposed contract provisions described in Chapter Three.

NATIONAL LEGISLATION AND REGULATION

Environmental protection clauses within sales and investment contracts can never substitute for a strong framework of environmental laws and standards, and broad, easily enforced access-to-information laws and public participation procedures. The regulatory system should have the adoption of Clean Production Methods as its goal and should present a clear path towards achieving that goal. The best system will probably contain both traditional command and control regulations – setting standards of environmental quality and prohibiting pollution that violates basic standards – and economic instruments, such as fees and taxes.

Particularly relevant to the discussion of privatization is legislation in some Western countries, notably the US, which requires private businesses to provide for environmental audits or cleanups as part of the purchase or sale of a facility. The first and strongest law of this sort is the US State of New Jersey's Environmental Cleanup and Response Act (ECRA), which requires both an environmental audit and a complete cleanup as a *condition of the sale* of any manufacturing property in the state. New Jersey is a heavily industrialized state with many chemical and metal manufacturing plants. The cleanups for many of these sites will take years. As a result, in most cases the State will allow the purchase or sale of the property, but only after the parties agree to an administrative consent order with specific timetables for cleaning up the site.

ECRA and other statutes like it impose legal limits on the business transactions between private parties in order to protect the public interest in environmental clean-up. The role of the government under these statutes is very similar to the Environment Ministry's role as conceived in the Model Contract Provisions. Such an active governmental role in protecting the environment is typical in Western market economies. Environmental regulation is simply one part of the State's legitimate role in structuring and limiting the role of the market.

RATIFICATION AND ENFORCEMENT OF INTERNATIONAL AGREEMENTS

International treaties, at least with respect to some issues (for example CFC manufacture and use) may impose requirements on the operations of multinational corporations. These treaties can also help to develop the political will and necessity for strengthening environmental laws. In some cases, international obligations may require the host country to conduct certain activities when a joint venture is proposed or approved.

For instance, the United Nations Convention on Environmental Impact Assessment in a Transboundary Context will, if it enters into force, require countries to conduct environmental assessments when a proposed activity (whether private or public) may have a transboundary effect on the environment.¹ Under the convention, if proposed activities of certain types – such as crude oil refineries, thermal and nuclear power stations, steel factories, and large dams – are “likely to cause a significant adverse transboundary impact”, then the country with jurisdiction must conduct an environmental impact assessment (EIA), must notify the other countries likely to be affected, and must give the public in the other countries the opportunity to participate in the EIA process.

The recently signed Convention on Biological Diversity provides another example. When it goes into force, the Convention will require countries to undertake a number of activities, ranging from environmental assessment (including public participation) of activities that may harm biological diversity to preparing national plans for conserving biological diversity.²

EXTRATERRITORIAL APPLICATION OF WESTERN ENVIRONMENTAL LAWS

The issue of “pollution havens” has caused great concern among environmentalists around the world. The term refers to the fact that transnational corporations can select from a number of countries in which to invest, and they may choose the country with the weakest environmental laws or enforcement because it may reduce the cost of industrial operations. This problem could be avoided if a corporation were required to meet the environmental standards of the country in which it was headquartered, wherever it operated.

There are strong arguments for requiring corporations based in one nation to comply with the same standards whether they are acting at home or abroad.³ Thus, for example, US corporations should be liable in US courts if they cause environmental damage overseas from activities that would violate US environmental laws if they occurred within the US. The US has considered legislation that would forbid corporations from selling pesticides in other countries when those pesticides have been banned in the US because of their effects on health and the environment.

A review of the environmental laws of the headquarters country of a foreign investor could reveal ways of improving the investor’s environmental performance in the host country for the investment. Even if those laws do not apply extraterritorially, they could be used to pressure the company into raising its environmental standards. And even if the investor does not agree to meet those standards, the disparity between its performance at home and abroad can help to make the case for legal reform to extend the application of environmental laws in the headquarters country.⁴

PUBLIC PARTICIPATION

It is important to note that the creation of stronger national environmental standards and the effective enforcement of international standards requires political will. The political will exists only if the public is informed of environmental concerns and is committed to addressing them. The environmental community must constantly work to ensure that all groups – including the media, labour, representatives in the legislators, government ministries, lawyers and judges, and business executives – are well-educated about environmental issues. The

environmental community must have the support of a well-informed and concerned public if it is to persuade decision-makers to create the necessary laws and institutions.

GREEN INVESTMENT FUNDS

Environmental and social concerns can be a powerful organizing principle for investments in a capitalist economy. The formation of investment funds that screen their investments for social and environmental behaviour can provide important financial rewards to better corporate actors. In the US, for instance, the stock of many large corporations is publicly traded on the open market from one investor to another. Many large investors, especially universities and pension funds, will prefer to invest in companies with good records on social or environmental issues. As a result, some environmentalists, such as the CERES project group (drafters of the "Valdez principles"), have begun systematically to pressure corporations to become more environmentally responsible through the influence of investors that wish to invest in environmentally productive enterprises. A short list of Western green investment funds is included in Annexe D.

The privatization process offers a good opportunity for Central and Eastern Europe to institute green investment funds. For example, in the Czech and Slovak Federal Republic, the government distributed shares in State-owned enterprises to citizens. A few environmentalists pooled their shares to create "green" investment funds that could encourage environmental responsibility in certain enterprises. Similar privatization processes are underway or being planned in other countries.⁵ In the future, if Central and Eastern European environmentalists organize earlier, they could form large and influential investment funds.

UNIFORM REGULATION OF TRANSNATIONAL CORPORATIONS (TNCs)

The activities of TNCs and their effect on the global ecology transcend national boundaries, but they are subject only to patchy, piecemeal regulation under unco-ordinated national laws. Ultimately, the legal system should reflect the economic and ecologic realities by ensuring that TNCs are subject to uniform regulations over all of their activities, and also that they are regulated in a way that takes into account their transnational character.

While standards have been proposed for guiding TNC conduct that affects the environment, none of them have binding force, and they tend to be very general, lacking specific guidelines that could effectively control behaviour.⁶

Monitoring and evaluating TNC activity – perhaps using the criteria of the UNCTC code of conduct – could be one possible role for the new UN Commission on Sustainable Development announced at UNCED. References to TNCs were, however, generally removed from Agenda 21, the policy document produced at UNCED. It is also extremely unlikely that the new Commission will have real enforcement powers. A list of Western NGOs active in monitoring TNC behaviour is included in Annexe D.

REFORM OF INTERNATIONAL DEVELOPMENT AID

Much foreign investment and privatization is being guided by the development assistance activities of multilateral development banks (MDBs), such as the World Bank and the

European Bank for Reconstruction and Development (EBRD), or bilateral assistance programmes, such as the European Community's PHARE programme or US Agency for International Development activities.

These programmes, particularly those of the MDBs, typically try to improve the country's macroeconomic system and infrastructure – to make it more appealing and accessible to Western investment. In the process, they often require borrowing or receiving countries to adopt certain policies – which may affect environmental protection either explicitly or indirectly – as a condition for the release of aid. Second, they often select and fund technical consultants to help borrowing governments to develop environmental and economic policy. Third, their decisions about lending are very influential because other international investors often follow their lead.

So far, environmentalists have had only limited success in persuading development aid sources to become environmentally responsible.⁷ In particular, MDBs and other sources of aid have resisted informing or consulting with the affected public when deciding whether to fund projects.

An important aspect of the campaign to ensure that foreign investment in Central and Eastern Europe is "clean" will be to pressure the World Bank, EBRD, and other development agencies to adopt clean production methods as a goal and to incorporate environmental concerns fully into their decision-making. If this campaign is to succeed, it will be important for environmental activists in the region to: (1) educate themselves on MDBs and their environmental policies, procedures and effects; (2) develop contacts with environmental activists in the Western countries that finance MDBs like the World Bank, who are working to reform international aid so that it is more socially productive and less environmentally destructive; and (3) educate their own government officials and persuade them to establish policies and laws that provide for environmentally sound international aid, including full public participation in decisions about projects and programmes. Groups active on monitoring MDB and development assistance in the region are included in Annexe D.

REFERENCES

1. See UN Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 (1991). Countries that are members of the UN Economic Commission for Europe are eligible to join the convention. The treaty will enter into force after 16 countries have ratified it; to date, very few countries have done so.
2. Arts. 6, 14, Convention on Biological Diversity, Jun. 5, 1992. Unfortunately, these requirements are limited by clauses stating that countries need carry out these activities only "in accordance with [each country's] particular conditions and capabilities", or "as far as possible and as appropriate".
3. See: Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 *N.W. U.L. Rev.* 598 (1990).
4. Thus, environmental activists or officials in Central Europe frequently contact environmental groups in the West to exchange information regarding environmental laws and specific cases of harmful investment. Some of the Western NGOs active in monitoring multinational behaviour are listed in Annexe D.
5. See, e.g., "Yeltsin Outlines Sale of Industry", *New York Times*, 20 August 1992 at A11, Col. 6 (describing plans for privatization of State-owned industries in Russia through

distribution of vouchers for shares to citizens). In addition, some public property is being redistributed to claimants seeking compensation for property taken from them or their ancestors under Communist regimes. See "Auction of Land Draws Few Bids in Hungary", *New York Times*, 6 September 1992 at 19 col. 1 (describing Hungarian programme to distribute rights in land or newly privatized enterprises as compensation for collectivization of farmers' lands during the 1940s and 1950s).

6. See, e.g. UN Center on Transnational Corporations, *Draft Code of Conduct on Transnational Corporations*, paras 43-45; International Chamber of Commerce, *The Business Charter for Sustainable Development: Principles for Environmental Management* (1991).
7. See Chris Wold & Durwood Zaelke, *Promoting Environmental Protection and Sustainable Development at the European Bank for Reconstruction and Development*.