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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. briefing paper	NEC Deputies Meeting: Environment and Labor (7 pages)	03/02/1993	P1/b(1)
001b. briefing paper	NEC Deputies Meeting: Import Surges (3 pages)	03/02/1993	P1/b(1)
001c. briefing paper	NEC Deputies Meeting: NEC Working Group on Uruguay Round (4 pages)	03/02/1993	P1/b(1)
002. briefing paper	Import Surges (3 pages)	00/00/0000	P1/b(1)
003. briefing paper	Environment and Labor (7 pages)	00/00/0000	P1/b(1)
004. briefing paper	Environment and Labor (7 pages)	00/00/0000	P1/b(1)
005. briefing paper	Import Surges (3 pages)	00/00/0000	P1/b(1)
006. list	PRD on Trade and the Environment [partial] (1 page)	03/04/1993	P3/b(3)

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Council on Environmental Quality
Kathleen "Katie" McGinty
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2012-0769-F

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2710
Terry

THE WHITE HOUSE

WASHINGTON

March 2, 1993

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF THE TREASURY
THE ATTORNEY GENERAL
THE SECRETARY OF THE INTERIOR
THE SECRETARY OF THE AGRICULTURE
THE SECRETARY OF COMMERCE
THE SECRETARY OF LABOR
THE SECRETARY OF TRANSPORTATION
THE SECRETARY OF ENERGY
THE DIRECTOR OF THE OFFICE OF
MANAGEMENT OF BUDGET
THE UNITED STATES TRADE REPRESENTATIVE
THE ASSISTANT TO THE PRESIDENT
FOR NATIONAL SECURITY AFFAIRS
THE CHAIR OF THE COUNCIL
OF ECONOMIC ADVISORS
THE ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY
THE ASSISTANT TO THE PRESIDENT
FOR ECONOMIC POLICY
THE ADMINISTRATOR FOR THE
FOOD AND DRUG ADMINISTRATION

FROM: ROBERT E. RUBIN *REH*
Assistant to the President
for Economic Policy

SUBJECT: PRINCIPALS MEETING, MARCH 4, 1993

There will be a NEC Principals meeting on Thursday, March 4, from 10:30 to 11:30 in the Roosevelt Room. The purpose of the meeting is a follow-up to the meeting the NEC Deputies had on Tuesday, March 2, regarding NAFTA strategy for side agreement negotiations and the Uruguay Round. Room and space limitations require that the meeting be strictly limited to Principals plus one attendee designated by the Principal. A memorandum will be circulated Wednesday morning.

NATIONAL SECURITY COUNCIL
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DATE 02 MAR 93

SUBJECT: NOTIFICATION OF 2 MAR NEC DC MTG
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MR. JOHN PANULAS U.S. TRADE REPRESENTATIVE VIA ROOM 414, WINDER BLDG 600 17TH STREET, NW WASHINGTON, DC 20560	_____	_____	_____ COPY: <u>1</u>
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PAGE 02 OF 02 PAGES

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NATIONAL SECURITY COUNCIL

WASHINGTON, D.C. 20506

20190

March 2, 1993

MEMORANDUM FOR

MR. LEON FUERTH
Assistant to the Vice
President for National
Security Affairs

MR. MARC GROSSMAN
Executive Secretary
Department of State

MR. EDWARD KNIGHT
Executive Secretary
Department of the Treasury

MR. DOUGLAS FRAZIER
Associate Deputy Attorney
General
Department of Justice

MS. NANCY HAYES
Special Assistant to the
Secretary
Department of the Interior

MS. DIANE LIESMAN
Executive Assistance to the
Secretary and Director,
Office of the Executive
Secretariat
Department of Agriculture

MS. PATTY MCHUGH
Director, Executive Secretariat
Department of Commerce

MR. KITTY HIGGINS
Chief of Staff
Office of the Secretary
Department of Labor

MS. RUTH KNOUSE
Director, Executive Secretariat
Department of Transportation
MS. ANN LAVIN
Director, Executive Secretariat
Department of Energy

MR. GORDON M. ADAMS
Associate Director for National
Security & International
Affairs
Office of Management and Budget

MR. JOHN PANULAS
Executive Secretary
U.S. Trade Representative

MR. JAMES R. OLIVER
Executive Secretary
Central Intelligence Agency

MS. LAURA D. TYSON
Chairman, President's Council of
Economic Advisors

MR. ALLEN HECHT
Assistant Administrator of
International Activities
Environmental Protection Agency

MS. KATIE MCGINTY
Office of Environmental Policy

MS. STUART NIGHTINGALE
Associate Commissioner for
Health Affairs
Food and Drug Administration

SUBJECT: NEC Deputies Meeting, 4:30 p.m., March 2

Attached at Tab A are background papers for the NEC Deputies meeting to be held from 4:30-6:30 p.m., March 2, in Room 474 OEOB.


William H. Itoh
Executive Secretary

Attachment
Tab A Background Papers

~~UNCLASSIFIED~~ with
~~CONFIDENTIAL~~ attachment

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DECLASSIFIED
E.O. 13526, Sec. 3.5 (b)
White House Guidelines, September 11, 2006
By: CA NARA, Date 03/14/17
2012-0769-F

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001a. briefing paper	NEC Deputies Meeting: Environment and Labor (7 pages)	03/02/1993	P1/b(1)

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Council on Environmental Quality
Kathleen "Katie" McGinty
OA/Box Number: 2614

FOLDER TITLE:

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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001b. briefing paper	NEC Deputies Meeting: Import Surges (3 pages)	03/02/1993	P1/b(1)

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FACSIMILE COVER SHEET
OFFICE OF THE UNDER SECRETARY FOR INTERNATIONAL AFFAIRS
DEPARTMENT OF THE TREASURY
1500 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20220

DATE: March 2, 1993

NUMBER OF PAGES TO FOLLOW: 2

TO: Bo Cutter
FAX NUMBER: 456-2223
CONFIRMATION NUMBER: 456-6630

Katie McGinty
FAX NUMBER: 456-2710
CONFIRMATION NUMBER: 456-6224

FROM: Lawrence Summers
FAX NUMBER: (202) 622-0081
CONFIRMATION NUMBER: (202) 622-0060

COMMENTS/SPECIAL INSTRUCTIONS:



DEPARTMENT OF THE TREASURY
WASHINGTON

March 2, 1993

Mr. W. Bowman Cutter
Deputy Assistant to the President
National Economic Council
Washington, DC 20500

Dear Bo:

We have been considering within Treasury possible measures that could advance discussions with Mexico on an environmental side-agreement to NAFTA. One idea that I believe has considerable potential would be to link environmental funds commitments by Mexico to external debt reduction. We could do this through (1) Mexico's buyback of CCC and Eximbank debt or (2) Mexican repurchases of debt to commercial banks (Brady bonds).

The first option is already feasible under legislation authorizing action on Exim and CCC debt under the Enterprise for the Americas Initiative. Such sales of debt, however, would have to be undertaken at the agencies' asset value of the debt under credit reform, to avoid budget cost. They could be implemented in FY 93 for Eximbank debt, but would require the approval of the appropriations subcommittees on agriculture for CCC debt, most likely as part of the FY 94 budget.

To provide an incentive for an environmental commitment under the second option, Treasury would ease current constraints on the redemption of Treasury zero coupon bonds which act as collateral behind the bulk of Mexico's commercial bank debt. Mexico redeemed \$5.2 billion in zero coupon bonds in the last 6 months of 1992, but will be facing a cap of \$1.5 billion per year beginning in June 1993. Treasury's Domestic Finance office has responsibility for modifying the existing memorandum of understanding on Treasury zero coupon bonds and has concurred with this general concept.

The first option could reasonably generate \$18 - 44 million in environmental resource commitments by Mexico, depending upon the amount of debt sold to Mexico. The second option could generate substantially larger sums, depending upon Mexican interest in such repurchases and its willingness to pledge a given amount of environmental funds for each additional dollar of debt which can be repurchased. The required amount of environmental funds would be subject to negotiations with the Mexicans.

We are not ready to broach either idea with Mexico yet, but I believe either one could prove to be a useful "add-on" to the

- 2 -

broader environmental discussions with Mexico. Implementation of both options would have to be effected by Treasury, in conjunction with your timetable.

Please let me know if you are interested in our exploring these approaches further.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Law', with a long, sweeping horizontal stroke extending to the right.

Lawrence Summers

cc: Katie McCinty

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Attachments:

- (A) Campaign position
- (B) Department of State paper on Environment
- (C) Department of Labor paper on Worker Standards and Safety
(To be provided)
- (D) Current state of play on U.S.-Mexican Bilateral Cooperation on
environmental matters and Mexican Enforcement Regime
- (E) Current state of play on U.S.-Mexican Bilateral Cooperation on
labor matters and Mexican Enforcement Regime

Environmental Issues Surrounding the NAFTA:
Options Paper

In order to address key concerns that:

- o closer economic integration with Mexico will adversely affect the environment in the U.S.-Mexico border area;
- o Mexico does not adequately enforce its environmental laws;
- o and no institutional oversight mechanism exists to monitor, and work to improve, the state of the North American environment,

agencies generally agree that the U.S. should pursue:

- o with Mexico, a variety of border-related and other bilateral measures; and
- o with Mexico and Canada, the establishment of a Commission and other trilateral measures.

(The assumptions/considerations underlying the development of such measures are set forth in Attachment A.)

I. Border and other bilateral measures with Mexico

The suggested measures, which include implementation of the Border Plan, revitalizing the 1983 Border Agreement and 1989 Mexico City Agreement, and signing last year's bilateral agreement on environmental pollution (including enforcement issues), are elaborated in Attachment B.

The effectiveness of border and other bilateral measures will be dependent upon adequate funding. Although some proposals involve bilateral or even trilateral mechanisms, funding is primarily a domestic issue that need not be decided before negotiations begin in mid-March. OMB will be coordinating an interagency effort to identify and analyze various funding options.

II. The Commission and other trilateral measures

There is general agreement that a Commission should be established to:

- o facilitate implementation of the NAFTA's environmental provisions;
- o play a role with respect to enforcement of environmental laws;
- o generally address environmental issues in North America; and
- o promote NGO involvement.

The suggested elements for the Commission, as well as other trilateral measures, are set forth in Attachment C. Issues for decision involve:

- o the extent of the Commission's enforcement role;
o whether the Commission should develop "minimum"
o environmental standards; and
o the status of the secretariat.

Issue #1 (Enforcement): As reflected in Attachment B, agencies consider that the Commission's enforcement role should include:

- o public reporting on the three countries' enforcement of their environmental laws (including an obligation on parties to submit to the Commission compliance and enforcement data);
- o promoting comparability of enforcement effectiveness;
- o playing a role in consultations under NAFTA Article 1114.2 (which involves using lax enforcement to lure investment);
- o receiving complaints/comments from the public on the enforcement of environmental laws in the three countries;
- o assessing complaints/comments, including by gathering information through public hearings and review of public documents;
- o making recommendations to the relevant government.

The issue is whether the Commission should enjoy other enforcement-related functions and/or the agreement should contain other enforcement-related commitments, bearing in mind their reciprocal nature. Options include:

- o a commitment by the parties to enforce their respective environmental laws

-- Considerations: the precise laws in question would need to be listed; U.S. concerns would be that such a commitment would be inconsistent with prosecutorial discretion (i.e., we only enforce a fraction of suspected cases of violation), would involve substantial resources, and might not be implementable vis-a-vis states and localities);

- 0 a commitment by the parties to permit their respective
publics to bring suits to enforce environmental laws

-- Considerations: this would promote a Rio Declaration goal; the laws in question would need to be listed; "standing" requirements would need to be spelled out, which would be difficult (there is no parallel to the concept of "right

-3-

holders," as in the NAFTA intellectual property provisions); a U.S. concern would be that, depending on the scope of "environmental laws," some U.S. laws do not provide for a private right of action;

- o in the context of assessing public complaints/comments, granting the Commission (i.e., secretariat staff) access to relevant facilities and data, with the consent of the country where the facilities/data are located

- Considerations: this would help provide the Commission with an independent basis for assessing complaints/comments (as opposed to relying solely on public information); although the consent of the country in question would be required -- this is a must for the United States -- the public nature of the Commission's request for consent would likely create appropriate pressure; on the U.S. side, consent would have to be given consistent with our legal system (e.g., after obtaining a search warrant, if necessary; after concurrence of a state, if necessary);

- o granting the Commission supranational enforcement authorities, such as the right to inspect facilities (without consent), subpoena documents, or conduct other traditional governmental enforcement functions

- Considerations: this would raise serious Constitutional problems in the U.S. and strong sovereignty concerns in Canada and Mexico;

- o authorizing the Commission to impose trade sanctions for lax enforcement

- Considerations: this would be inconsistent with the NAFTA; it would also be difficult to establish a benchmark against which to measure enforcement performance; Mexico and Canada would strongly oppose; the Baucus proposal, which, beyond a Commission recommendation, leaves enforcement measures, including imposition of any penalties, to national enforcement authorities, should be noted.

Issue #2 (Standards): Because Canada has proposed it, there is an issue whether the Commission should develop "minimum" North American environmental standards. Agencies do not support this proposal, as elaborated in Attachment D.

-4-

Issue #3 (Secretariat): Agencies generally agree that a secretariat is needed to support the Commission. Options are:

- o a secretariat that rotates among the three countries

- Considerations: this approach has been supported by Mexico and Canada; it is the least costly option; it is unlikely to be adequate to perform the desired functions; there would be a lack of continuity; some are concerned that Mexico would not perform adequately during its rotation;

- o each country has its own standing section of the secretariat for which it pays the costs

- Considerations: this approach would ensure greater continuity than option #1 and the ability to perform more functions; it resembles the CFTA and NAFTA models; and

- o a trilateral body housed in one of the countries and paid for collectively

- Considerations: this option is favored by environmental NGOs as the strongest; it would be the most expensive; it would also have the ability to perform more functions than option #1; it might require giving Commission international legal personality).

III. Other:

An additional concern is that, depending upon how broadly/narrowly a NAFTA dispute settlement panel were to construe the environmental exceptions to the NAFTA, certain U.S. environmental laws that employ trade measures might be found inconsistent with the NAFTA. (This concern stems from a GATT panel's recent finding that the tuna/dolphin portion of the Marine Mammal Protection Act is inconsistent with the GATT.) Seeking Mexican and Canadian agreement at this point to "immunize" all such laws:

- o would be a reopening of the NAFTA;
- o would encounter strenuous objection from Mexico and Canada; and
- o raises complex issues that are at the crux of the upcoming Administration trade/environment policy review.

As a result, it is suggested that the concern be addressed for the moment by empowering the Commission described below to address the underlying environmental goals of the U.S. laws in question (e.g., protection of endangered birds, dolphin, turtles).

Attachment AAssumptions/Considerations

- President Clinton has said the NAFTA text will not be reopened to further negotiation.
- The NAFTA countries agree that economic development flowing from NAFTA is to be undertaken "in a manner consistent with environmental protection and conservation" and that the development promoted by the Agreement is to be "sustainable development."
- A principal environmental objective of the NAFTA is "to strengthen the development and enforcement of environmental laws and regulations."
- The extent to which environmental, health, safety and conservation (hereinafter "environmental") concerns are addressed may determine whether the NAFTA is approved. How supplemental or "parallel track" environmental initiatives and agreements help ensure that the NAFTA is both an engine for economic growth and an affirmative force for environmental protection, restoration and enhancement, will shape Congressional response to creation of a North American free trade area.
- Certain environmental concerns are related to the stage of development of the Mexican economy and how existing conditions may be exacerbated or improved by the NAFTA.
- The proposed timing of submission of implementing legislation to Congress and the up-or-down vote on that legislation is such that if side agreement(s) are to be concluded concurrently, their negotiation must be concluded by June 1, 1993.
- There is a range of available foreign policy tools (bilateral and trilateral agreements or initiatives and unilateral actions) that the United States may use, concurrently if necessary (i.e., they are not mutually exclusive), to address regional environmental concerns.
- Agreement(s) reached with Mexico and/or Canada to address environmental concerns will likely be "reciprocal," meaning that the United States will itself be subject to the same conditions that it succeeds in imposing on the other NAFTA countries.

- Each NAFTA country, including the United States, is concerned with the measure of "sovereignty" it will surrender in reaching agreement on how environmental concerns are to be addressed.
- Subnational authorities in each NAFTA country retain certain authority of environmental enforcement and standards development.
- There are limitation on what international obligations the United States could accept with respect to enforcement within its national jurisdiction, given its system involving prosecutorial discretion, Constitutional rights of due process, and concerns related to the commitment of resources.
- The content of any agreement that the United States reaches with Mexico and/or Canada will influence the form of the agreement (e.g., executive agreement, treaty requiring two-thirds approval of the Senate, agreement and/or its implementing legislation rolled into NAFTA implementing legislation).
- The U.S., Mexican, and Canadian legal systems are different from one another (e.g., Mexico's reliance on administrative action as opposed to litigation and Canada's generally non-litigious system).
- Institutions or mechanisms created in the NAFTA context may be viewed as a models in other multilateral fora.
- There are budgetary constraints on the ability of each NAFTA country to address every environmental concern raised in connection with the NAFTA; the effectiveness of any new institutions or mechanisms created and Mexico's willingness/ability to take additional environmental measures could be dependent upon the commitment of additional financial resources from the U.S./Canada.
- With respect to the issue of working toward the harmonization of standards, it should be noted that the United States has recognized, most recently in Principle 11 of the Rio Declaration, that "[e]nvironmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."

- Principle 10 of the Rio Declaration (to which Mexico and Canada have made a political commitment) provides, in the context of public participation in environmental issues, that "Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."
- Principle 10 of the Rio Declaration (to which Mexico and Canada have made a political commitment) provides that "[E]ach individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes."

Attachment BBorder and Other Bilateral Measures with Mexico

- The first phase (1992-1994) of the U.S.-Mexico Border Plan should be implemented.
 - o In the context of this Plan, the U.S.-Mexico Joint Committee for Wildlife Conservation should be strengthened and recognition should be given to ongoing cooperation in fishery and wildlife conservation and management.
- There should be an expectation that cooperation will be further enhanced in the second phase of the Plan (1995-1997); development of this phase should include greater involvement by the range of interested USG agencies, as well as state and local health authorities.
- The 1983 "La Paz" Agreement should be revitalized and strengthened; additional annexes on necessary topics should be considered.
 - o (The "La Paz" Agreement is a bilateral framework agreement with Mexico intended to address environmental concerns in the border region. It currently has five annexes, on: border sanitation; chemical emergencies; transboundary shipments of hazardous wastes; air pollution from copper smelters; and international transport of urban air pollution. While helpful on paper, this package of agreements has been criticized for inadequate funding/implementation.)
- The United States should seek Mexican agreement to conclude the bilateral agreement on environmental pollution negotiated last year (but not signed), which constructs a framework for bilateral cooperation and assistance activities -- including with respect to enforcement -- throughout Mexico.
- Implementation of the 1989 Agreement on Cooperation for the Protection and Improvement of the Environment in the Metropolitan Area of Mexico City should be strengthened.
 - o While several working groups have been created to address various forms of pollution, these groups have not met regularly and have not developed joint programs. (Implementation of DOE's separate agreement on Mexico City is apparently being successfully implemented.)

- Implementation and enforcement of fish and wildlife trade controls on each side of the border should be strengthened.
- Technical assistance to Mexico (e.g., including training of enforcement personnel) should be increased.
- Existing collaborative relationships regarding the management and protection of natural resources should be expanded.

Attachment CThe Commission and Other Trilateral MeasuresThe Commission

The United States should reach agreement with Mexico and Canada that a trilateral Commission be established to:

- o facilitate implementation of the NAFTA's environmental provisions;
- o play a role with respect to enforcement of environmental laws in the three NAFTA countries;
- o generally address environmental issues in North America, including monitoring the state of the North American environment (including any positive/negative environmental impacts of trade), and recommending ways to further cooperation; and
- o to promote NGO involvement.

-- In all these functions, "environment" should be construed broadly to include environmentally-related health issues and conservation of living natural resources.

NAFTA-Related Commission Functions

- In terms of facilitating implementation of NAFTA's environmental provisions, the Commission:
- o should monitor, and report regularly and publicly, on the extent to which the parties are meeting the NAFTA's environmental objectives;
 - o should serve as a point of inquiry, in addition to points available at trade authorities, for information on NAFTA disputes related to the environment under Article 2008, disputes implicating Article 104, and environmental consultations under Article 1114.2;
 - o should serve as a point of receipt, in addition to points available at trade authorities, for comments on Article 2008/104/1114.2 disputes and consultations from interested non-governmental organizations and other private parties and forward these comments to trade authorities involved in such disputes (the NACE should not delay the timetable for resolution of disputes under Chapter 20);

- o should assist in the implementation of NAFTA Article 1114.2, which provides that the Parties "recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures" and providing for consultation in the event "a Party considers that a Party has offered such an encouragement;"
- o should make available/act as a clearinghouse for providing environmental expertise to NAFTA dispute settlement panels, at the latter's request; and
- o should generally discuss/report on (including to the NAFTA Free Trade Commission) any environmental issues related to the NAFTA.

Enforcement-Related Commission Functions

- The Commission should also play a role with respect to the enforcement of environmental laws and regulations in the three NAFTA countries.
- It should be noted that many of the functions set forth above as NAFTA-related functions are also related to enforcement, including:
 - o reporting on the extent to which the parties are achieving NAFTA's environmental objectives, in that one of those objectives is "to strengthen the development and enforcement of environmental laws and regulations"
 - o playing a role in the implementation of NAFTA Article 1114.2, in that this provision directly addresses the issue of lax enforcement leading to "pollution havens"; and
 - o discussing/reporting on any environmental issues related to the NAFTA, in that this could include enforcement-related issues.
- Beyond these, the Commission should enjoy additional powers related to enforcement:
 - o The Commission should be able to receive complaints/input from the public regarding the enforcement of environmental laws and regulations in the three countries. Such complaints/input could be either general or specific to a particular situation, plant, etc.

- o The scope of such complaints/input should be left open, with the Commission being accorded discretion as to what issues to pursue.

- (There have been suggestions that the public should only be able to raise issues concerning its own government's enforcement; others have suggested that complaints be limited to transboundary ones, i.e., environmental impacts in one country caused by lax enforcement in another; still others would limit complaints to trade-related ones, i.e., competitiveness impacts in one country caused by lax enforcement in another.)

- o The Commission should be able to gather information regarding complaints/input through visits (to public places), public hearings, and review of public documents.

- o The Commission should be able to make recommendations to the relevant government.

- The Commission would be relied upon to use its discretion in making recommendations. For example, if a particular situation were the subject of a pending lawsuit, it is assumed that the NACE would not choose to make a recommendation in that case.

- Further, in order for the Commission to be able to report on enforcement (as it will be called upon to do in connection with reporting on the extent to which the parties are achieving the NAFTA's environmental objectives), the parties should be obligated to report to the NACE on their compliance and enforcement data. This would promote achieving comparability in evaluating enforcement programs, so that reliable indicators of compliance and enforcement productivity can be generated and made available to the public.

General Environmental Commission Functions

- In terms of addressing generally environmental issues in North America, the Commission:

- should monitor, and report regularly and publicly on, the state of the North American environment, including any positive/negative environmental impacts of trade;

- should discuss, and make recommendations to the three governments on, any aspect of the North American environment, including the protection of "common" resources such as migratory birds, dolphin, turtle, etc.; and
- should promote and facilitate environmental cooperation between and among the NAFTA parties, including with respect to technical cooperation.

Other Aspects of the Commission

- In addition to the functions discussed above, there are several other important aspects of the Commission:
 - o the Commission should be composed of government representatives (but each government should be free to include an NGO representative(s) -- which includes both environmental and business NGOs -- on its delegation);
 - o the Commission should operate by consensus;
 - o the Commission should meet at least annually, or more frequently upon the request of at least one party;
 - o in terms of support to the Commission, there should be some sort of secretariat;
 - o there should be maximum appropriate public involvement in the Commission's work, including:
 - Commission meetings should normally be open to the public (with the option left open for occasional closed sessions, if necessary);
 - the public should be able to submit information/complaints to the Commission concerning enforcement of environmental laws (as described in more detail above);
 - the public should be able to give input to the Commission for inclusion, as appropriate, in the Commission's reports and recommendations;
 - as noted above, all Commission reports should be made available to the public;
 - there should be a mechanism for the Commission to gather advice from the public, whether through separate national advisory committees, a trilateral advisory committee, and/or public hearings; and

- the Commission should be able to establish subsidiary working groups that involve members of the public.

Other Trilateral Measures

- In the agreement establishing the Commission, the parties should commit to adopt community right-to-know laws, which promote citizen involvement and governmental responsiveness. (Any such commitment needs to be carefully crafted to be consistent with U.S. law.)
- Implementation of the established Tripartite Committee for the Conservation of Wetlands and their Migratory Waterfowl should be strengthened.
- The U.S. should seek advance Mexican and Canadian agreement that, once the NAFTA has entered into force, certain additional international environmental agreements (i.e., the U.S.-Mexico Convention for the Protection of Migratory Birds and Game Mammals, the Convention for the Protection of Migratory Birds in the United States and Canada, and the SPAW Protocol) should be added to the list of agreements contained in Article 104 of the NAFTA. (This is without prejudice to seeking to add yet further agreements in the future, should they include, or be amended to include, mandatory trade measures.)
 - o Under that Article, certain enumerated environmental agreements that contain mandatory trade provisions are to take precedence over any inconsistent NAFTA provision. The list may be expanded by agreement of the NAFTA parties without formal amendment.

Attachment D"Minimum" Standards

- o Canada has proposed that the Commission begin developing "minimum" North American environmental standards.
- o The concerns with such a proposal are:
 - although each country remains free to set higher standards, the process could lead to lowering of current Mexican standards and also to pressure in the U.S. for downward harmonization;
 - such standards would be inconsistent with certain U.S. laws, which rely on market approaches instead of standards; and
 - the problem with Mexico is not inadequate standards, but the lax enforcement of such standards.
- o It should be noted that environmental NGOs are divided on this issue.
- o If the Commission were to be given the function of developing "minimum" standards, it would be appropriate for it to provide input to the NAFTA Standards Committee, which is already charged with harmonizing product standards and sanitary/phytosanitary measures.

Current State of Play: BILATERAL LABOR COOPERATION PROGRAMS
AND MEXICAN ENFORCEMENT REGIME

IMPLEMENTATION OF THE 1991 MOU

Overview: The United States and Mexico signed an MOU on May 3, 1991, calling for closer cooperation and joint action on a wide range of labor issues over the following 5 years.

Initiatives to Improve Occupational Safety and Health

Since the MOU was signed, the United States and Mexico have developed a comparative study of their respective safety and health systems. This study, which was released in August 1992, is intended to serve as a foundation for future improvements in safety and health standards and enforcement.

1. Improved Health Enforcement

To help Mexico develop an improved health enforcement program for its workforce, OSHA sponsored technical assistance and training programs for Mexican officials in U.S. laboratories. In addition, under a memorandum signed on February 7, 1992, with STPS (the Mexican Labor ministry), OSHA has allowed Mexico to use OSHA laboratories for specialized sample testing until such time as Mexico has its own laboratory in place.

OSHA has shared with Mexico its sampling and analytical procedures for determining compliance with permissible exposure limits for airborne contaminants and has provided Mexico with advice on the appropriate equipment and procedures for establishing its own laboratory. OSHA will also provide on-the-job training for Mexican technical personnel.

In addition, the United States has agreed to include Mexico in U.S. systems designed to assure the professional competence of laboratories and the integrity of lab work products.

In June 1992, OSHA conducted the first of several training courses for Mexican trainers on industrial hygiene sampling methods; this course was attended by 44 Mexican government and industry experts. Future courses will include principles of ergonomics, industrial toxicology, process risk analysis in the chemical industry, and respiratory protection.

Mexican officials have accompanied OSHA inspectors to observe pre-inspection planning and equipment calibration, on-site sampling, and inspection procedures.

2. Enforcement Training

As part of the program initiated by OSHA to help train Mexican officials in occupational safety and health inspection and enforcement, Mexican officials have visited the OSHA Training

Institute in Illinois to examine courses and simulations of worksite conditions used for inspector training programs. The United States and Mexico are also cooperating on the development of industry-specific guides for workplace inspection to assist inspectors in identifying and controlling workplace hazards.

3. Focus on High Hazard Industries

The United States and Mexico agreed to hold a series of seminars, including representatives from government, labor, management, and academia, to focus on identifying "what works" to prevent accidents in high-hazard industries.

The first conference was sponsored by Mexico and held in Mexico City in February 1992. Attended by over 130 experts from the United States and Mexico and observers from Canada, the conference focused on safety and health issues in the iron and steel industries. It featured joint technical sessions on hazard communication, training and education, and the identification, evaluation, and control of safety and health hazards.

Mexico subsequently sponsored similar conferences on the bottling, rubber, and footwear industries. Future tripartite (labor, industry, and government) conferences will address occupational safety and health in the construction, petrochemicals, and electronics industries.

4. OSHA-EPA Working Group Established

A working group of U.S. OSHA and EPA officials was established on July 15, 1992, to explore linkages between environmental and safety and health issues in Mexico. The two agencies have worked closely in the United States in the areas of chemical accident prevention and response and hope to encourage Mexico to further explore the common ground between worker and environmental safety and health.

5. Hazard Communication

To help Mexico reduce the incidence of chemical source illnesses and injuries, OSHA has provided Mexico with relevant information and technical assistance. The United States has delivered to Mexican safety and health officials Spanish versions of more than 260 U.S. Material Safety Data Sheets on the potential hazards and uses of specific chemicals, as well as Spanish-language publications regarding workplace hazards in the agriculture industry.

1992 BILATERAL AGREEMENT

A. New Agreement and Consultative Commission

On September 15, 1992, the United States and Mexico signed a new bilateral agreement for the formulation of longer-term strategies

and concrete activities to address labor standard and enforcement issues. The agreement, which was signed by has not been put into force (pending an exchange of letters), establishes a Consultative Commission on Labor Matters under the auspices of the 1991 MOU and the U.S.-Mexican Binational Commission.

The Commission, co-chaired by the U.S. and Mexican Secretaries of Labor, is intended to serve two purposes: to provide a forum for consultation on labor issues of interest or concern, and to manage and oversee new and ongoing cooperative labor activities. The Commission will meet at least once a year, but more frequent or emergency meetings may be held, as necessary.

The Commission is expected to establish working groups on various issues. Moreover, each side may provide for public participation by interested groups from their respective countries. In addition, the United States had intended to establish a mechanism for receiving written comments from the public on issues under the purview of the Commission, including:

- o Labor standards, including those related to workplace safety and health;
- o Workers rights;
- o Child labor issues;
- o Procedures for resolution of labor-management conflicts;
- o Labor laws and labor law systems;
- o General work conditions;
- o Labor standards applicable to migrant workers;
- o Retraining programs for workers facing structural change; and
- o Mechanisms to ease conversion of plant and equipment to new technologies promoting occupational safety and health.

In addition to the Consultative Commission, the United States and Mexican Secretaries of Labor agreed to two new "pillars" of bilateral cooperation focused on improving industrial hygiene and workplace safety.

B. Industrial Hygiene Programs

The United States and Mexico agreed to work toward greater similarity in their industrial hygiene schemes by dates certain. The two labor ministries would work jointly to upgrade their industrial hygiene programs by developing common approaches to:

- o Hazard communication standards;
- o Permissible exposure limits for airborne contaminants;
- o Sampling and laboratory analysis of airborne contaminants;
- o The effects of noise, vibrations, and other physical agents on workers;
- o Ergonomic issues; and
- o The protection of workers in agricultural industries.

C. Workplace Safety Programs

The Department of Labor and STPS agreed to initiate a variety of activities under the "pillar" of workplace safety designed to improve by dates certain appropriate standards, implement effective programs that prevent accidents, avoid hazardous conditions, remedy potential deficiencies, and assure compliance. Specific activities will include joint projects to improve:

- o Occupational safety and health in small and medium-sized firms;
- o Procedures for the identification and control of workplace hazards; and
- o Inspection techniques.

ENFORCEMENT OF LABOR LAWS AND REGULATIONS

A. Mexican Legal Framework

Basic worker rights and protections in Mexico are rooted in Article 123 of the Mexican Constitution and the Federal Labor Law (FLL).

Right of Association/Strike: The Constitution recognizes the right of association for both workers and employers. (Between 30 and 35 percent of Mexico's 26 million workers are members of organized trade unions.) The FLL upholds the right to organize and to bargain collectively, and the Constitution recognizes the right of workers to strike.

Forced Labor: Mexico is a signatory to the International Labor Organization (ILO) Conventions regarding the prohibition of forced or compulsory labor and such practices are prohibited by Mexican law.

Worker Standards and Safety: (See specific discussion in Worker Standards sections below.) The 1992 National Accord for Improvement of Productivity and Quality represents a consensus among government, business, and labor to undertake a series of initiatives to improve workplace conditions, increase wages, strengthen labor relations, and improve overall standards of living.

Other: Mexico has established a system of retirement insurance, managed through private financial institutions, to complement the social security system. The government has also made reforms in the National Savings Trust for Workers' Housing to ease credit for home purchases and require employers to make payroll contributions to individual worker bank accounts.

B. Child Labor

Child labor standards in Mexico are established by virtue of the Mexican Constitution and through implementing regulations and legal contracts entered into by unions, employers, or employers' associations that are binding and enforceable by Federal authorities. Mexico's Federal Labor Law regulates the working

activities of children between the ages of 14 and 18 who are being paid by a third-person employer. (Children who are self-employed or working in a family enterprise are outside the scope of the FLL.) The enforcement of the labor standards applicable to individuals under the age of 18 is delegated to both local and federal authorities.

Mexico has ratified several ILO conventions relating to child labor, basically involving minimum age and medical certificates. In Mexico, ILO conventions consistent with the Federal Labor Law are ratified by Congress, giving them the force of law.

Mexican law prohibits entirely the employment, in a subordinated labor relationship, of minors under age 14 and in any dangerous or unhealthy work for 14- and 15-year-olds. Mexican law imposes restrictions on employment of 16- and 17-year-olds in industrial night-shift work, as storeroom workers or as stokers on ships, and also prohibits them from engaging in certain types of work (mining, public transportation, and around radiation). In contrast, the U.S. Fair Labor Standards Act (FLSA) contains exemptions for minors under 14 in certain circumstances and does not limit hours for individuals 16 and over.

Furthermore, Mexican 15- and 16-year-olds must have finished their compulsory primary education (unless a determination has been made that there is compatibility between study and work); they must have received permission to work from their parents or guardians; and they must obtain a medical certificate demonstrating their ability to work and must submit to periodic medical examinations.

In Mexico, workers under 18 must be paid at least the same wages as adults. Under U.S. law, various sub-minimum wage exemptions exist for young workers.

Child labor violators in Mexico are subject to penalties of 3 to 155 times the general minimum daily wage per violation. Workplace complaints can be initiated by joint workplace committees, the unions, and individual workers. Such complaints are investigated by Federal or State authorities.

During each workplace inspection (which may include minimum wage or safety and health issues), inspectors are required also to determine compliance with child labor standards.

C. Workplace Health and Safety

Mexico has detailed laws and regulations governing occupational safety and health. These regulations address many workplace hazards and include provisions designed to protect workers from harmful substances. In drawing up safety and hygiene standards, the Mexican Government relies on various internationally recognized sources, such as the ILO, the American National Standards Institute, OSHA, and the European Economic Community. The standards address most of the same hazards as do U.S. standards and

are applied in all industrial sectors.

Mexico officially encourages the participation of all interested parties in all phases of its health and safety program, including standards development and implementation. Mexico requires employers to establish joint labor-management health and safety committees or "mixed commissions" at the workplace. Some of the functions of the commissions include: making recommendations for hazard control, investigating accidents and illnesses, and conducting safety and health training.

Mexico relies on various enforcement strategies, including compliance assistance programs, monetary penalties, and incentives. For example, the Mexican Government imposes penalties ranging from 15 to 315 times the general minimum wage, taking into account such factors as the number of violations and their seriousness, and the financial condition of the company.

In addition, the Mexican Government assesses workers' compensation premiums paid by employers based on the employers' safety and health performance in the previous year. This system thus acts both to cover the costs of accidents and injuries at the individual employer's workplace and to reward or penalize employers for their performance. Mexico uses the same data to target high-risk establishments for compliance assistance and enforcement.

SPECIFIC WORKER STANDARDS PROGRAMS

Focus on Small Businesses: Firms with fewer than five employees represent 80 percent of all firms in Mexico. Mexico set as a goal the registration of 100,000 new "mixed commissions" in small firms by the end of 1992. However, because functioning commissions are problematic in very small firms, Mexico has distributed "self-audits" to small firms in several industrial sectors. These audits are part of a public awareness campaign for the identification and abatement of hazards. U.S. materials are being adapted for use in this campaign.

Training for Maquiladoras and High Hazard Sectors: Mexico has initiated several programs to improve safety and health conditions in specific geographic areas, such as the border region where most maquiladoras are located, and in specific industrial sectors with higher than the national average for injuries and illnesses.

The United States worked with Mexican authorities to host a series of six training seminars in maquiladora industries on safety and health compliance during 1992. Mexico followed this series of conferences with evaluations of existing local and firm-specific programs and notification to management of federal action if approved programs are not subsequently implemented.

In addition, during 1992, Mexico initiated sector specific "Information and Guidance" training in other industries (e.g., aluminum, autos, bottling, cardboard, chemicals, footwear, paper,

and rubber). Mexico has also increased the number of enforcement officials in Tijuana and Matamoros.

Increased Penalties: Mexico has taken several recent actions to increase the incentives for compliance with labor laws. Mexican labor authorities review annually the workers' compensation insurance payment program that requires firms with hazard rates that exceed the maximum allowable to pay higher premiums for IMSS hazard insurance. The Mexican Institute for Social Security (IMSS) has revised upward social insurance premiums paid by several firms in Mexico because their workplace injury and illness rates were above the national average in their category.

Enforcement Training: From 1992 Mexican labor authorities sponsored five regional courses to update approximately 250 federal compliance officials on inspection criteria and skills and harmonization of inspection procedures. The next cycle of courses will be directed to state government inspectors under federal-state agreements.

In addition, Mexico invited OSHA to conduct a special course in Mexico City in June 1992 on workplace hazard identification for technicians from STPS (the Mexican labor ministry), IMSS, the Federal District, and the private sector; some 20 inspectors from STPS attended this course.

New Industrial Health Lab: Mexico is in the process of establishing an Industrial Hygiene Laboratory for the analysis of samples of air to which workers are exposed. A site has been chosen and equipment purchased.

Closer STPS - IMSS Cooperation: The Mexican Ministry of Labor and Social Welfare and the Mexican Institute for Social Security have forged a closer relationship for improving workforce safety and health compliance under the framework of the 1992 National Program for the Prevention of Work-Related Hazards and includes the following activities:

- o High Hazard Firms: In 1992, 3,871 firms with employment of 100 or more and whose accident rates are higher than the national average, accounting for 35 percent of all workplace accidents, have been notified of new mandatory programs for improving safety and health compliance;
- o State programs and sectoral consultation: Agreements were signed with state governments for health and safety programs targeted to vulnerabilities in regions;
- o Awareness and prevention campaign: The mass media has been used as part of a campaign to disseminate information on hazard abatement;
- o National incentives system: Public recognition is being given to workplace models that have proved effective in preventing

work-related hazards, including models incorporating new investment and/or innovations; and

- o Health and Safety Commissions: Consulting Commissions on Health and Safety at the Workplace and Joint Commissions on Health and Safety are being promoted and annual programs and semi-annual evaluations have been established.

STPS - State Cooperation: STPS and state governments signed an agreement in 1992 for the strengthening of compliance inspection services in workplace safety and health.

Enforcement Information: Mexico is publishing and making available to the public the General Regulation on Safety and Hygiene with its 22 sets of instructions, with the goal of distributing 500,000 copies to business and labor.

Loan Funds: The Mexican development bank, National Financiera (NAFIN), is offering three loan funds for modernization of industry and for environmental, safety, and health improvement at the workplace. During the first part of 1992, nearly 43,000 enterprises, many small and medium-sized firms, received loans from these funds.

WAGE RATES

Mexican workers are guaranteed a minimum wage, which is set by the day (one 8-hour shift). As of December 1991, the national average daily minimum wage was \$4.00 (12.084 new pesos/day). This was 13 percent higher than the previous year.

In 1991 roughly 90 percent of Mexican workers in urban areas earned some multiple of the minimum wage. A considerable portion of this compensation is usually in the form of supplementary benefits and other bonuses, some required by law and others offered voluntarily by the employer.

For example, according to the U.S. Bureau of Labor Statistics, the total 1991 hourly compensation for a Mexican worker in the manufacturing sector was \$2.17, or \$17.36 per 8-hour work day. This was 29 percent higher than in 1990. Roughly 30 percent of manufacturing compensation, however, is in the form of supplementary benefits. Thus, the approximate daily wage of a manufacturing sector worker is \$12.00, or more than triple the minimum wage.

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The first conference was sponsored by Mexico and held in Mexico City in February 1992. Attended by over 130 experts from the United States and Mexico and observers from Canada, the conference focused on safety and health issues in the iron and steel industries. It featured joint technical sessions on hazard communication, training and education, and the identification, evaluation, and control of safety and health hazards.

Mexico subsequently sponsored similar conferences on the bottling, rubber, and footwear industries. Future tripartite (labor, industry, and government) conferences will address occupational safety and health in the construction, petrochemicals, and electronics industries.

4. OSHA-EPA Working Group Established

A working group of U.S. OSHA and EPA officials was established on July 15, 1992, to explore linkages between environmental and safety and health issues in Mexico. The two agencies have worked closely in the United States in the areas of chemical accident prevention and response and hope to encourage Mexico to further explore the common ground between worker and environmental safety and health.

5. Hazard Communication

To help Mexico reduce the incidence of chemical source illnesses and injuries, OSHA has provided Mexico with relevant information and technical assistance. The United States has delivered to Mexican safety and health officials Spanish versions of more than 260 U.S. Material Safety Data Sheets on the potential hazards and uses of specific chemicals, as well as Spanish-language publications regarding workplace hazards in the agriculture industry.

1992 BILATERAL AGREEMENT

A. New Agreement and Consultative Commission

On September 15, 1992, the United States and Mexico signed a new bilateral agreement for the formulation of longer-term strategies

and concrete activities to address labor standard and enforcement issues. The agreement, which was signed by has not been put into force (pending an exchange of letters), establishes a Consultative Commission on Labor Matters under the auspices of the 1991 MOU and the U.S.-Mexican Binational Commission.

The Commission, co-chaired by the U.S. and Mexican Secretaries of Labor, is intended to serve two purposes: to provide a forum for consultation on labor issues of interest or concern, and to manage and oversee new and ongoing cooperative labor activities. The Commission will meet at least once a year, but more frequent or emergency meetings may be held, as necessary.

The Commission is expected to establish working groups on various issues. Moreover, each side may provide for public participation by interested groups from their respective countries. In addition, the United States had intended to establish a mechanism for receiving written comments from the public on issues under the purview of the Commission, including:

- o Labor standards, including those related to workplace safety and health;
- o Workers rights;
- o Child labor issues;
- o Procedures for resolution of labor-management conflicts;
- o Labor laws and labor law systems;
- o General work conditions;
- o Labor standards applicable to migrant workers;
- o Retraining programs for workers facing structural change; and
- o Mechanisms to ease conversion of plant and equipment to new technologies promoting occupational safety and health.

In addition to the Consultative Commission, the United States and Mexican Secretaries of Labor agreed to two new "pillars" of bilateral cooperation focused on improving industrial hygiene and workplace safety.

B. Industrial Hygiene Programs

The United States and Mexico agreed to work toward greater similarity in their industrial hygiene schemes by dates certain. The two labor ministries would work jointly to upgrade their industrial hygiene programs by developing common approaches to:

- o Hazard communication standards;
- o Permissible exposure limits for airborne contaminants;
- o Sampling and laboratory analysis of airborne contaminants;
- o The effects of noise, vibrations, and other physical agents on workers;
- o Ergonomic issues; and
- o The protection of workers in agricultural industries.

C. Workplace Safety Programs

The Department of Labor and STPS agreed to initiate a variety of activities under the "pillar" of workplace safety designed to improve by dates certain appropriate standards, implement effective programs that prevent accidents, avoid hazardous conditions, remedy potential deficiencies, and assure compliance. Specific activities will include joint projects to improve:

- o Occupational safety and health in small and medium-sized firms;
- o Procedures for the identification and control of workplace hazards; and
- o Inspection techniques.

ENFORCEMENT OF LABOR LAWS AND REGULATIONS

A. Mexican Legal Framework

Basic worker rights and protections in Mexico are rooted in Article 123 of the Mexican Constitution and the Federal Labor Law (FLL).

Right of Association/Strike: The Constitution recognizes the right of association for both workers and employers. (Between 30 and 35 percent of Mexico's 26 million workers are members of organized trade unions.) The FLL upholds the right to organize and to bargain collectively, and the Constitution recognizes the right of workers to strike.

Forced Labor: Mexico is a signatory to the International Labor Organization (ILO) Conventions regarding the prohibition of forced or compulsory labor and such practices are prohibited by Mexican law.

Worker Standards and Safety: (See specific discussion in Worker Standards sections below.) The 1992 National Accord for Improvement of Productivity and Quality represents a consensus among government, business, and labor to undertake a series of initiatives to improve workplace conditions, increase wages, strengthen labor relations, and improve overall standards of living.

Other: Mexico has established a system of retirement insurance, managed through private financial institutions, to complement the social security system. The government has also made reforms in the National Savings Trust for Workers' Housing to ease credit for home purchases and require employers to make payroll contributions to individual worker bank accounts.

B. Child Labor

Child labor standards in Mexico are established by virtue of the Mexican Constitution and through implementing regulations and

legal contracts entered into by unions, employers, or employers' associations that are binding and enforceable by Federal authorities. Mexico's Federal Labor Law regulates the working activities of children between the ages of 14 and 18 who are being paid by a third-person employer. (Children who are self-employed or working in a family enterprise are outside the scope of the FLL.) The enforcement of the labor standards applicable to individuals under the age of 18 is delegated to both local and federal authorities.

Mexico has ratified several ILO conventions relating to child labor, basically involving minimum age and medical certificates. In Mexico, ILO conventions consistent with the Federal Labor Law are ratified by Congress, giving them the force of law.

Mexican law prohibits entirely the employment, in a subordinated labor relationship, of minors under age 14 and in any dangerous or unhealthy work for 14- and 15-year-olds. Mexican law imposes restrictions on employment of 16- and 17-year-olds in industrial night-shift work, as storeroom workers or as stokers on ships, and also prohibits them from engaging in certain types of work (mining, public transportation, and around radiation). In contrast, the U.S. Fair Labor Standards Act (FLSA) contains exemptions for minors under 14 in certain circumstances and does not limit hours for individuals 16 and over.

Furthermore, Mexican 15- and 16-year-olds must have finished their compulsory primary education (unless a determination has been made that there is compatibility between study and work); they must have received permission to work from their parents or guardians; and they must obtain a medical certificate demonstrating their ability to work and must submit to periodic medical examinations.

In Mexico, workers under 18 must be paid at least the same wages as adults. Under U.S. law, various sub-minimum wage exemptions exist for young workers.

Child labor violators in Mexico are subject to penalties of 3 to 155 times the general minimum daily wage per violation. Workplace complaints can be initiated by joint workplace committees, the unions, and individual workers. Such complaints are investigated by Federal or State authorities.

During each workplace inspection (which may include minimum wage or safety and health issues), inspectors are required also to determine compliance with child labor standards.

C. Workplace Health and Safety

Mexico has detailed laws and regulations governing occupational safety and health. These regulations address many workplace hazards and include provisions designed to protect workers from harmful substances. In drawing up safety and hygiene standards,

the Mexican Government relies on various internationally recognized sources, such as the ILO, the American National Standards Institute, OSHA, and the European Economic Community. The standards address most of the same hazards as do U.S. standards and are applied in all industrial sectors.

Mexico officially encourages the participation of all interested parties in all phases of its health and safety program, including standards development and implementation. Mexico requires employers to establish joint labor-management health and safety committees or "mixed commissions" at the workplace. Some of the functions of the commissions include: making recommendations for hazard control, investigating accidents and illnesses, and conducting safety and health training.

Mexico relies on various enforcement strategies, including compliance assistance programs, monetary penalties, and incentives. For example, the Mexican Government imposes penalties ranging from 15 to 315 times the general minimum wage, taking into account such factors as the number of violations and their seriousness, and the financial condition of the company.

In addition, the Mexican Government assesses workers' compensation premiums paid by employers based on the employers' safety and health performance in the previous year. This system thus acts both to cover the costs of accidents and injuries at the individual employer's workplace and to reward or penalize employers for their performance. Mexico uses the same data to target high-risk establishments for compliance assistance and enforcement.

SPECIFIC WORKER STANDARDS PROGRAMS

Focus on Small Businesses: Firms with fewer than five employees represent 80 percent of all firms in Mexico. Mexico set as a goal the registration of 100,000 new "mixed commissions" in small firms by the end of 1992. However, because functioning commissions are problematic in very small firms, Mexico has distributed "self-audits" to small firms in several industrial sectors. These audits are part of a public awareness campaign for the identification and abatement of hazards. U.S. materials are being adapted for use in this campaign.

Training for Maquiladoras and High Hazard Sectors: Mexico has initiated several programs to improve safety and health conditions in specific geographic areas, such as the border region where most maquiladoras are located, and in specific industrial sectors with higher than the national average for injuries and illnesses.

The United States worked with Mexican authorities to host a series of six training seminars in maquiladora industries on safety and health compliance during 1992. Mexico followed this series of conferences with evaluations of existing local and

firm-specific programs and notification to management of federal action if approved programs are not subsequently implemented.

In addition, during 1992, Mexico initiated sector specific "Information and Guidance" training in other industries (e.g., aluminum, autos, bottling, cardboard, chemicals, footwear, paper, and rubber). Mexico has also increased the number of enforcement officials in Tijuana and Matamoros.

Increased Penalties: Mexico has taken several recent actions to increase the incentives for compliance with labor laws. Mexican labor authorities review annually the workers' compensation insurance payment program that requires firms with hazard rates that exceed the maximum allowable to pay higher premiums for IMSS hazard insurance. The Mexican Institute for Social Security (IMSS) has revised upward social insurance premiums paid by several firms in Mexico because their workplace injury and illness rates were above the national average in their category.

Enforcement Training: From 1992 Mexican labor authorities sponsored five regional courses to update approximately 250 federal compliance officials on inspection criteria and skills and harmonization of inspection procedures. The next cycle of courses will be directed to state government inspectors under federal-state agreements.

In addition, Mexico invited OSHA to conduct a special course in Mexico City in June 1992 on workplace hazard identification for technicians from STPS (the Mexican labor ministry), IMSS, the Federal District, and the private sector; some 20 inspectors from STPS attended this course.

New Industrial Health Lab: Mexico is in the process of establishing an Industrial Hygiene Laboratory for the analysis of samples of air to which workers are exposed. A site has been chosen and equipment purchased.

Closer STPS - IMSS Cooperation: The Mexican Ministry of Labor and Social Welfare and the Mexican Institute for Social Security have forged a closer relationship for improving workforce safety and health compliance under the framework of the 1992 National Program for the Prevention of Work-Related Hazards and includes the following activities:

- o High Hazard Firms: In 1992, 3,871 firms with employment of 100 or more and whose accident rates are higher than the national average, accounting for 35 percent of all workplace accidents, have been notified of new mandatory programs for improving safety and health compliance;
- o State programs and sectoral consultation: Agreements were signed with state governments for health and safety programs targeted to vulnerabilities in regions;

- o Awareness and prevention campaign: The mass media has been used as part of a campaign to disseminate information on hazard abatement;
- o National incentives system: Public recognition is being given to workplace models that have proved effective in preventing work-related hazards, including models incorporating new investment and/or innovations; and
- o Health and Safety Commissions: Consulting Commissions on Health and Safety at the Workplace and Joint Commissions on Health and Safety are being promoted and annual programs and semi-annual evaluations have been established.

STPS - State Cooperation: STPS and state governments signed an agreement in 1992 for the strengthening of compliance inspection services in workplace safety and health.

Enforcement Information: Mexico is publishing and making available to the public the General Regulation on Safety and Hygiene with its 22 sets of instructions, with the goal of distributing 500,000 copies to business and labor.

Loan Funds: The Mexican development bank, National Financiera (NAFIN), is offering three loan funds for modernization of industry and for environmental, safety, and health improvement at the workplace. During the first part of 1992, nearly 43,000 enterprises, many small and medium-sized firms, received loans from these funds.

WAGE RATES

Mexican workers are guaranteed a minimum wage, which is set by the day (one 8-hour shift). As of December 1991, the national average daily minimum wage was \$4.00 (12.084 new pesos/day). This was 13 percent higher than the previous year.

In 1991 roughly 90 percent of Mexican workers in urban areas earned some multiple of the minimum wage. A considerable portion of this compensation is usually in the form of supplementary benefits and other bonuses, some required by law and others offered voluntarily by the employer.

For example, according to the U.S. Bureau of Labor Statistics, the total 1991 hourly compensation for a Mexican worker in the manufacturing sector was \$2.17, or \$17.36 per 8-hour work day. This was 29 percent higher than in 1990. Roughly 30 percent of manufacturing compensation, however, is in the form of supplementary benefits. Thus, the approximate daily wage of a manufacturing sector worker is \$12.00, or more than triple the minimum wage.

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2012-0769-F
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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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RR. Document will be reviewed upon request.

2710



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

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TRANSMISSION NUMBER: 202-295-5691

VERIFICATION NUMBER: 202-295-6194

TO:

Ram Mc Clivee

FROM:

Annette Rooney

Per your request, attached is a copy
of DOT/FHWS testimony on Environmental
Issues as presented to the Committee

NUMBER OF PAGES TO FOLLOW:

9 + cover

DATE:

3/10

TIME:

10 30

LEGISLATIVE REFERENCE DIVISION
ROOM 7230
WASHINGTON, D.C. 20503

Annette Rooney

STATEMENT OF JOHN TURNER, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES, COMMITTEE ON MERCHANT MARINE AND FISHERIES, REGARDING ENVIRONMENTAL ASPECTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

March 10, 1993

Mr. Chairman, I am John Turner, Director, United States Fish and Wildlife Service, Department of the Interior. I am pleased to be here today to discuss environmental aspects of the proposed North American Free Trade Agreement (NAFTA), particularly as they affect the resources within the jurisdiction of the Department of the Interior.

In 1992, the Environmental Protection Agency and its Mexican counterpart, the Secretaria de Desarrollo Social, prepared the first phase (1992-1994) of an Integrated Environmental Plan for the border area to address various issues, including industrial pollution, wastewater, hazardous substances and related matters as they affect human health or the environment. In my testimony today I want to focus on another aspect of the environment -- fish, wildlife and habitat resources along the border and within Mexico.

The Department of the Interior has a long history of cooperative efforts with our counterparts in Mexico. We are the largest land manager along our common border, as about 13% of the border area is within National Parks and 8 National Wildlife Refuges comprising over 1,000,000 acres are along or adjacent to it. The

Bureau of Land Management also oversees a strip of land about 60 feet wide along much of the land border, as well as managing large areas of adjacent public lands.

For over 50 years we have cooperated with our Mexican counterparts on shared species and habitat protection, wetlands management, mapping, and recreational planning. Our common heritage has led to programs of cultural and historic exchanges, and increasing trade has resulted in the sharing of information about techniques for mineral extraction and decreasing the environmental impacts of our projects. The Department currently has eight active Memoranda of Understanding, and 67 specific joint projects, with our Mexican counterparts, mostly through the Fish and Wildlife Service and the National Park Service.

Our history of cooperation in fish and wildlife management and research with Mexico dates back to the Migratory Bird Treaty with Mexico in 1936. Since 1974, agencies in both countries have implemented a comprehensive program of cooperation through the Joint Committee on Wildlife and Plant Conservation. Conservation projects in the fields of training, protected areas management, endangered species and migratory birds have been implemented throughout Mexico as a result. The 1988 Tripartite Agreement for the Conservation of Wetlands, funded through the North American Wetlands Conservation Act written by this committee, is now generating similar benefits.

NAFTA represents a significant new opportunity to promote environmental conservation in Mexico and along the border. NAFTA itself is expected to raise standards of living in Mexico, which should help reduce pollution and increase attention to environmental quality. In addition, President Clinton has called for negotiation of a side agreement to ensure sound environmental protection under NAFTA. We expect the increased trade and development opportunities stemming from NAFTA will produce environmental impacts that will need to be managed effectively to ensure continued progress in fish and wildlife conservation in the U.S. and in Mexico. The major issues to be addressed are law enforcement activities, protection of endangered species, and management of fisheries, wildlife refuges and wildlife habitat generally along the border.

The Fish and Wildlife Service has the responsibility for ensuring that wildlife and wildlife products entering the United States are in compliance with Federal, State laws, and international treaties, including the Endangered Species Act and the Convention on International Trade in Endangered and Threatened Species of Flora and Fauna (CITES). Service wildlife inspectors are currently stationed at various ports of entry around the country to inspect wildlife shipments, with emphasis on 10 "designated" wildlife ports of entry. As a result of increased trade flows and the development of new border crossings, we anticipate an increase in wildlife traffic across the border.

Illegal trade in wildlife and wildlife products still exists between the United States and Mexico. The effects of this trade are reflected throughout Mexico as fish, wildlife and plant populations, many of them threatened or endangered, decrease due to collecting pressures. Mexico became a party to CITES in 1991, and is currently working to fully implement its provisions, but needs additional trained personnel. Without additional enforcement resources on the United States side of the border, and technical assistance to Mexico, the present illegal wildlife traffic is anticipated to continue or increase, with potentially serious adverse effects on many species.

There are also habitat protection concerns in and around the border area. Thirty-seven Federally listed and 158 candidate species of animals and plants occur within the first tier of counties bordering the Rio Grande from Maverick County, Texas, to the Gulf of Mexico. Along the New Mexico/Mexico border, 12 Federally listed wildlife species, 1 proposed species (Mexican spotted owl), and 45 candidate species occur.

Twenty Federally listed, one proposed, and 83 candidate species of animals and plants occur within 25 miles north of the Arizona-Mexico border. Along the California-Mexico border there are presently 13 endangered and threatened listed species, and at least 90 proposed or candidate species. In addition, the California condor, now the subject of an intensive recovery

action, formerly occurred in Baja California, Mexico.

In what is primarily an arid or semi-arid region with a fragile ecosystem, potential changes in land use need to be carefully managed. The increased flow of goods between the U.S. and Mexico under NAFTA will generate pressure to expand the infrastructure necessary for transportation, customs, and other related services. For example, already a number of new bridges over the Rio Grande have been proposed between the Gulf of Mexico and Del Rio, Texas. Pursuant to two Executive Orders (E.O. 11423 and 12114), as well as the National Environmental Policy Act, the United States evaluates the environmental impacts of proposed development. Each bridge and its approaches have the potential to destroy habitat, multiply human presence, and affect the management of State and Federal refuges. For this reason, the new bridge proposals are subject to environmental review before the Department of State and the Coast Guard issue the required permits.

Population growth and development is also anticipated. In Arizona, the City of Nogales and Santa Cruz County have advised that they expect expansion of industrial park areas along the Santa Cruz River, which borders Interstate 19 as it connects Nogales to Tucson and Phoenix to the north. The Yuma area, located along the lower Colorado River, expects expansion associated with the Free Trade Agreement. This border area on

Mexico to establish International Reserves.

Preservation of wetlands along the Rio Grande border should also carry a high priority. Floodway channel maintenance is an authorized responsibility of the International Boundary and Water Commission (IBWC) that must continue, and an accommodation on flood control versus riparian habitat has been worked out between the IBWC and the Service on the lower Rio Grande. This recent initiative should demonstrate the feasibility of conserving the riparian resource along the border.

The Fish and Wildlife Service is working on a draft plan to address these issues.

You have asked that we address the details of an environmental supplemental agreement as well. The Administration is currently formulating its position as to what should be contained in such an agreement, and I am not in a position today to say what the final document will look like.

The Department of the Interior is committed to being an active participant in the process, and we take very seriously our responsibilities to protect the resources under our jurisdiction along the border. To this end, Secretary Babbitt has created a Departmental task force to coordinate all of our activities on this issue.

You also asked that we address the question of enforcement of NAFTA environmental and wildlife agreements. Although this specific question is still under consideration,* so that I cannot comment on it at this time, there are other related enforcement issues that may be of interest. One major constraint on the implementation of strategies for the sustainable use of Mexico's resources is the scarcity of personnel adequately trained in biodiversity and resource management. Although Mexico has various high quality institutions generating professionals in many disciplines, it does not have a graduate program specifically oriented toward wildlife and biodiversity management.

Mexico's cadre of resource managers could usefully be strengthened in order to address the need to develop management practices that deal comprehensively with potentially competing land requirements for biodiversity conservation, agriculture, industry, transport and other vital societal needs. This would require formal professional-level training. Formal training in biodiversity/resource management is essential for building and strengthening the capacity of a nation to manage its resources sustainably.

Public outreach and environmental education are fundamental to the success of all of Mexico's conservation initiatives. This is because Mexico recognizes that it is the attitudes of people that

determine the success or failure of any specific program. As Mexico's population grows, environmental education and public awareness become evermore critical for promoting attitudes and behaviors consistent with the sustainable utilization of resources, and for fostering public participation in decision-making. Mexico is beginning to expand its efforts at public outreach, but its resources may be limited. •

One avenue for expanding public participation would be to coordinate with Mexican authorities on wildlife and plants through the existing mechanisms of the U.S.-Mexico Joint Committee for the Conservation of Wildlife and Plants. The Service has experience funding this type of activity in Mexico, and has mechanisms in place for coordination with Mexican authorities.

Lastly, you asked that we address opportunities for public participation and the role of the National Environmental Policy Act (NEPA) in the environmental agreement negotiations. This issue is under litigation and I am therefore unable to address it at this time.

Mr. Chairman, this concludes my statement. I would be pleased to respond to questions.

5:30 Mtg 3/12

Mickey Kantor in

USTR Room 203

Also: Gary Mauro,

Texas Land Commissioner



**OFFICE OF THE
UNITED STATES
TRADE
REPRESENTATIVE**

North American Affairs

**Executive Office of the
President
Washington, D.C. 20506**

Date: Time: 3/11/93; 1:30

C.D. Log: 16

No. of Pages Excluding Cover: 1

TO:	<u>NAME</u>	<u>AGENCY</u>	<u>PHONE NO.</u>	<u>FAX NO.</u>
	Mr. Trey LINDSETH	OEP	395-	456-2710

FROM: Bryan SAMUEL *[Signature]*

PHONE NO.: (202) 395-5663

FAX NO.: (202) 395-3911

SUBJECT: Friday 5:30 Meeting

Mickey wants to the group to discuss strategy for building support in Texas and the border area for NAFTA and the supplemental agreement on environmental issues. Main contact will be Garry Mauro, Texas land Commissioner, who Mickey knows from the campaign. Mauro will want to talk about the Gulf of Mexico and the border area, in both cases with reference to efforts he has initiated or strongly supports to get the business community and others involved.

Business Council for Sustainable Development of the Gulf of Mexico

First and most important, Mauro will ask the Administration to take the initiative to generate U.S. business participation in the Business Council for Sustainable Development of the Gulf of Mexico. The basic idea is for a business-government partnership in the US and Mexico to protect/improve the environmental conditions in the Gulf while continuing to develop business opportunities in the Gulf area. The US business community generally supports this concept, but one corporation/CEO needs

to take the lead to build a strong business group behind it.

A group including Fred Krupp of the Environmental Defense Fund, executives from Conoco and Ciba Geigy, and 2 Mexican companies, met with President Salinas in December to discuss this idea, and got his enthusiastic support. Subsequently, the CEO of Grupo IMSA in Monterrey, Eugenio Clariond, has organized support from Mexican business. He also received endorsement from the world Business Council for Sustainable Development (chaired by Swiss businessman Stephen Schmidheiny) which played a major role in the Rio conference. Mexico is now waiting for the US to join in the Gulf of Mexico initiative.

Interested US companies include BFI and Dow as well as Conoco and Ciba Geigy, but for various reasons (corporate re-organizations, etc.) none of these companies want to spearhead the effort. Moreover, all are headed by Republicans; a Democrat or two would help make it bi/non-partisan.

Mauro's office is also in touch with EPA on this issue, in preparation for Browner's visit to Mexico next week. Their contacts there include John Cannon (tel: 260-4711), who left a law firm in 1992 to become head of EPA's Gulf of Mexico efforts, and was promoted on March 8 to Acting Deputy Administrator.

Finally, Mauro is working with the Texas Dept. of Commerce and Gov. Ann Richards on this idea. (We have learned separately that Gov. Richards is in town this week working with the White House and environmental groups on the NAFTA.)

Bentsen's Government Commission Concept

The other part of Mauro's Gulf of Mexico story is the concept of a government commission on the Gulf, proposed last year by Lloyd Bentsen. Mauro thinks that the Bentsen concept should be taken over by the White House and made into a Gulf of Mexico task force. The idea would be to make an overall assessment of environmental and economic development conditions in and around the Gulf. There is still some interest in this idea in the Congress (the Sunbelt caucus) but no leadership as yet, though Sen. Bob Krueger may drop in such a bill.

The Border Area

Mauro has been in El Paso and elsewhere along the border promoting the idea of a border environment and development task force. Interested people so far include the mayor of El Paso and some El Paso business people. Again, Mauro envisions White House leadership to get such an idea launched.



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

March 15, 1993

MEMORANDUM TO JAMES BAKER,
STATE DEPARTMENT, I./OES

FROM: PATRICIA BLISS-GUEST *PS*

RE: EAI CIRCULAR 175

We would like to thank you for sending us the draft Circular 175, "Authority to Negotiate and Conclude a Series of Environmental/Child Development Agreements...". We concur with the draft circular and clear the text.

We have also forward the draft text to the White House Office of Environmental Policy for its review.

Thank you for your assistance.

cc: Katie McGinty, OEP



March 15, 1993

UNCLASSIFIED

TO: OES/EHC - Paul Blakeburn
ARA/ECP - John Harrington
EB/IFD/OMA - Perry Ball
OMB - Scot Cameron
WH/EP - Patricia Bliss-Guest
L/T - George Tsft
L/EBC - Robin Frank
L/ARA - Allen Weiner

FROM: L/OES - James Baker, 647-2282, FAX 736-7115

SUBJECT: EAI Circular 175

Please review the attached draft Circular 175 request by COB Friday March 19. In my absence, please pass your comments to Marie-Paule Royle.

Thank you.

UNCLASSIFIED

TO: E - Mr. Pauver

FROM: OES - E.U. Curtis Bohlen
ARA -

SUBJECT: Request for Circular 175 Authority to Negotiate and Conclude a Series of Environmental/Child Development Agreements, and to Replace Certain Existing Environmental Agreements, between the Government of the United States of America and Governments of Latin America and the Caribbean that Have Received Debt Relief under the Enterprise for the Americas Initiative

ISSUE FOR DECISION

Whether to grant Circular 175 authority to negotiate and conclude a series of environmental/child development agreements, and to replace certain existing environmental agreements, between the Government of the United States of America and Governments of Latin America and the Caribbean that have received debt relief under the Enterprise for the Americas Initiative.

DISCUSSION

On June 27, 1990, President Bush announced the Enterprise for the Americas Initiative (EAI), a major foreign policy initiative for Latin America and the Caribbean, containing trade, investment, debt, and environmental components. The basic objective of the EAI is to deepen and expand the wide array of trade and investment ties which link the United States with the countries of Latin America and the Caribbean, and to promote democratic values and market-based economic reforms in the process. An ancillary objective is to increase the amount of financial resources that the governments of the region devote to environmental protection.

On November 28, 1990, Public Law 101-624 amended the Agricultural Trade Development and Assistance Act of 1954 to authorize the forgiving of P.L. 480 farm debt of Latin American and Caribbean countries if it is determined that they meet certain economic eligibility requirements (pursuant to Executive Order 12757 of March 19, 1991, this determination is made by the Secretary of the Treasury, in accordance with recommendations of the National Advisory Council on International Monetary and Financial Policies). P.L. 101-624

stipulates that interest owed on the remaining P.L. 480 debt may be paid in local currency into an environmental fund if the country in question has concluded an environmental framework agreement with the United States. The funds may then be disbursed for local environmental projects by a local administering body consisting of representatives from the U.S. Government, the foreign government, and local non-governmental environmental and community development organizations. In addition, the law established an Environment for the Americas Board consisting of U.S. Government and non-government representatives inter alia to advise the President on the negotiation and implementation of the agreements.

Based on this law, the United States negotiated and concluded environmental framework agreements with Bolivia (November 26, 1991), Chile (February 27, 1992), and Jamaica (November 26, 1991), based on Circular 175 authority granted on June 21, 1991 (TAB 2). The President's power to enter into and conclude these agreements was delegated by Executive Order 12757 to the Secretary of State.

On October 23, 1992, a new Part IV was added to the Foreign Assistance Act of 1961 by P.L. 102-549. This new law provides authority to reduce debt owed by Latin American and Caribbean countries to the Agency for International Development. As in the case of the P.L. 480 debt, interest may be paid in local currency into a fund if the country in question has concluded a framework agreement with the United States. Funds may then be disbursed for local projects by an administrative body organized under local law. The negotiation of these agreements is also pursuant to the advice of the board consisting of U.S. Government and non-government representatives, which for purposes of both the AID debt and P.L. 480 debt is renamed by P.L. 102-549 the Enterprise for the Americas Board.

There are, however, two key differences in the new AID debt reduction legislation. Local currency interest payments associated with the AID debt shall be used not just for environmental activities, but also for "child survival and other child development activities." In recognition of the expansion of the purpose of the program, the legislation refers to the agreements as "Americas Framework Agreements" and the funds into which interest may be placed as the "Americas Funds." Second, to qualify for AID debt relief, the foreign government must meet certain political requirements in addition to economic requirements. It must be a country whose government: (1) is democratically elected; (2) has not repeatedly provided support for acts of international terrorism; (3) is not failing to cooperate on international narcotics control matters; and (4) does not engage in a consistent pattern of gross violations of internationally recognized human rights. This determination is made by the Secretary of the Treasury in accordance with the recommendations of the Secretary of State (Executive Order 12757, as amended Dec. 3, 1992).

We would like to negotiate and conclude framework agreements with Latin American and Caribbean countries that take account of the authorities we now have with respect to both P.L. 480 debt and AID debt reduction. A generic agreement (TAB 1) will be used as the basic negotiating document in countries that benefit from both P.L. 480 and AID debt reduction (e.g. El Salvador, and Uruguay). This generic agreement will be altered as appropriate for those countries that benefit from only one type of debt reduction (for instance, countries such as Argentina and Colombia benefit from AID but not P.L. 480 debt reduction). For countries with which we already have agreements related to P.L. 480 debt reduction that we would like to expand to cover AID debt reduction (e.g. Jamaica and Chile), we will either replace the existing P.L. 480 agreement with the generic AID/P.L. 480 agreement, amend the existing P.L. 480 agreement to reflect the provisions of the generic agreement or negotiate a separate AID agreement. Though once concluded each agreement may vary somewhat in its details to meet the particular circumstances of each country, it will not change substantially from the generic agreement because of the need to include the basic criteria set forth in U.S. law.

As provided by the relevant laws, the attached generic agreement was presented to the Enterprise for the Americas Board, which approved the Agreement with minor amendment. Any proposed changes from the generic agreement would be fully reviewed by ARA, OES, L, and other agencies as appropriate.

Conclusion of such agreements would only take place with countries that have been determined eligible in accordance with U.S. law. The attached legal memorandum (TAB 3) states that there is no legal objection to the negotiation and conclusion of these agreements.

SOURCE OF FUNDING

All U.S. activities under these agreements will be subject to the availability of appropriated funds and personnel. The Department of State commits no funds to the implementation of these agreements, other than the travel funds required in the course of their negotiation. The requirement that the USG be represented on the local commissions to be established under the agreements will impose an additional administrative burden on the agency providing that representation. It is assumed that in most cases the USG representative will be the AID officer responsible for USG-funded environment and development programs in the host country, and that no increase in personnel or administrative costs will result.

ENVIRONMENTAL CONSIDERATIONS

The preparation of environmental documentation for negotiation and conclusion of these agreements is not required under Executive Order 12114 (January 4, 1979), "Environmental Effects Abroad of Major Federal Actions."

CONGRESSIONAL CONSULTATIONS

Congress is well aware of, and has expressly authorized, the negotiation and conclusion of these agreements. No additional consultations are necessary, although relevant members and staffers will be kept apprised of the progress of the negotiations.

RECOMMENDATION

That you grant Circular 175 authority for the negotiation and conclusion of a series of environmental/child development agreements, and the replacement of certain existing environmental agreements, between the Government of the United States of America and Governments of Latin America and the Caribbean that have received debt relief under the Enterprise for the Americas Initiative.

Approve: _____

Disapprove: _____

Attachments:

- TAB 1 - Draft generic agreement
- TAB 2 - June 21, 1991 Circular 175 action memorandum
- TAB 3 - Memorandum of Law

Drafted: L/OES:SMurphy/JBaker^{MS}
SELOES 3756 1/8/92 647-2282

Cleared: 1::AKreczko
L/OES:SBiniaz^{MS}
L/T:GTaft
L/EBC:RFrank
L/ARA:AWeiner
OES:RSmith
OES/ENC:PBlakeburn
ARA:DMalpass
ARA/ECP:JHarrington
EB/IFD/OMA:PBall
AID/LAC:JMichel
Treasury:LStedman
Treasury/GC:LRoberts^{MS}
OMB:RGrady
WH:PBliss-Guest

NOTE TO EILEEN AND KATIE FROM DAN
RE: NAFTA/NACE NEGOTIATIONS
MARCH 15, 1993

Rufus finally agreed that there should be some written instructions for the negotiations on the NACE. I was able to review them today at State. They will be distributed and discussed at a 10 am meeting at USTR tomorrow.

In general, they looked pretty good (i.e., green). In some cases, what we might consider to be the preferred option was listed as an "FYI" note in the instructions. As appropriate we should be able to put those fully on the table.

Specifically:

Objectives -- looks good

General Functions -- looks good

NAFTA Functions

- o I think the NACE should be more than just a point of inquiry for disputes regarding environmental issues; it should have a specific role in dispute resolution.
- o The "FYI" note in this section suggests that the NACE could act as a forum for early consultation, and in that way it could provide some degree of dispute avoidance -- maybe this is the way to go.

Improving National Enforcement

- o Per the "FYI" note, this should apply to sub-national units as well as federal enforcement.
- o Provision for citizen suits (as raised in this section) is an important issue. It would be nice to make the provisions for environment consistent with other aspects of NAFTA as much as possible. (Parallels to intellectual property are limited by some Constitutional issues; maybe the labor section has some relevant provisions?)
- o The instructions as written are to "hint" about the need to discuss possible trade sanctions -- let's be bold and agree that we should in fact "raise" the need to discuss...

Other Aspects

- o In addition to the Secretariat and the minister-level Commissioners, there should be an independent advisory board that includes NGOs from each country. This idea is hinted at in the next section on public participation, but perhaps it should be raised in the context of the NACE structure.

- o A 2/3 majority (rather than consensus) in voting is very important on some issues as a kind of a "sunshine" provision that would prevent a country from blocking an investigation into lax enforcement, etc.

Transparency and Public Involvement -- looks good; see NGO advisory board comment above

cc: Marc Chupka



Coastal America

722 Jackson Place, N.W., Washington, D.C. 20503

Tel: (202) 395-3706 Fax: (202) 395-3874

March 12, 1993

MEMORANDUM

TO: Kathleen McGinty, Director
Office of Environmental Policy

FROM: Virginia K. Tippie, Director VKT
Coastal America

RE: NAFTA related Coastal America Projects

At our last meeting you requested that we identify some potential NAFTA related Coastal America projects. For your consideration, I've attached a brief description of two potential projects with Canada and Mexico.

POTENTIAL COASTAL AMERICA PROJECTS RELEVANT TO THE NORTH AMERICAN FREE TRADE AGREEMENT

CANADA - St. Croix Estuary

This project would develop an action plan and implement demonstration projects, in direct cooperation with Canadian interests, to reduce point and nonpoint source pollution into the St. Croix estuary.

The St. Croix River has been designated a Canadian Heritage River and sections of the river are designated "significant" under the Maine Rivers Act. The estuary supports commercial fishing and shipping and recreational activities. It also supports a large number of nesting bald eagles and ospreys, an abundance of soft-shell clam and scallop beds, and has outstanding potential for anadromous fish production because of its large drainage area and extensive lake system.

Harvest of shellfish resources in the estuary is largely restricted due to bacterial pollution. The shellfish beds below the City of Calais, Maine, have been closed to harvesting since 1969. Although significant improvements have been made to the Calais municipal wastewater treatment plant, stormwater discharge and land use practices in the area continue to contribute high levels of bacterial pollution.

MEXICO - Rio Grande/Rio Bravo River Basin

This project would develop a watershed action plan for the Rio Grande/Rio Bravo basin, the 355,000 square-mile area drained by the river called the Rio Grande in the U.S. and the Rio Bravo in Mexico. It includes two major tributaries, the Pecos River in the U.S. and the Rio Conchos in Mexico, and is a boundary between the U.S. and Mexico.

In concert with basin institutions that have a common commitment to regional self-determination, an alliance is being established among the interests and communities of the Basin to develop a vision for a sustainable future and an action plan to realize that vision. This effort, which is a component of the Sustainable Biosphere Initiative*, is ongoing through 1993 and will culminate with a basin-wide conference to be held in El Paso/Ciudad Juarez in February of 1994. The Coastal America partners could collaborate with this non-governmental effort to assure that the initiative will focus on management/policy concerns. The U.S. and Mexican partner agencies would identify specific actions to implement the consensus vision.

* The Sustainable Biosphere Initiative is a concept that was proposed by the Ecological Society of America and endorsed by the Council of Scientific Society Presidents.

NOTE TO EILEEN AND KATIE FROM DAN
RE: DEBRIEF OF MEETING WITH NWF ON THE CSD
MARCH 15, 1993

I met today with Angela Harkavy of the National Wildlife Federation on issues related to the UN Commission on Sustainable Development. She was particularly concerned with the composition and attitude of the US delegation to the recent CSD meeting in New York. (See attached "confidential" memo.)

- o She related that the NGOs were "alarmed" to see that Stephanie Kinney (whom they knew and distrusted from the climate negotiations) was now the UNCED coordinator (they would prefer Patricia B-G); and that, unlike Buff, John McGuinness was antagonistic towards the NGOs and their participation.
- o In general it sounds like the USdel has been pushing some bad positions only to have them soundly defeated and the US isolated (sound familiar?). Specifically:
 - + McGuinness asked the Secretariat not to accept reports from NGOs (defeated)
 - + USdel pushed for the CSD to be located in Geneva rather than NY because it wasn't important enough to be in NY (defeated)
 - + USdel proposed to put consideration of "forests" back in the "climate" category (again defeated, causing "bad feeling" and confusion a la Rio)
 - + USdel opposed consensus on the yearly treatment of the five cross-cutting clusters (e.g., finance, tech transfer, etc.)
- o The first substantive meeting of the CSD is June 14-25 in NY. The expectation (as with climate) is that the new Administration will make a big statement. It sounds like we probably need to.
- o The Secretary General (who will be making the nominations) has asked for recommendations for the high-level board of the CSD. We should think about who we might want -- the NGOs (via CAPE 2000) will be providing us with suggestions from the US and other countries.

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: ~~W~~ DATE: 03/14/17
2012-0769-F

~~CONFIDENTIAL~~

March 11, 1993

TO: Interested parties
FR: Angela Harkavy/T:202-797-6609/F:202-7975486
RE: 1. Final Resolutions on the organization of the CSD; 2. US Performance at the First Meeting of the UN Commission on Sustainable Development; 3. Up-coming ECOSOC Committee meeting on NGOs (March 27-April 2); 4. Points to give attention before next CSD meeting.

The 53 members of the Commission on Sustainable Development, chaired by Ismail Razali (Malaysia), **agreed** without vote in its first meeting last week, February 24-26, on a **resolution** that decides its **multi-year work program** and on a **provisional agenda for the first substantive session** (14-25 June in New York) as follows:

I. Multi-year thematic work program:

1. recommended for consideration at the substantive session (14-25 June in New York), the adoption of a clustering of chapters of Agenda 21 as the basis for its program of work, as follows:

- Critical elements of sustainability (chapters 2-5);
- Financial resources and mechanisms (chapter 33);
- Education, science, transfer of environmentally sound technologies, cooperation and capacity-building (chapters 16, 34-47);
- Decision-making structures (chapters 8, 38-40);
- Roles of major groups (chapters 8, 38-40);
- Health, human settlements and freshwater (chapters 6, 7, 18 and 21);
- Land, desertification, forests and biodiversity (chapters 10-15);
- Atmosphere, oceans and all kinds of seas (chapters 9 and 17); and
- Toxic chemicals and hazardous wastes (chapters 19, 20 and 22)

2. recommended that the first five of those clusters should be considered on an annual basis, and the remaining four on a "multi-year basis," (i.e. rotating in sequence, over several years).

II. Provisional agenda for the first substantive meeting:

1. examine "voluntary" national reports, and reports from all relevant organs, organizations, programmes and institutions of the U.N. system, as well as international financial institutions, including the GEF, and contributions from entities outside the U.N. system **including NGOs**;

2. examine national sustainable development plans;

The resolution also requests the chairman to conduct informal consultations during the intercessional period with all members of the CSD and other interested delegations in preparation for the June meeting.

III. North/South issues and U.S. Positions

Most of the negotiations went smoothly but for a few dissonant notes from China and India on the Southern side and from the U.S. on the Northern side, as follows:

A. China and India proposed the elimination from the text of the resolution of any references to guidelines for National Reports. With the mediation of Uruguay, the U.S. succeeded in defeating China and India on this issue. We welcomed this stand by the U.S.

B. On the other hand, the U.S. set brackets (i.e. held hostage till their concessions were met) around the resolutions's reference to financial commitments (chapter 33.14).

C. Another source of distress and surprise for delegations and NGOs was the U.S. proposal to remove the issue of forests from the issue cluster of "land, desertification, forests and biodiversity" and to include it in the cluster of "atmosphere, oceans and all kinds of seas." The U.S. was defeated by an almost unanimous opposition from all the other members of the Commission on the issue of forests.

Forests and Atmosphere

It was surprising to all, governments and NGOs, that the U.S. would try to bring back its old climate change model after being defeated both at the Climate Change Negotiations and at UNCED. In the U.S. model, forests are treated strictly as "sinks," which minimizes the importance of forests for a large range of other issues such as biodiversity, timber and non-timber products, indigenous rights, etc. The revival of this old U.S. position awakened soured feelings against U.S. positions.

U.S. Delegation

Another surprise was the composition of the U.S. delegation itself. The position of UNCED coordinator has been filled by a former climate change negotiator, Stephanie Kinney; together with other U.S. delegates, she was a champion of the old U.S. model, which among other issues treated forests as a sink. The implications of the U.S. positions on these matters for the North/South relations on Climate Change and Sustainable Development are many, most of them detrimental.

U.S. Style

Overall, the new U.S. Administration is not reflected yet in the negotiations. The U.S. approach to negotiations hasn't changed. The arrogance and the power struggle styles observed by many during the UNCED negotiations are still apparent in the tone struck by the delegation - as soon as China and India raised the specter of eliminating guidelines for National Reports, the U.S. overreacted as usual. Instead of seeking a negotiated solution, they immediately threatened to hold hostage again the financial issues. Although we appreciated the stand they

took, their confrontational attitude could have stalled the negotiation if they hadn't been rescued by the Uruguayan delegate. This is an outdated (and sometimes unethical) approach to negotiations; it did not work for the U.S. during UNCED, keeping the U.S. isolated and hated throughout the process.

U.S. Position on NGOs' Issues

The delegation's approach to NGOs was even worse this time. During UNCED, the U.S. was more open to NGO ideas and input than they were during these later meetings at the U.N. Many important issues, that will govern NGOs' institutional participation at the CSD, were ignored by the U.S. delegation even when members were approached by U.S. NGOs. During the discussions of the resolution, Canada proposed a provision under which the CSD officially would take into consideration NGO reports; when I approached the delegation to ask their support, I was told they were too busy with other issues to even consider NGO matters. After the Canadian proposal was accepted the U.S. tried to share credit for supporting it.

Unfortunately, the conclusion on this matter is that somehow the old administration's views are still prevailing in the negotiations at the UN, for UNCED matters. The U.S. "Non-Paper on CSD Agenda and Work Program", but for the points explained above is of little substance, though lengthy.

IV. Inter-Agency Committee on Sustainable Development:

This new body, set up to coordinate cooperation among all the U.N. agencies and programmes in the U.N. System, will be reporting on the changes in the U.N. that are needed to move toward sustainability. The first meeting of the IACSD will happen during the third week of March.

V. ECOSOC Organizational session April 29-30 will debate:

1. EEC participation in the CSD;
2. election of members for 1994?
3. High-level advisory body (15-25) to be appointed by the Secretary General;

VI. Preparations for the first substantive meeting of the CSD in June should give attention to the following subjects:

1. Structural organization of the Commission;
2. Methodology of work for integration of development and environment using newly devised indicators of sustainability;
3. Measurable principles of sustainability;
4. Priorities for the multi-year work programme;
5. Necessary financial resources for the work of the commission;
6. U.S. commitments to financial resources for the implementation of Agenda 21 (could be through the gradual increase of foreign aid towards the U.N. goal of 0.07% of GDP;
8. Proper mechanism for Consultation with NGOs inside the U.S.;
9. Inclusion of NGOs in the U.S. delegation;
10. Definition of a style of leadership, and of negotiations that aims to create partnership

and cooperation, and respects mediation, as opposed to confrontation;

11. Disclosure of U.S. plans to comply with Agenda 21 requirement to produce a National Sustainability Plan;

VII. Up-coming ECOSOC Committee meeting on NGOs, N.Y. March 27-April 2)

This meeting will make important decisions for the future of public participation at the U.N. Although the U.S. is not a member of the committee, non-members are welcome to participate and to give suggestions. I suggest that the U.S. attend these meetings and take a positive stand on the opening of the U.N. to broader public participation through more flexible rules of procedure for NGO accreditation to ECOSOC and to U.N. conferences and commissions. We will be sending more detailed information in a letter from CAPE 2000 shortly.

Working for the Nature of Tomorrow



NATIONAL WILDLIFE FEDERATION

1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

March 12, 1993

Katie McGinty
Special Advisor to the President
on Environment
Office on Environmental Quality
Old Executive Building
Room 360
Washington, D.C. 20501

Dear Katie:

The attached document is intended to give you an insider perspective of the negotiations at the first CSD organizational meeting. It also suggests what to look for in advance of the first substantive meeting in June. There is more to all these issues but most of it confidential.

Again, congratulations on your new position. I hope that my notes can help you. I am looking forward to seeing you next Monday.

Sincerely,


Angela Harkavy

OUTGOING FAX

U. S. MISSION - ECOSOC SECTION

UNCLASSIFIED ONLY

(212) 415-4141 (DEPT DIAL 44141)

PAGE 1 OF 3 PAGES

DATE: 3/15/93

FROM: Edward Marks

TO: 1) Katie McGinty

OFFICE/TEL (202) 456-6231 FAX 456-2710

2)

OFFICE/TEL FAX

SUBJECT: Statement made today at Intergovernmental Negotiating
Committee Framework Convention on Climate Change.

ROUTINE

PRIORITY

URGENT

COMMENTS: Text as delivered today by Ambassador Albright.

Note addition to para 1. Text was well received

and may well receive press notice.



UNITED STATES MISSION TO THE UNITED NATIONS

799 United Nations Plaza
New York, N.Y. 10017

Tel. 212-415-4050
FAX 212-415-4053

PRESS RELEASE

FOR RELEASE ON DELIVERY
CHECK TEXT AGAINST DELIVERY

Press Release USUN 32-(93)
March 15, 1993

Statement by Ambassador Madeleine K. Albright, United States Permanent Representative to the United Nations, at the 7th Session of the Intergovernmental Negotiating Committee, Framework Convention on Climate Change, March 15, 1993

Thank you, Mr. Chairman. I appreciate the opportunity you have afforded this delegation to make a brief statement on behalf of the new Administration of President Bill Clinton and Vice President Al Gore and to say how delighted I am to be here with you today as we dedicate ourselves to the work that this Committee must accomplish before the Convention enters into force and before the first meeting of the Conference of Parties. The Convention requires that we reach decisions at that meeting on a substantial number of issues. Among them, the Convention requires that we review the adequacy of the commitments contained in Article 4.2 (a) and (b), and provides for us to take appropriate action based on this review, which may include the adoption of amendments. The new Administration of the United States welcomes such a review.

My government recognizes the historic first step signalled by the signing of this Convention. At the same time, we are well aware of the disappointment in many quarters that the Convention did not go further, particularly in Article 4.2 (a) and (b). During the Earth Summit last June, our new President expressed his own disappointment and pledged to do better. The new Administration believes we must act with a sense of urgency to strengthen our common resolve for protecting the global climate.

In this regard, the new Administration has launched a comprehensive review of U.S. policy with respect to global climate change. We are examining all aspects of our policy to determine as quickly as possible how best to respond to this great threat to the integrity of the global environment.

-- more --

In our review, we will reassess all options for reducing greenhouse gas emissions. Our goal is to determine whether we can at least stabilize our greenhouse gas emissions by the year 2000. Already, President Clinton has announced plans to move forward with a new energy tax. We believe that this measure, as well as others that will emerge in our review, will help us move beyond previous policies and enable the United States to contribute substantially to the global effort to reduce greenhouse gas emissions.

In our view, it is vital that we meet the challenge of global climate change with all the energy and creativity we can summon. We must not delay in beginning serious efforts toward meeting the Convention's ultimate objective.

Toward that end, the previous Administration issued last December a "U.S. Action Plan for Global Climate Change." This document was prepared in accordance with paragraph 6 of this Committee's resolution on "Interim Arrangements," which invited states to communicate information concerning measures consistent with the Convention pending its entry into force. As the U.S. delegation made clear at the time, however, the document submitted was by no means a final plan.

Since December, it has been subject to public review and comment in the United States. The public review and comment period ended one week ago on March 8, 1993. I can assure you that the plan will be significantly revised to take carefully into account the comments received from the public and the results of our comprehensive review of policy options. We aim to set a high standard for ourselves, and to encourage the highest possible standard under the Convention. By June, the anniversary of the signing of this agreement, we will have made significant headway toward producing a new version of the plan and will make every effort to have that plan available by the Committee's next session in August of this year.

Mr. Chairman, the Earth Summit and the negotiations that led to it created historic opportunities for the nations of the world to build a partnership for sustainable development. No doubt, the problems we face are daunting. But Rio proved that by working together as partners we can make a difference. Together we have established a new basis for integrating the twin imperatives of environment and development. As much as was accomplished at Rio, the United States believes that much more can and must be done. This Committee and the vital preparations on which it is embarked can help to fulfill that promise. The United States wants to help lead this effort.

Thank you, Mr. Chairman.

* * * * *

"We recognize the mutual interests of the Nations which occupy the Continent of North America and the dependence of the welfare of each upon its natural resources. We agree that the conservation of these resources is indispensable for the continued prosperity of each Nation."

From the Declaration of Principles, North American Conservation Conference, February 23, 1909.

THE NORTH AMERICAN ENVIRONMENT: OPPORTUNITIES FOR TRINATIONAL COOPERATION

A COLLOQUIUM OF THE NORTH AMERICAN INSTITUTE
SANTA FE, NEW MEXICO
FEBRUARY 12-14, 1993

Friday, 6:30-8:30 p.m.
Artists' Pub

Reception and buffet
Hotel St. Francis

Saturday, 8:30 a.m.-12:30 p.m.
DeVargas Room

SESSION I. ANALYSIS AND ASSESSMENT OF OPPORTUNITIES

A. Existing Agenda for Trinational Environmental Cooperation

Canadian perspective:

Hon. Leonard Good

Mexican perspective:

Lic. Santiago Oñate Laborde

U.S. perspective:

Mr. Timothy Atkeson

B. Additional Opportunities for Trinational Environmental Cooperation

Environmental perspective:

Mr. Lynn Greenwalt and Mr. Stewart Hudson

Public policy perspective:

Mr. Paul Portney

NAFTA perspective:

Ambassador Arthur Campeau

C. Relevance of the European Experience

EC:

Mr. Gilbert Dubois

OECD:

Mr. F.G. Hurtubise

12:30-2:15 p.m.
Dining room

Luncheon

2:15-5:15 p.m.
DeVargas Room

SESSION II. WAYS AND MEANS TO RESPOND TO OPPORTUNITIES

A. Developing and Enforcing Regional Pollutant Standards

Presenter: Mr. William Futrell
Respondent: Mr. Paul Muldoon

B. Role of Multinational Corporations in Promoting Regional Environmental Cooperation

Presenter: Dr. Margaret Kerr
Respondent: Fis. Sergio Reyes Luján

C. Public and NGO Role in Fostering Trinational Cooperation

Presenter: Dr. Keith Caldwell
Respondent: Mr. Manuel Arango

7:00-10:00 p.m.
New Mexico Fine Arts Museum
107 E. Palace Avenue
Dinner and Keynote Speech
Dr. Gary Hufbauer

Sunday, 9:00 a.m.-noon
DeVargas Room

SESSION III. ACTION PROPOSALS: DISCUSSION AND RECOMMENDATIONS

Rapporteurs: Dr. Albert Utton and Mr. Robert L. Earle
Moderator: Dr. John D. Wirth

Colloquium site:
Hotel St. Francis
210 Don Gaspar Avenue
Santa Fe, NM 87501
tel 505-983-5700

NAMI office:
The North American Institute
128 Grant Avenue, Suite 106
Santa Fe, NM 87501
tel 505-982-3657
fax 505-983-5840

This colloquium was made possible by grants from the David and Lucile Packard Foundation and the U.S. Environmental Protection Agency, and by the support of Canadian and Mexican citizens.

**"The North American Environment:
Opportunities for Trinational Cooperation"**
The North American Institute, Santa Fe, Feb. 12-14, 1993

Canada

Ambassador Arthur Campeau, Q.C.
Ambassador for Environment and
Sustainable Development
Department of External Affairs
Lester B. Pearson Building
125 Sussex Drive
Tower A, 8th floor
Ottawa, Ont. K1A 0G2
Canada
tel 613-944-0886
fax 613-944-0892

Mr. Robert Couchman
113 Borden Street
Toronto, Ont. M5S 2N2
Canada
tel 416-921-8493

Professor Rod Dobell
School of Public Administration
University of Victoria
Victoria, B.C. V8W 2Y2
Canada
tel 604-721-6116
fax 604-721-8849

Ms. Jeanine Ferreti
Executive Director
Pollution Probe
12 Madison Avenue
Toronto, Ont. M5R 2S1
Canada
tel 416-926-9876
fax 416-926-1601

Hon. Leonard Good
Deputy Minister
Environment Canada
10 Wellington Street, 5th Floor
Hull, Québec K1A 0H3
Canada
tel 613-994-1655
fax 613-953-6897

Mr. Michael Keating
Environmental consultant and
writer
10 Astor Ave.
Toronto, Ont. MG4 3M2
Canada
tel 416-425-0005
fax 416-425-0019

Mr. Charles Kelly
The Canadian Public Affairs
Consulting Group
Suite 401
1155 Robson Street
Vancouver, B.C. V6E 1B5
Canada
tel 604-688-0753
fax 604-688-8239

Dr. Margaret G. Kerr
Vice President
Environment, Health and Safety
Northern Telecom, Ltd.
3 Robert Speck Parkway
Mississauga, Ont. L5A 3A2
Canada
tel 416-897-9000
fax 416-566-3038

Mr. Paul Muldoon
Counsel
Pollution Probe
12 Madison Avenue
Toronto, Ont. M5R 2S1
Canada
tel 416-926-1907
fax 416-926-1601

United States

Mr. Timothy Atkeson
3141 Highland Place NW
Washington, D.C. 20008
U.S.A.
tel 202-966-2923

Ms. Susan Bass
Environmental Law Institute
1616 P Street, N.W.
Washington, D.C. 20036
U.S.A.
tel 202-328-5150
fax 202-328-5002

Dr. Lynton (Keith) Caldwell
School of Public and
Environmental Affairs
Indiana University
Bloomington, Ind. 47405
U.S.A.
tel 812-855-7980
fax 812-855-7802

Mr. Guillermo Castilleja
World Wildlife Fund (U.S.)
1250 24th St., N.W.
Washington, D.C. 20037-1175
U.S.A.
tel 202-293-4800
fax 202-293-9211

Dr. George Cowan
The North American Institute
128 Grant Avenue, Suite 106
Santa Fe, NM 87501
U.S.A.
tel 505-982-3657
fax 505-983-5840

Linda Fisher
Consultant to the Administrator
Environmental Protection Agency
401 M Street SW
Washington, D.C. 20460
U.S.A.
tel 202-260-4711

Mr. J. William Futrell
President
Environmental Law Institute
1616 P Street NW
Washington, D.C. 20036
U.S.A.
tel 202-328-5150
fax 202-328-5002

Mr. Lynn A. Greenwalt
Vice President of International
Affairs and Special Assistant
to the President
National Wildlife Federation
1400 16th Street NW
Washington, D.C. 20036-2266
U.S.A.
tel 202-797-6669
fax 202-797-5486

Mr. Robert Hardaker
Senior Fellow
World Environment Center
1600 Wilson Blvd., Suite 500
Arlington, Va. 22209
U.S.A.
tel 703-524-2805
fax 703-524-2808

Dr. Alan Hecht
Acting Assistant Administrator
for International Activities
Environmental Protection Agency
401 M St. S.W.
Washington, D.C. 20460
U.S.A.
tel 202-260-4870
fax 202-260-9653

Mr. Stewart Hudson
National Wildlife Federation
1400 16th St. N.W.
Washington, D.C. 20036-2266
U.S.A.
tel 202-797-6602
fax 202-797-5486

Dr. Gary Hufbauer
Institute for International
Economics
11 Dupont Circle, N.W.
Washington, D.C. 20036
U.S.A.
tel 202-328-9000
fax 202-328-5432

Mr. Richard Kiy
Special Assistant for the
U.S.-Mexico Border
Office of International
Activities
Environmental Protection Agency
401 M St. S.W.
Washington, D.C. 20460
U.S.A.
tel 202-260-0791
fax 202-260-9653

Mr. Jonathan Lash
President
World Resources Institute
1709 New York Avenue, N.W.
Washington, D.C. 20006
U.S.A.
tel 202-638-6300
fax 202-638-0036

Mrs. Diana MacArthur
Chair and CEO
Dynamac Corporation
2275 Research Blvd., Suite 500
Rockville, Md. 20850-3268
U.S.A.
tel 301-417-9800
fax 301-417-6152

Ann C. Pizzorusso
Director, Environmental Affairs
North American Philips
Corporation
100 East 42nd Street
New York, N.Y. 10017
U.S.A.
tel 212-850-5472
fax 212-850-5515

Mr. Paul Portney
Resources for the Future
1616 P Street NW
Washington, D.C. 20036
U.S.A.
tel 202-328-5093
fax 202-939-3460

Mr. Mason Willrich
President and CEO
PG&E Enterprises
444 Market Street, Suite 1900
San Francisco, Calif. 94106
U.S.A.
tel 415-291-6410
fax 415-291-6498

Mr. Randolph Wu
Vice President
El Paso Natural Gas Co.
San Francisco, Calif.
U.S.A.
tel 415-765-6400
fax 415-391-9532

Mexico

Mr. Mario Aguilar
Environmental Attache
Embassy of Mexico
1911 Pennsylvania Ave. NW
Washington, D.C. 20006
U.S.A.
tel 202-728-1770
fax 202-728-1781

Mr. Manuel Arango
Campos Eliseos No. 400-10
11000 México, D.F.
México
tel 52-5-280-84-62
fax 52-5-280-28-51

Lic. Emilio Carrillo Gamboa
Bufete Carrillo Gamboa
Plaza Cormermex, Of. 609
Blvd. Avila Comacho #1
11000 México, D.F.
México
tel 52-5-202-70-00
fax 52-5-202-00-05

Embajador Juan Antonio Mateos
Director General de Asuntos
Internacionales
SEDESOL
México, D.F.
México
tel 52-5-271-45-10
fax 52-5-271-25-57

Lic. Santiago Oñate Laborde
Attorney General for the
Protection of the Environment
SEDESOL
Blvd. Pi Pila No. 1 - 1 Piso
Col. Lomas de Tecamachalco
Naucalpan de Juarez
53950 México, D.F.
México
tel 52-5-589-43-45
fax 52-5-589-79-83

Mr. Fernando Ortiz Monasterio
Director General
ERM de México, S.A. de C.V.
Mazatalán 96, Col. Condesa
México, D.F.
México
tel 52-5-286-46-26
fax 52-5-286-97-57

Fis. Sergio Reyes Luján
SEDESOL
Presidente del Instituto
Nacional de Ecología
Río Elba No. 20 Piso 16
Col. Cuauhtémoc
06500 México, D.F.
México
tel 52-5-553-95-38
fax 52-5-286-66-25

Mr. Mauricio Ruiz Galindo
Vicepresidente
Cia. Comerciale Industrial
Veracruzana, S.A. de C.V.
Reforma No. 90 Piso 5
Col. Juarez
06600 México, D.F.
México
tel 52-5-536-30-70
52-5-592-30-22
fax 52-5-535-30-70

International

Mr. Gilbert Dubois
First Secretary
Delegation of the Commission of
the European Communities
2100 M Street, N.W., 7th floor
Washington, D.C. 20037
U.S.A.
tel 202-862-9570
fax 202-429-1766

Mr. F.G. Hurtubise (OECD)
Director General
International Affairs
Directorate
Environment Canada
10 Wellington Street
Hull, Québec K1A 0H3
Canada
tel 819-994-5203
fax 819-953-7025

Moderator

Dr. John D. Wirth
President
The North American Institute
128 Grant Avenue
Santa Fe, N.M. 87501
U.S.A.
tel 505-982-3657
fax 505-983-5840

Rapporteurs

Mr. Robert L. Earle
P.O. Box 2819
Corrales, N.M. 87048
U.S.A.
tel & fax 505-897-9470

Dr. Albert Utton
University of New Mexico Law
School
1117 Stanford NE
Albuquerque, N.M. 87131
U.S.A.
tel 505-277-4820
fax 505-277-4165

Excerpt from NAFTA: An Assessment
by Gary Clyde Hufbauer and and Jeffrey J. Schott

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3. Environment

With the election of President Clinton, environmental issues stand at the center of questions to be resolved before the United States ratifies the NAFTA. Environmental issues were certainly not forgotten in the NAFTA negotiations, and many points raised in our 1992 book were addressed.²² Indeed, the NAFTA stands as a landmark accord for handling environmental issues in a trade agreement. But the Bush administration's solutions fell behind the rising curve of environmental concerns. In contrast with goals advocated by environmental groups, the NAFTA provisions appear "mild in terms of obligations on Mexico, and vague in terms of substance" (Uimonen and Whalley 1992, 113). In recent years Mexico has unilaterally raised its standards and will probably continue to do so. The NAFTA attempts to ensure that existing standards are maintained, but the NAFTA does not contain provisions to upgrade the enforcement of existing standards or to adopt enhanced standards.

Mexican Unilateral Actions

Under President Salinas, Mexico has constructed a solid legal framework for protecting the environment.²³ All new investments must be accompanied by filing of an environmental impact assessment and meet from the outset Mexico's recently strengthened environmental standards. But Mexico's strong legislation has not yet been complemented by equally strong enforcement, directed both at individual industrial plants and at common municipal services.

Much has been done to correct the pollution created by individual plants. The number of Mexican environmental inspectors was increased from 109 in 1991 to more than 300 in 1992, including 200 inspectors operating in Mexico's border areas. As of August 1992, over 200 plants in the US-Mexico border region had been shut by Mexican officials for noncompliance with Mexican environmental laws. These efforts will be

22. For a good legal summary of the NAFTA accomplishments on the environment, see McKenna & Cuneo (1992).

23. US environmental groups acknowledge that Mexico has strong environmental laws. Justin Ward of the Natural Resources Defense Council recently testified that, "Mexico has made important strides in development of strong environmental laws and regulations . . . we are impressed by their rapid progress in crafting a legal and institutional framework for pollution control and natural resource protection." However, Ward emphasized the enforcement lapses that have plagued Mexico's environmental laws, including weak environmental impact assessment requirements for private and public developments. He also cited key areas, such as the lack of community "right-to-know" provisions for toxic releases, in which the scope of Mexican environmental law is more limited than requirements in the United States (Justin Ward, testimony before the Subcommittee on International Trade, Committee on Finance, US Senate, 16 September 1992).

strengthened by a recently approved \$50 million World Bank loan to modernize and decentralize SEDESOL, the Mexican environmental authority.²⁴

More difficult to solve are environmental problems associated with inadequate municipal services: contaminated drinking water, unauthorized hazardous waste dumps, poor sewage treatment, polluted rivers, and bad air quality. Over the last four years, President Salinas has increased the country's environmental budget sevenfold; in 1992 Mexico will spend 1 percent of its GDP on the environment, an unusually high figure for a developing country (*Journal of Commerce*, 24 August 1992, 8A).²⁵ But after decades of neglect, Mexico's environmental problems are deep-rooted and will require sustained long-term attention.

Bush Administration Actions

In its May 1991 Action Plan, the Bush administration promised to address environmental issues both in the NAFTA text and through bilateral and trilateral cooperative efforts.²⁶ When the NAFTA text was released, the administration argued that it had met its commitment to address environmental concerns through three mechanisms: explicit NAFTA provisions, the Integrated Environmental Plan for the Mexican-US Border Area (the "Border Plan"), and additional bilateral and trilateral arrangements, including a newly established North American Environmental Commission.

Explicit NAFTA Provisions

The NAFTA explicitly addresses environmental issues in four chapters: sanitary and phytosanitary measures (S&P, chapter 7b), standards-related measures (chapter 9), investment (chapter 11), and dispute settlement (chapter 20).²⁷ Much of the language in these chapters relating to the environment is either new to trade agreements or clarifies ambiguous

24. SEDESOL is the Secretariat of Social Development, which includes the former environmental agency SEDUE. SEDESOL has an enforcement budget of roughly \$68 million for 1992, up from \$4 million in 1989.

25. An increasing percentage of Mexico's environmental budget is being designated for enforcement purposes.

26. Soon after the administration released its Action Plan, the House of Representatives passed the Gephardt-Rostenkowski resolution (H.Res. 146), which bound the administration to meet its outlined commitments regarding labor, environmental, and health concerns in the NAFTA talks.

27. In addition, the preamble commits the three countries to "promote sustainable development" and to "strengthen the development and enforcement of environmental laws and regulations."

provisions in GATT articles and codes (and in the Uruguay Round draft text). The new and stronger language underpins the claim, often voiced by Ambassador Carla Hills, that the NAFTA is the "greenest" trade agreement ever negotiated.

In the S&P and standards chapters, the NAFTA meets our recommendation to maintain existing federal and subfederal health, safety, and environmental standards. These chapters permit a country to ban all nonconforming imports, so long as the country's standards are non-discriminatory, are "based on data or information derived using scientific methods,"²⁸ and respect both the national treatment and MFN principles. The NAFTA states that the parties may enact standards stricter than those at the international level (Article 905.3).²⁹ While the text does not explicitly ensure that subfederal governments can also enact standards stricter than the international norm, Article 902 states: "Each Party shall seek . . . to ensure observance of Articles 904 through 908 by provincial or state governments . . ." This language would seem to permit subfederal governments to enact standards that are stricter than international ones if stricter measures are otherwise permitted by national law.

Some critics view parts of the NAFTA text as hostile to environmental measures. David Wirth, for example, points to Article 712.1, which establishes the right of NAFTA parties to take measures "for the protection of human, animal, or plant life," provided that the measures are applied "only to the extent necessary to achieve the appropriate level of protection, taking into account technical and economic feasibility" (David Wirth, Assistant Professor of Law at Washington and Lee University, statement before the House Committee on Science, Space, and Technology, 30 September 1992).³⁰ Wirth is troubled by the phrase "to the extent necessary" because this phrase has been interpreted in similar

28. The reference to scientific methods (Article 724) hardly provides a touchstone for quick and easy resolution of disputes. Scientists often disagree on the harm associated with a given chemical or environmental change. And it is a value judgment, not a scientific judgment, whether a risk of one in a million (or one in 10 million) is "acceptable." The NAFTA parties are required to "take into account" the risk assessment techniques devised by international organizations, but that requirement still allows considerable scope for judgment.

29. By contrast, critics of the Uruguay Round draft text on S&P contend that it might establish international (primarily, Codex) standards as a "ceiling" on national S&P standards. In addition, the current Uruguay Round text has been criticized for its requirement that domestic S&P standards exceeding international norms must be supported by "scientific justification" and not be "maintained against available scientific evidence" (Mark Silbergeld, "NAFTA Food Safety Measures," Consumers Union internal memo, 15 September 1992).

30. It should be noted that the language "to the extent necessary" does not appear in the standards chapter; in that chapter the touchstones are scientifically based principles and nondiscrimination.

contexts by GATT panels to require, variously, a "least GATT-inconsistent" or "least trade-restrictive" environmental measure.

The GATT tests are designed to prevent environmental measures from becoming a new handmaiden of protection. However, in our opinion, the NAFTA could go part way toward recognizing Wirth's concerns without opening the door to trade protection masquerading as environmental protection. A suggestion offered by Justin Ward of the Natural Resources Defense Council points to a possible middle ground: a country's environmental measures should be sustained by a dispute panel, even if they are not in a theoretical sense the "least trade-restrictive," if no less trade-restrictive measure is both equally available and equally effective (Justin Ward, "NAFTA Assessment," memorandum to the authors, 4 November 1992).³¹ In addition, the scope of potential controversy would be substantially narrowed if existing federal and subfederal regulations were exempt from the "least trade-restrictive" test.

Probably the biggest gap in the S&P and standards chapters is that they do not explicitly address process standards. In some cases, no traces of the production process show up in the exported product. Nevertheless, for example, an agricultural product may be grown in a way that destroys an underground aquifer or ruins a nearby wetland through the use of DDT. But nothing in the standards or S&P chapters would address that possibility.

In our view, some attention to process standards should properly be a major objective of the Environmental Protection Commission that Clinton called for in his campaign speech on NAFTA. But it is still an open question whether Clinton's proposed supplemental agreement on the environment should only address those processes that affect the global commons (such as taking dolphins from the sea) or spill effluents that cross international boundaries (such as pollution of the Rio Grande); processes that have irreversible effects but are contained within national borders (such as clearing a tropical forest); or processes that have strictly local and reversible effects (such as the emission of particulates into the atmosphere).³² As discussed later, we think that the reach of NAFTA into process standards should reflect both the nature of the process and the extent of its economic impact.

The NAFTA dispute settlement procedures are environmentally friendly in various ways. First, to promote cooperation and harmonization, the agreement establishes a Committee on Sanitary and Phytosanitary Measures and a Committee on Standards-Related Measures. Both commit-

31. Consideration should also be given to cost: the hypothetical alternative should be preferred if it is less costly than the measure under dispute; if it is substantially more costly, it should not be regarded as a reasonable alternative.

32. This trichotomy was suggested by William Cline, Institute for International Economics, 24 November 1992.

tees are supposed to play a role in dispute resolution proceedings. Second, the S&P subchapter explicitly places the burden of proof on the party that challenges an environmental measure.³³ Third, the dispute settlement chapter gives the complaining party the right to have a dispute resolved either through the NAFTA dispute mechanism or through the GATT.³⁴ To the extent that NAFTA environmental standards are higher than the GATT standards, the complaining party will thereby have a better chance of achieving its objectives.³⁵

The investment chapter permits each country to impose environmental requirements on inward foreign investment, so long as those requirements also apply to domestic investment. Critics of the NAFTA, particularly organized labor, have long claimed that the agreement will encourage US and Canadian companies to move south to take advantage of Mexico's weaker environmental standards.³⁶ Responding to this fear of "runaway plants," the investment chapter states: "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures" (Article 1114.2).

This language has a "green" character. Nevertheless, for a complaining NAFTA partner to prevail in a dispute, it would probably have to demonstrate that the other partner intends to encourage investment by its environmental measures. Intent is always hard to prove, and the offending country could almost always cite some other reason for altering its standards. Critics are therefore not satisfied with the language in the investment chapter. Further, they point out that if a country discovers one of its NAFTA partners relaxing its standards or enforcement measures, the concerned country can take no action to remedy the situation other than consultations. In this important respect, the agreement falls short of our recommendations.

Environmentalists argue that the NAFTA should explicitly state that lax environmental regulations or enforcement practices constitute unfair trade practices, which in turn should permit a partner country to apply trade remedies. Without such enforcement powers, environmentalists claim, the call in the NAFTA preamble to "strengthen the development and enforcement of environmental laws and regulations" will have little practical meaning. Ambassador Carla Hills, by contrast, has argued that

33. Under Article 723.6, "a Party asserting that a S&P measure of another Party is inconsistent with [the agreement] shall have the burden of establishing such inconsistency."

34. While parties are free to make the initial choice of forum—GATT or NAFTA—once dispute settlement procedures are initiated in one forum, they cannot be switched to another (NAFTA Article 2005).

35. However, since NAFTA does not cover process issues, cases in that realm would presumably go to the GATT (Charnovitz 1992a, 335–56; 1992b).

36. These criticisms were reiterated by Ross Perot, especially in the third presidential debate, held 19 October 1992.

there is no legitimate basis for concern that Canada or Mexico will lower standards to attract investment (Testimony before the US Senate Finance Committee, 8 September 1992). However, while NAFTA states that a party cannot relax its standards, the issue of better enforcement is not explicitly addressed.

In our view, the fear of runaway plants attracted by lax environmental standards or enforcement has been exaggerated. First, with rising per capita incomes, Mexican citizens will exhibit even stronger demands for a cleaner environment (The World Bank, *World Development Report 1992*, 36-41). Most Mexicans need no convincing that lax enforcement of environmental regulations is a bad idea. Second, as the Mexican political system becomes more open, these demands will be felt by Mexican leaders. Third, for the vast majority of US and Canadian companies, the cost of moving to Mexico could not be justified by the savings obtained from lax enforcement of environmental standards.³⁷

Even though the runaway plant may be a problem of minor rather than major economic proportions, it plays a very large role in the US public's acceptance of free trade with a poorer country. Thus, it is a matter of concern that the agreement falls short of providing an explicit plan for the parties to raise their standards (including their enforcement efforts).

We recommend that the parties undertake negotiations to elevate, to the highest common denominator, those standards or enforcement practices that have a measurable effect on trade patterns. This should be a task for Clinton's Environmental Protection Commission (discussed below). If, after an appropriate period of consultation and negotiations, a country failed to enforce its own minimum standards, or if the countries could not agree on common NAFTA standards, the issue would be handed over to dispute settlement proceedings. As an ultimate sanction, after allowing a reasonable period for voluntary implementation of the recommendations, a second international panel could authorize a low-rate "green fee" on all the respondent nation's exports to the other NAFTA countries. The "green fee" (unlike countervailing duties) would not be imposed unilaterally and would not be specific to a particular product. Again (unlike countervailing duties), the fee would not be retained by the importing country. Instead, the funds generated would be either be paid to a binational institution (the NAFTA Fund in the

37. For most US industries, pollution abatement costs represent a small share of total production costs: 86 percent of US industries have abatement costs under 3 percent of total costs (World Bank, *World Development Report 1992*, 128). Companies for which the benefits of lax environmental standards substantially outweigh the costs of moving presumably were attracted to Mexico long before the NAFTA negotiations began. However, by eliminating tariffs on shipments to the United States, the NAFTA might attract additional companies seeking refuge from pollution standards.

case of US-Mexico trade) or to Canada (in the case of Canadian exports).³⁸ The green fee would thus discourage bad environmental practices and provide a funding source for better practices.³⁹ But the green fee would not become a mechanism for interrupting trade flows in particular products, and thus it should not become a lightning rod for protectionist initiatives.

The Border Plan

The Bush administration's second mechanism to address environmental concerns was the Integrated Environmental Plan for the Mexican-US Border Area (the "Border Plan"). The Border Plan, released in February 1992, commits the United States and Mexico to pursue specific objectives: strengthen the enforcement of existing environmental laws; reduce pollution through joint initiatives; expand planning, training, and education programs; and improve mutual understanding of environmental conditions along the border.

The Border Plan is an important first step in binational cooperation to address serious pollution along the 2,000-mile border. Critics of the Border Plan claim that it is vague, without formal links to the NAFTA. We do not think that formal links to the NAFTA are essential—after all, the United States and Mexico have negotiated many agreements that are not formally tied to the NAFTA text.⁴⁰ But we do think that the criticism of vagueness has merit. The Border Plan does not commit the parties to specific projects, and it lacks a long-term funding strategy.

Mexico promised \$460 million for the Border Plan over the next three years. The Bush administration committed \$379 million to the plan over the next two years, with \$241 million allocated for 1993 (US Trade Representative 1992b, 14). However, the US funds have not been appropriated by Congress: in political terms, border environmental projects must compete with equally worthy projects elsewhere in the country, including a backlog of \$80 billion of unfunded sewage treatment plants (*Journal of Commerce*, 24 August 1992, 8A).

Even assuming that Congress appropriates the full \$379 million for the border, notwithstanding competing demands, our rough reckoning suggests that this amount falls far short of the resources required. We recommend that the United States budget at least \$5 billion over the

38. The NAFTA Fund is explained in this chapter's subsequent section on financing the NAFTA.

39. To the extent that green fees, or other NAFTA Fund monies, are used to improve environmental practices, those uses should not be regarded as a countervailable subsidy under the laws of the NAFTA partners.

40. The recently signed (but not yet ratified) US-Mexico Income Tax Treaty is a case in point.

next five years to clean up and improve the sewage, water, and air basin condition in the border region.

In any event, opponents of the NAFTA believe that neither the Mexican nor the US governments will meet their environmental commitments once the agreement is ratified and political leverage is thus lost. The worsening problem of hazardous waste illustrates their concern. The Texas Water Commission (the state's primary environmental enforcement agency) has an annual budget of only \$250,000 to cover an enforcement region of 8,800 square miles. Yet this commission must ~~confront a large number of truckers that haul hazardous waste from the United States into Mexico for cheap and illegal disposal.~~ A contributing factor is that many maquiladoras in Mexico do not follow prescribed rules for shipping hazardous waste back to the United States for legitimate disposal. The reason is cost: disposing of the hazardous waste legitimately can cost as much as \$1,000 per barrel for some substances (*Wall Street Journal*, 10 November 1992, A1).⁴¹

In the case of hazardous waste, one possible solution is to set up a system of licensed and regulated hazardous waste disposal companies. In a given region, all factories would have to register with the licensed company. The licensed company would charge a lump-sum fee (set according to regulations) for each factory based on the projected amount and type of hazardous waste that it will generate (the fee would be periodically renegotiated to reflect actual waste generation). The disposal firm would then collect and dispose of the hazardous waste and in general serve the role of hazardous waste policeman in the region.⁴²

The practical political question ahead is how to devise and implement such solutions, now that the NAFTA negotiations are completed. According to the Bush administration, the United States and Mexico "have developed one of the world's most comprehensive bilateral relationships in the area of environmental protection" (USTR 1992, 14). Despite myriad joint initiatives the two countries have undertaken to reduce border pollution and to address problems in the interior of Mexico, environmental groups are not convinced that these mechanisms will adequately deal with the environmental issues facing North America.

In response to this criticism, in September 1992 the three countries agreed to establish a North American Environmental Commission to promote long-term cooperation on improving the environment.⁴³ Ac-

41. One study found that only 33 out of 600 maquiladoras had registered to transport their hazardous waste back into the United States.

42. The regulatory body (for example, a committee of EPA and SEDESOL) would monitor the performance of the licensed company. The advantage of this approach over disposal by a government agency is that it minimizes bureaucratic cost and obstacles and provides funding outside the public budget process.

43. When the administration announced that it would establish the North American En-

cording to Ambassador Carla Hills, the commission will have three purposes: to provide a forum to discuss environmental issues of concern to the three environmental ministers, to support cooperation on environmental matters and solutions to environmental problems, and to help coordinate environmental expertise and information. In concept, the mandate of the Environmental Commission was basically limited to common problems with a direct connection to NAFTA.

Clinton's Plan

In October 1992 Governor Clinton delivered a major speech in which he endorsed the NAFTA and said he would not renegotiate the pact if elected president (Clinton 1992). He would, however, negotiate three supplementary agreements, one of which would create a trilateral Environmental Protection Commission, to be headed by Vice President Gore.

In many ways, Clinton's Environmental Protection Commission is a "bigger and better" version of the North American Environmental Commission proposed by President Bush in September 1992. Clinton's Environmental Protection Commission essentially gives more funding and more enforcement power to the Bush administration's commission. According to Clinton, his commission would have "substantial powers and resources to prevent and clean up water pollution" and would "encourage the enforcement of the country's own environmental laws through education, training, and commitment of resources, and provide a forum to hear complaints." Furthermore, the commission would have the "power to provide remedies, including money damages, and the legal power to stop pollution" (Clinton 1992, 14).

~~Details of the Clinton Environmental Protection Commission remain to be drafted.~~ Several bilateral commissions already deal with transboundary water-quality issues and other problems (for example, the Canada-US International Joint Commission). Presumably, the Clinton Environmental Protection Commission will coordinate these existing bodies, as well as taking on new tasks. Beyond that obvious mandate, Clinton, Salinas, and Mulroney must make a strategic decision of how environmental convergence is to be sought.⁴⁴

- through rhetorical complaints directed by each country against the other, with very little action (the situation with Canadian complaints about acid rain from US power stations until the late 1980s);

Environmental Commission, the National Wildlife Federation (the nation's largest conservation organization) endorsed the environmental provisions of the NAFTA, the first major environmental group to do so.

44. This trichotomy was suggested by David Leyton-Brown in private remarks to the authors, 17 December 1992.

- through enforcement actions against each other, by way of trade reprisals (as with US actions under the Marine Mammal Protection Act against imports of tuna from Mexico);
- through joint design of environmental product and process standards, initially with cooperation at the federal level and later with cooperation at the state and provincial levels.

While all three approaches are likely to be used, in our view, the sooner that emphasis is placed on joint design of product and process standards, the better. ~~Toward this end, the new commission should sponsor broad assessments of environmental conditions in each country.~~ The assessments would examine, for example, air basins, hazardous waste dumps, sewage treatment, forest practices, and similar problems. The assessments should be updated regularly to determine the extent to which the parties have achieved the environmental objectives of the NAFTA. Qualified experts should make these assessments on the basis of public hearings, available data, and field inspections. Where necessary, the commission would have the power to compel firms and municipalities to open their doors and books to provide evidence. The assessments should be published, on the theory that sunshine is the best disinfectant.

Second, the commission should perform a detailed and open evaluation of the means by which citizens and public interest groups can use legal and administrative processes to compel state and federal governments to enforce standards that have been legally established. This investigation should address both the problem of excessive litigation as well as the problem of inadequate legal remedies. It should examine the workings of judicial mechanisms, including the questions of standing, injunctive relief, and penalties for environmental abuse. For the foreseeable future, the commission should confine itself to suggesting, rather than prescribing, changes in national legal systems.

Third, the commission should establish a procedure to encourage the upward harmonization of environmental standards and enforcement, especially in the area of process standards (such as aquifer pollution).⁴⁵ Processes that abuse the global commons or the transboundary environment should be the subject of upward harmonization within the NAFTA, regardless of any trade effects.⁴⁶ In addition, process standards with a measurable trade effect should be subject to review, as discussed earlier, with the possibility of upward harmonization. At a later stage,

45. A timetable for upward harmonization of standards is suggested on page 152 of our 1992 book.

46. Processes that abuse the global commons will, of course, be discussed in multilateral forums as well as in the NAFTA. When progress is being made multilaterally, the NAFTA partners would normally recess their own talks.

say in 10 years, processes with an irreversible environmental impact, but an impact contained economically and physically within national borders, might also be the subject of upward harmonization within the NAFTA.

The fourth point deals with sanctions. In the vast majority of cases, commission review alone should lead to better process standards. In a few cases, additional sanctions may be required to redress trade distortions created by lax standards or enforcement. Our preferred sanction, mentioned earlier, is a system of "green fees" applied to all exports from any NAFTA country that, after a period of consultation, does not raise its environmental standards or enforcement rigor to the level recommended by an international panel. The green fees would be assessed by a second international panel only upon application by one of the NAFTA countries, and only upon clear and convincing evidence that the recommended higher standards are necessary to fulfill the objectives of the NAFTA.⁴⁷ Once assessed, the green fees would be remitted to the NAFTA Fund in the case of fees levied against US or Mexican exports, or to Canada in the case of Canadian exports.

Finally, the commission should seek wider implementation of the "polluter pays" principle. This principle was long ago endorsed by OECD nations, but it remains to be implemented in a wide range of activities, from industrial air emissions to household sewer connections (Rich 1992, 45). Implementation of the "polluter pays" principle should be the main way in which NAFTA countries correct industrial and municipal processes that have local and reversible pollution effects.

47. Petitioning nongovernmental organizations, such as the National Wildlife Federation, would present initial complaints to their home governments rather than to the commission. The home government would then decide which issues to bring to the commission.

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2012-0769-F

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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

b(1) National security classified information [(b)(1) of the FOIA]
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RR. Document will be reviewed upon request.

[006]

PRD ON TRADE AND THE ENVIRONMENT

<u>Name</u>	<u>Agency</u>	<u>Phone</u>	<u>Fax</u>
Dan Blank	White House	456-6224	456-2710
Cindy Sheeley	USDA	720-3631	720-5437
(b)(3)			
Jeri Jensen	Commerce	482-1051	482-5933
John Hill	Defense	703-695-9282	703-695-0054
Jack Blanchard	Energy	586-6703	586-2062
Annie Petsonk	Justice	514-7982	514-0557
Carol Grigsby	AID	647-7034	647-8595
Mary Wileden	Treasury	622-1536	622-1731
Brooks Yeager	Interior	208-4203	208-4561
Natalie Tawil	CEA	395-3142	395-6947
Pep Fuller	EPA	260-7176	260-0512
Bob Reinstein	State	647-2232	647-0217
Peter Yu	NEC	456-2800	456-7739
Lisa Witt	OMB	395-4604	395-5651

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20506

March 4, 1993

MEMORANDUM

TO: Katie McGinty
Deputy Assistant to the President
for Environmental Policy

FROM: Carmen Suro-Bredie *CS*

Pursuant to PRD/NSC-12, I chaired two interagency meetings this week to begin the drafting process for a review paper on trade and the environment. At those meetings, agencies were tasked with preparing short papers for next week that will be used in drafting the review paper. A list of tasking assignments is attached.

In order to ensure we are able to meet the short deadline that the White House has set for completion of the trade and environment review paper, I will inform you immediately if any agencies are unable to complete their submissions by next week.

cc: Eileen Claussen

**TASKER FOR PRD PAPER
ON TRADE AND THE ENVIRONMENT**

*** Note:** Papers tasked below can be informal documents, and need not be fully cleared. Papers should also be short (one or two paragraphs in many cases).

I. Process Issues: Public Participation

A) Policymaking and Negotiations

USTR: Provided TPSC paper 1992-20, on NGO participation in trade and environment meetings at the GATT and OECD. Agencies were asked to review this document by March 8.

All agencies: Report on any international negotiations that they chair in which NGOs are involved at the March 8 meeting.

State: Prepare a paper by March 8 covering: the nature of NGO involvement in international environmental meetings (including the UN, UNCED and fisheries talks), distinguishing, as appropriate, treaty negotiations from non-legally binding negotiations (e.g., OECD), from technical discussions; and any changes in State's policy regarding NGO participation, particularly in the climate change negotiations. The paper will cover the ability of NGOs to speak at these meetings and whether NGOs are allowed to participate in the negotiations themselves. State also committed to bring a representative from the Legal Advisor's Office to the March 8 meeting to address issues involving NGO involvement in treaty negotiations and OECD document confidentiality.

Commerce: Prepare a paper by March 8 describing NGO involvement in talks on whaling and meetings of the Inter-American Tropical Tuna Commission and other fisheries conventions.

EPA: Prepare a paper for March 8 discussing linkages between the domestic approval process (e.g., for test guidelines) and NGO participation in the OECD chemicals group. Also, prepare a paper by March 8 describing the nature of and legal basis for NGO participation in the OECD chemicals group.

B) Advisory Groups

USTR: Prepare a paper by **March 8** describing USTR's private sector advisory system.

All agencies: Prepare a paper by **March 8** describing any private sector advisory groups involving trade or the environment that they chair. In particular, **Commerce** (covering the ISACs, IFACs and NOAA's advisory system), **Energy**, **Interior**, and **EPA** committed to provide papers.

Justice: Prepare a paper by **March 8** describing the status of OECD and GATT documents pursuant to FOIA and FACA, depending on whether they (a) are kept within the USG, (b) are provided to cleared advisors, (c) are provided to advisors who have signed confidentiality agreements, or (d) are distributed to selected members of the public.

C) Dispute Settlement

USTR: Will provide an oral briefing at the **March 8** meeting regarding NGO suggestions for increasing public participation in the dispute settlement process.

D) International Organizations

State: Prepare a paper by **March 8** describing UN policies for NGO participation, particularly in UNEP.

II. Process Issues: Policy Coordination within the USG**A) Coordination within the Executive Branch**

State: Prepare a paper by **March 11** describing how policy coordination takes place with trade agencies for issues involving international environmental agreements.

Commerce: Prepare a paper by **March 11** describing how export promotion activities are coordinated with environmental agencies. Also, describe policy coordination for fisheries agreements negotiated by NOAA.

AID: Prepare a paper by **March 11** describing policy coordination for the U.S.-Asia Environmental Partnership.

All agencies: Prepare a paper by March 11 describing how trade and environmental policies are coordinated for issues on which they have the lead -- particularly Interior and Transportation (for the Coast Guard).

B) Coordination with the Courts and the Congress

All agencies: Prepare a list by March 11 of all Congressional committees and subcommittees which have jurisdiction over trade and/or environmental issues within the agency's purview.

Justice: Prepare a paper by March 11 describing litigation involving trade and environment issues.

III. Analysis of Linkages Between Trade and Environmental Agreements

A) Environmental Analysis of Trade Agreements

All agencies: Review the USTR environmental review of the NAFTA before the March 11 meeting.

Justice: Bring to the March 11 meeting CEQ documents describing NEPA requirements, as well as Executive Order 12114. In addition, prepare a synopsis of the Massey decision by March 11.

EPA: Prepare a one-page description of the Canadian environmental review of the NAFTA by March 11.

Treasury: Prepare a paper by March 11 describing environmental reviews of structural loans performed by multilateral development banks.

State and AID: Prepare a paper by March 11 describing any non-project-related (i.e., structural) environmental reviews that they have performed.

EPA and Interior: Prepare papers by March 11 describing any reviews of which they are aware with environmental implications.

B) Analysis of Trade Measures in IEAs

State: Prepare a paper by March 11 describing a possible procedure for accommodating a trade policy analysis of international environmental agreements.

IV. Agency Positions

Agencies were asked to come to upcoming meetings with their positions on the following issues

- A) Whether we should maintain our current policy regarding NGO participation in the GATT and OECD (as outlined in TPSC Document 1992-20) -- by March 11.
- B) Preferred structure for interagency coordination of trade and environmental policy -- by March 11.
- C) Issues surrounding environmental analysis of trade agreements and trade policy analysis of environmental agreements (which will be outlined at the March 11 meeting) -- by March 16.

H:PRD.TASK

Working for the Nature of Tomorrow



NATIONAL WILDLIFE FEDERATION

1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

To: KATY MCGWY ATTN: TREN

FAX # 3 456 2710

From: STEWART HUDSON / RODRIGO PRUDENCIO

Phone # 797-6603 / 6602 Fax # 797-5486

Date: 3/4 Number of pages to follow: 13

Message: Katy requested this material on Canadian
NGO's position on the WACE / NAFTA. Clearly,
there is interest and it would be wrong if Can.
govt. were to say Can. groups didn't want a Commission
hope its useful.



March 3, 1993

By Fax

The Honourable Michael Wilton
Minister of Trade, and Industry
Science and Technology Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, K1A 0G2

Dear Mr. Wilson,

Attached please find a brief outlining some of the elements Pollution Probe feels are vital in ensuring that the proposed North American Commission on the Environment (NACE) is an effective institution.

The proposals we make are intended to advance the concept of a North American Commission on the Environment. The governments must take bold and innovative steps in their negotiations to establish the NACE. To successfully address the regional environmental concerns of the 1990s and beyond, the NACE must be a significant departure from those institutions established in the past. The NACE must marshal an unprecedented level of cooperative environmental efforts. It must address economic policies such as trade. It must also enshrine in its terms of reference: commitment to action, means for accountability, and meaningful public participation.

Pollution Probe looks to Canada to take leadership in promoting a vigorous and effective NACE. We hope that your negotiators will be incorporating our suggestions in the positions Canada brings to the table.

I would be pleased to meet with your officials to discuss any of the proposals we have made.

Sincerely yours,

Janine Ferretti
Executive Director

Encl.

cc. Mr. Barry Carin, External Affairs
Mr. David McLaughlin, PMO
Mr. John Weekes, External Affairs



**ELEMENTS OF AN EFFECTIVE
NORTH AMERICAN COMMISSION
ON THE ENVIRONMENT**

March 4, 1993

Janine Ferretti

**Pollution Probe
12 Madison Avenue
Toronto, Ontario
M5R 2S1
(416) 926-1907**

COLLECTION NUMBER: 100-4410-920-1001 MAR 04 30 10-40 190.012 P.0807

Introduction

There is a continued debate concerning the adequacy of the environmental provisions in the North American Free Trade Agreement (NAFTA). The governments of Canada and the United States have proposed to address this concern through the negotiation of supplemental agreements to deal with some of the environmental issues. In particular, the governments of Canada, Mexico and the United States have agreed to establish a North American Commission on the Environment (NACE) to enhance environmental cooperation in North America as well as monitor and address trade and environment matters related to the NAFTA.

This brief lays out some of the important elements to be considered in the establishment of an effective NACE.

Background

In 1991 environmental organizations from Canada, Mexico and the United States began calling on their governments to ensure that a trilateral institutional mechanism be established to: identify and address the environmental impacts of North American trade; to monitor and enforce environmental agreements; and to make recommendations for national actions on the environment.¹

¹ "The Environmental Dimensions of Free Trade: A Preliminary Identification Of Issues To Be Addressed Within the Context of Negotiations Of A North American Free Trade Agreement," Pollution Probe, June 1991.

"Binational Statement On Environmental Safeguards That Should be Included in the North American Free Trade Agreement". May 1992.

On September 17th, the governments of Canada, Mexico and the United States agreed to establish the North American Commission on the Environment (NACE).

The idea of a trilateral commission on the environment goes back much further, however. In 1909, the leaders of Canada, Mexico, the United States, and Newfoundland proposed the establishment of a North American commission to enhance the conservation of natural resources:

Since then, trade, including the likelihood of increased liberalized trade, between the three countries has brought additional environmental challenges to North America which need to be addressed. In this regard, the North American Commission on the Environment should play an important role in monitoring implementation of the environmental provisions of the NAFTA, identifying environment and trade concerns, and making recommendations to the NAFTA parties to address them.

Nonetheless, the value of a trilateral commission charged with addressing the ecological concerns facing North America stands alone. With or without the NAFTA, the NACE is an important institution to promote and activate cooperative efforts for environmental protection and sustainable development.

While Canada, Mexico and the United States debate the merits of economic interdependence codified in a North American Free Trade Agreement, the reality that the three countries have always been ecologically interrelated has been rarely acknowledged. The establishment of a North American Commission on the Environment is an essential formal acknowledgement of the ecological links which have always existed within the region of North America.

There are environmental imperatives for an effective regional institution to address North American environmental concerns. Some of them are:

- a) **Regional Pollution Problems** Environmental problems that appear to be "local" at first glance have significant dimensions at a broader regional level. For example, the International Joint Commission has recognized in its biennial reports to the governments under the *Great Lakes Water Quality Agreement* that the Great Lakes will remain threatened by toxic contaminants until regional and global action is taken. The high levels of a number of chemicals present in the Great Lakes are a result of air deposits coming as far away as the southern U.S. states and Mexico, and even further from South America. A regional institution would marshal cooperative efforts to help reduce the build up of toxic contaminants in the Great Lakes coming from beyond the Great Lakes Basin.

- b) **Regional Natural Resources** - While Canada, U.S. and Mexico do not share many of the same physical resources, they do share a number of migratory wildlife resources. Trilateral cooperation is needed to protect these resources.
- c) **Regional Emerging Problems** - While many of the environmental problems being addressed today have been a recognized concern for over 20 years, a growing number of new environmental problems are emerging. For example, it is becoming increasingly evident that climate change will impact North America. As such, a trilateral commission can have a positive anticipatory effect on working to avoid the problem and trying to mitigate its effect.

Purpose

The purpose of the proposed Commission is:

- a) to facilitate and enhance environmental cooperation among the countries in North America. The scope and operations of the NACE should reflect the ecological interdependence of Canada, Mexico and the United States;
- b) to monitor and address environmentally related trade issues; and
- c) to assist North American governments in implementing environmentally sustainable development.

I. FUNCTIONS OF THE NACE

There are three broad areas of focus for NACE: (a) environmental cooperation among the three countries; (b) trade related environmental issues and (c) environmental sustainability in North America.

A. The NACE and North American Environmental Cooperation

The facilitation of cooperative efforts to address environmental concerns is an important aspect of the NACE. The NACE would coordinate action on environmental concerns by developing joint strategies, facilitating common approaches, and recommending specific actions by national governments. To carry out this mandate effectively the NACE should:

I. Establish common environmental objectives and develop common policies and programmes to achieve them.

The NACE should play a lead role in identifying common environmental objectives in those areas regarding transboundary environmental issues (i.e. air pollution, etc.), or trade-related environmental concerns (i.e. labelling, environmental dumping, etc.). The NACE would recommend programmes, including minimal 'floor' standards, for national action to ensure that the parties at least meet the environmental objectives agreed upon. In essence, the Commission would work toward the upward movement of environmental objectives, gradually raising the level of environmental protection. It would also ensure there would be no backsliding of government objectives. Establishing specific timetables and milestones should be an integral part of the Commission's mandate in this area.

II. Audit the environmental performance of the Parties.

The audit function of the NACE must be an essential part of its mandate and it must be done in a credible fashion. The value of any cooperative initiative is in its follow-up and implementation. The NACE should have a vigorous role in ensuring that progress is made in achieving the environmental commitments made by the three countries. This aspect of the Commission's work is vital to ensure that environmental conflicts are prevented or minimized.

The NACE should audit and report on the national and international efforts of the Parties. Specifically, the NACE should audit:

- a) the adoption and enforcement of environmental laws and programs;
- b) areas where lack of environmental protection laws, lax enforcement or environmental action might lead to environmental conflicts among the three parties or to trade and environment conflicts; and
- c) the implementation of international environmental agreements and the effectiveness of the agreements in achieving the goals where relevant to the North American environment.

III. Investigate complaints or concerns raised.

The NACE should have the power to receive and investigate complaints from the Parties and from citizens concerning transboundary-related issues, environmental enforcement deficiencies by a party, and other matters related to the mandate of the NACE.

iv. Ensure enforcement of domestic environmental laws and international agreements.

The NACE should have an active role in ensuring that environmental laws of the three countries are meaningful, effective and enforced. The value of North American cooperative initiatives on the environment is entirely dependent on the strength of domestic environmental laws and the vigour with which they are enforced. Domestic environmental laws at the national or provincial and state level that are feeble or weakly enforced will undermine any regional efforts to protect the North American environment.

Pollution Probe recognizes that options such as the establishment of a super-national organization with the powers to investigate and enforce environmental laws in North America may be premature. Nor do we believe that vesting in national environmental agencies the power to investigate and enforce laws in other national jurisdictions will be considered acceptable.

We believe, however, that the adoption and enforcement of environmental laws are crucial to the success of the NACE and the environmental provisions of the NAFTA. Enforcement can be achieved in the following ways:

- a) Common environmental objectives for all Parties are established and the Parties are obligated to develop domestic laws or programmes to achieve them. It is crucial to ensure that these common objectives not inhibit a jurisdiction from setting tougher standards or programmes, but rather present a minimum "floor" level resulting in a basic level of environmental protection throughout North America.
- b) Each party is obligated to ensure that civil and administrative enforcement procedures are available under its domestic law so as to ensure effective implementation and action to be taken against any violation.
- c) Each party must make available to citizens of all three countries access to its civil and administrative enforcement procedures.
- d) Governments are able to challenge before an independent tribunal a party's domestic environmental law and/or its implementation where it is ineffective or where it is lacking in meeting the agreed objectives.
- e) The audit report of the NACE should identify inadequate and ineffectual domestic laws and programmes.

The steps to ensure the adoption and enforcement of environmental programmes as laid out in points (a) - (d) are similar to the enforcement provisions related to

Investment, intellectual property rights, and antidumping and countervailing duty matters in chapters 11, 17, and 19. As such, they should not present difficulties in gaining acceptance. The agreement to establish the NACE should include provisions that commit the parties to taking the steps outlined above.

v. Monitor and Identify emerging environmental concerns affecting North America.

The NACE should serve to anticipate and prevent environmental problems that will affect the North American environment in those areas where no existing bilateral or trilateral arrangements exist. For example, the NACE should not duplicate the functions of existing organizations such as the International Joint Commission or the International Boundary and Water Commission. The NACE, however, should be able to make recommendations on how the organizations and activities can be more effective.

In addition, the NACE should act as a forum where governments or citizens can bring up a bilateral or trilateral environmental concern not being addressed by an existing international agency, and request the Commission to investigate the matter and recommend appropriate action.

vi. Review and analyze environmental information.

The NACE has a role in research and analysis in two areas: environmental science and policy. Without duplicating the efforts of other existing research agencies, the NACE should review and commission studies where needed to identify and address North American environmental concerns. The research and analysis should be the basis for recommendations of the Commission.

A priority for the Commission in this area is to provide a regular public report on the state of North America's environmental quality. Work has been done on state of the environment reporting for individual countries. The experience gained in these efforts should be applied to the regional level of North America.

vii. Facilitate transfer of technology and access to funding for environmental protection.

Environmental cooperation in pollution prevention, remediation, enforcement and development of environmental standards will require technological and financial resources. The NACE should play a role in providing access to these. Creative arrangements with the private sector should be considered. Northern Telecom's

work on phasing out CFC use with its Mexican counterparts in cooperation with AT&T and the U.S. EPA is an example of this.

B. The NACE and Trade

While a substantial part of the activities of NACE will focus on promoting environmental cooperation, a significant amount of NACE's attention should be focused on trade-related matters.

Specifically the NACE should:

I. Monitor and report on trade-related environmental trends and impacts of the NAFTA.

The NACE should play a strong role in identifying trade-related environmental North America trends and issues to prevent trade and environment conflicts from occurring or improving the ability of governments to resolve them when they occur. The Commission would gather and disseminate information on trade and environment concerns in North America and keep track of conflicts when they occur.

The Commission should identify activities arising from the NAFTA which are causing or could cause irreversible damage to the environment. In particular, the Commission should review and evaluate the impact on the environment, natural resources and human health resulting from the implementation of specific provisions of the NAFTA. The NACE should make recommendations to the Trade Commission for appropriate action to stop or prevent the damage from occurring.

The Commission would also make recommendations on how Parties can prevent trade from having a negative impact on the environment, including strengthened domestic and international measures, as well as amendments to the NAFTA.

II. Oversee and assist in the implementation of NAFTA environmental provisions.

The NACE should have a role in monitoring the environmentally-related work of the Committees and Working Groups identified in the NAFTA and assisting where necessary. Examples where the NACE should have a role in implementing NAFTA provisions include:

- Chapter 9 - Technical Barriers to Trade. Articles 906.1 and Article 906.2

which commit the Parties to work together to enhance environmental measures; Article 913 which gives relevant responsibilities to the Committee on Standards-Related measures; and Annex 913-A and Annex 913-C which establish charge subcommittees to set emissions and environmental pollution levels that affect land transportation in North America.

- Chapter 11 - Investment Article 1114.2 calls Parties to avoid weakening environmental standards or enforcement in order to attract or maintain investment. The NACE should play a role in identifying violations of that provision. The Commission would report on the adoption and enforcement of environmental laws in the three countries. It could also play a role in the consultation process proposed.

Other NAFTA provisions where the NACE should play a role are in Chapter 7 and in Article 104.

In addition, the NACE should assist in interpreting NAFTA environmental provisions where clarification is needed in effectively implementing a provision. Areas where NACE should address include:

- adherence to ecological principles such as the precautionary principle in implementing provisions in Chapters 7 and 9.
- reference to "legitimate objective" of safety, protection of human, animal or plant life, the environment and sustainable development which exists in Chapter 9 should be included in Chapter 7.
- the use of subsidies to encourage better environmental practices.
- the definition of what constitutes "equally effective and reasonable measures" or complying to an international environmental agreement in Article 104.

III. Identify and report on the effectiveness of NAFTA's environmental provisions.

The NACE should evaluate the effectiveness of NAFTA's environmental provisions in achieving its stated goal of sustainable development and environmental protection. It should identify problems and solutions related to the implementation of NAFTA provisions. It should also identify areas where the NAFTA may need to be amended to better achieve its environmental objectives.

iv. Participate in the NAFTA dispute resolution process.

There are several ways that the NACE can assist in ensuring that the environment gets a fair chance when there is a trade and environment dispute under the NAFTA. The NACE should:

- a) help determine whether there are legitimate environmental aspects in a trade dispute. Should a case go before the Free Trade Commission under the NAFTA, the NACE should have a meaningful role in providing recommendations in the deliberations of the Trade Commission.
- b) play a role in providing a roster of capable and impartial environmental experts to be included in the roster of panellists. These experts would be called on to serve as panel members when an environmentally-related trade dispute goes before a panel.
- c) provide expertise on its own accord in the form of a brief or in response to a request by any of the disputing parties.
- d) serve as a point of input for public views and concern.

v. Assess the unfair competitive advantages.

The Commission should identify and assess unfair competitive advantages gained by parties resulting from differences in environmental standards.

The Commission should also establish procedures and disciplines to govern "environmental dumping". These are vital to ensure that producers pay for the environmental costs of their production.

vi. Serve as a forum for negotiating supplemental environmental agreements or amendments to the NAFTA.

The NACE should be charged with the responsibility of affecting any future changes to the NAFTA that are necessary to deal with environmental issues not now envisioned. The NACE should be given the authority to initiate these negotiations. The NACE should also participate in the procedures laid out in Article 2202 when amendments to the NAFTA are being sought by the Parties.

C. The NACE and Sustainable Development

Governments committed themselves to developing and implementing sustainable development strategies at the UN Conference on Environment and Development in Rio de Janeiro in June of 1992. The NACE can play a critical role in the development and implementation of these strategies in North America.

The NACE should:

- a) work to help governments direct economic policies in North America to achieve sustainable development in a coordinated fashion. It should focus on a set of specific economic policies at one time in all three countries and recommend ways they could be enhanced to achieve sustainable development.
- b) help promote the exchange of information regarding sustainable development efforts in all three countries. For example, it could link the efforts of Canadian Round Tables with similar initiatives in the U.S. and Mexico.
- c) act as a coordinating body in helping the three countries achieve some of the specific commitments laid out in Agenda 21. It could assist the countries of North America in playing a leadership role in implementation.

II. Structure of the NACE

I. Membership

The differing functions of the NACE, makes a dual - level membership necessary. The functions of the NACE can be grouped into two categories. One makes the presence of high-level government officials necessary. Included in this category are functions such as negotiating environmental agreements, coordinating national actions, etc. The other makes a certain amount of arms-length independence necessary. Included in this category are functions such as auditing, investigating complaints, etc.

An effective NACE will require both the presence of high-level government officials to provide political accountability and decision-making power, and the presence of a group of unbiased, arms-length experts.

To this end, the Commission should be composed of two distinct but related bodies. The first is the **Council of Ministers**. This council would be made up of the

environment minister of each country, acting as a counterweight to the North American Free Trade Commission, which is made up of Trade Ministers. The Ministers would chair the NACE.

The second is a **Public Citizens Advisory Board**. The Advisory Board would be composed of nine individuals, three from each country. The members should be impartial to national trade interests, and not have any conflicts of interest. The primary allegiance of the members, individually and collectively, should be to the North American environment. The primary role of this group is to carry out the work of the Commission that is best done by an independent group. In addition, the Board would coordinate citizen input into the activities of the NACE, and increase public participation in the implementation of the NAFTA as well as in the environmental cooperative initiatives of the NACE.

II. The Secretariat

A permanent secretariat will be needed to enable the Commission to carry out its mandate. A well-staffed secretariat, with equal representation from each country is crucial to the full-functioning of the Commission. The secretariat would be responsible for the daily operations of the NACE and would assist the Ministers and members of the Citizens Advisory Board in successfully fulfilling their roles. The secretariat would also provide the institutional research and technical capacity for the NACE.

III. Meetings

The NACE must be more than an annual meeting of Environment Ministers. The Ministers should meet as needed, but at least twice annually to review the work and recommendations of the Citizens Advisory Board, as well as the day to day operations of the Commission.

III. Public Participation

Openness, transparency and public access are essential elements of an effective NACE. In this regard the following elements of participation should be secured in the terms of reference of the NACE:

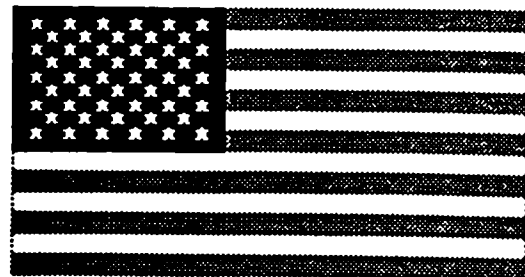
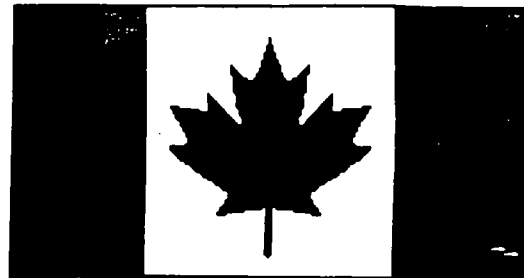
- a) the appointment of citizens groups representatives on the Citizens Advisory Board;
- b) the ability of citizens to bring a complaint to the NACE and request an investigation;

- 10-20 520 1001
- c) public access to documents, data and procedures of the Commission;
 - d) the ability of the public to provide input to and comment on draft recommendations and reports; and
 - e) adequate and effective channels for communication and dialogue between citizens groups and the Commission.

CONCLUSION

The governments of the Canada, Mexico and the United States stand before a unique opportunity to establish an institutional mechanism that reflects the ecological ties that have always existed between the three countries. The NACE represents a chance to better address the increasing number of transboundary issues. It is also a necessity in ensuring that the increased economic interdependencies are matched with increased cooperation and commitment to prevent and address the related environmental concerns.

Efforts to establish a successful NACE, however, will end in failure if the good intentions expressed by governments are not met with innovative and bold approaches. An institution set up in the 1990's to effectively address regional environmental concerns must be a departure from those institutions established in the 1970's and 1980's. The NACE must marshal an unprecedented level of cooperative environmental efforts. It must address economic policies such as trade. It must also enshrine in its terms of reference: commitment to action, means for accountability, and meaningful public participation.



**THE NORTH AMERICAN COMMISSION ON ENVIRONMENT
AND OTHER SUPPLEMENTAL ENVIRONMENTAL AGREEMENTS:
PART TWO OF THE NAFTA PACKAGE**

February 4, 1993

A Report Prepared by:

**Stewart J. Hudson and Rodrigo J. Prudencio
Trade and Environment Program
International Programs Division
National Wildlife Federation**

**1400 16th St. NW
Washington, D.C. 20036-2266
(202) 797-6600**

REPORT SUMMARY

Now that the dust has settled from the recent U.S. Presidential election, a new landscape affecting consideration of the North American Free Trade Agreement (NAFTA) has emerged. On December 17, 1992, the NAFTA text was signed by Canadian Prime Minister Mulroney, Mexican President Salinas, and former U.S. President George Bush and, with the blessing of the Clinton Administration, it now seems certain that the underlying text will not be renegotiated.

Nevertheless, despite the progress made in dealing with environmental issues in the current text, concerns about the environmental consequences of the NAFTA still remain. President Clinton has announced that he will address these residual concerns, including the creation of a North American Commission on Environment (NACE), through supplemental environmental agreements with Canada and Mexico.

These supplemental agreements, together with the NAFTA text and the NAFTA implementing legislation, constitute what might be referred to as the "NAFTA Package" (see fig. 1), and it is the contents of this package, rather than the NAFTA text alone, which will determine whether the U.S. Congress approves or rejects the NAFTA itself. While some non-governmental organizations continue to advocate

renegotiation of the NAFTA text, the focus of the Clinton Administration and the Canadian and Mexican governments has shifted to the second part of the NAFTA package, consisting of supplemental agreements among the three NAFTA countries.

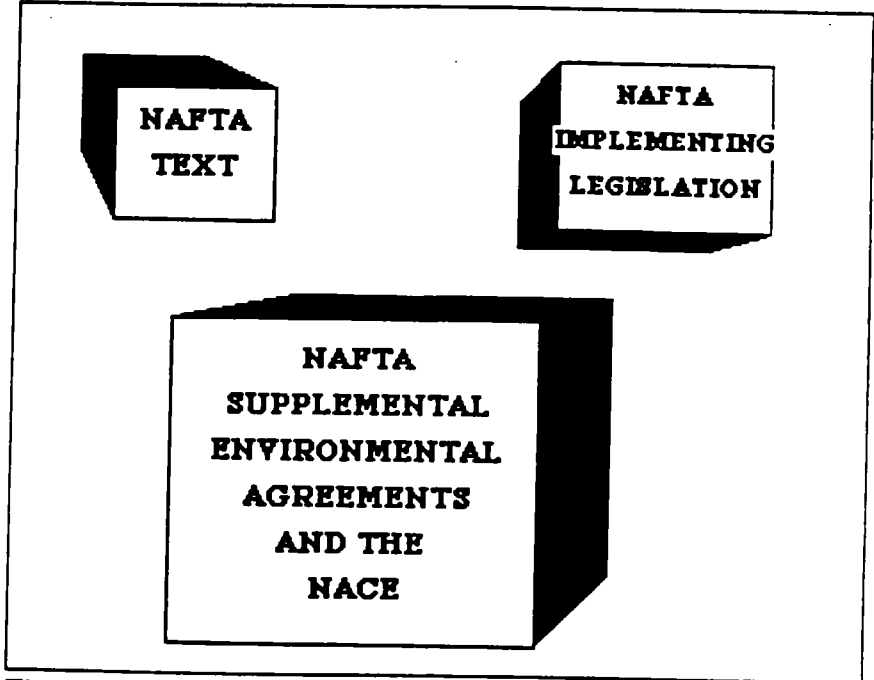


Figure 1: The NAFTA Package

Failure to negotiate comprehensive agreements on trade and environment in North America will lead to the defeat of NAFTA by the U.S. Congress. These supplemental environmental accords, building on the provisions already in the NAFTA text, will form an integral part of the NAFTA package that Congress expects as a condition of its support for the trade agreement with Canada and Mexico.

The purpose of this report is to provide some specific suggestions for what these supplemental agreements should contain, and

what the U.S. Congress should expect from the second part of the NAFTA package.

The report is divided into two parts. In the first, we describe what the *Functions of the North American Commission on Environment* should be, and how it should be constituted. Aside from promoting environmental cooperation among the NAFTA countries, and implementation of the Earth Summit's goals for sustainable development, the NACE should have an extensive mandate to deal with trade and environmental issues in North America. Key elements of NACE's mandate on trade would include the following:

- ✓ *Participate actively in the NAFTA dispute resolution process;*
- ✓ *Investigate and report on environmental concerns related to implementation of the NAFTA, and trade in North America;*
- ✓ *Enhance the adoption and enforcement of environmental laws and regulations in NAFTA countries;*
- ✓ *Serve as the forum for any current and future negotiations on supplemental environmental agreements to the NAFTA;*
- ✓ *Oversee implementation of NAFTA provisions dealing with environmental concerns;*
- ✓ *Participate in implementation of general NAFTA provisions that may affect the environment; and*
- ✓ *Serve as the inquiry point for NAFTA environmental issues.*

Aside from describing the characteristics of the North American Commission on Envi-

ronment, this report goes into more detail on the *Five Essential Elements of the Supplemental Environmental Agreements to the NAFTA*. These elements include:

- ✓ *Establishment of a timetable and process for the continued upward harmonization of environmental standards in North America, relating to products as well as production and process methods (PPMs);*
- ✓ *Establishment of criteria for the use of trade measures related to PPMs;*
- ✓ *Creation of funding mechanisms to finance environmental infrastructure, and pollution prevention and remediation activities, related to trade activities in Canada, Mexico, and the U.S.;*
- ✓ *Development of mechanisms for enhancing the adoption and more effective enforcement of national environmental laws, particularly those affecting trade; and,*
- ✓ *Crafting of technical amendments and clarifications of existing NAFTA text in order for the agreement to effectively realize its stated environmental objectives.*

The supplemental environmental agreements, and creation of the NACE, are viewed with trepidation by those who believe that additional negotiations will unnecessarily delay U.S. Congressional passage of the NAFTA. In fact, negotiation of these supplemental agreements is the only way to assuage the outstanding concerns of the 103rd Congress. The Clinton Administration, together with the governments of Canada and Mexico, should move to conclude these agreements well before the NAFTA comes to a vote. To do otherwise will consign the NAFTA to almost certain defeat.

THE NORTH AMERICAN COMMISSION ON THE ENVIRONMENT

BACKGROUND

An important early step in addressing NAFTA environmental issues is to assure that negotiations on the North American Commission on the Environment (NACE) are on track. In this context, the historical evolution of this new entity is important to keep in mind.

Initially, the National Wildlife Federation called for a NAFTA Committee on the Environment, analogous to the Committees established by the NAFTA, to follow through on trade and environmental issues in North America. In informal discussions, the Bush Administration responded by suggesting a trilateral commission that would deal exclusively with *environmental* issues in North America but not have a role in following through on NAFTA concerns.

As negotiations on the NAFTA proceeded, and Congressional attention to the environment increased, the Bush Administration's position changed, and became more favorable to the idea of a trilateral commission that would deal, at least in part, with environmental concerns arising from the NAFTA. On September 9, 1992, NWF met with Ambassador Carla Hills and shared with her an updated proposal for the North American Commission on Environment which included a trade mandate. In Canada, influential organizations like Pollution Probe pressured their government, and conservation organizations in Mexico proposed their own version of a North American Commission.

Subsequently, USTR and the Administration endorsed the NWF proposal (somewhat different versions had also been proposed by groups in Mexico, and other organizations in the U.S.), and on September 17, 1992, Canada and Mexico joined the U.S. in calling for negotiations leading to the creation of the NACE.

The North American Commission on the Environment, as endorsed by the Bush Administration, would monitor the implementation of the environmental provisions of the NAFTA, and provide information on the extent to which NAFTA countries enforce their own domestic environmental laws. The Commission should make recommendations to the NAFTA Parties on environmental issues related to trade, including future changes in NAFTA provisions that would better improve the environmental impact of the agreement.

As a complement to the trade and environment authority granted to the Commission, it would also be given the responsibility for

The NACE's mission is three-fold: push for the greening of trade under NAFTA, encourage trilateral environmental cooperation, and promote sustainable development in North America.

promoting cooperative environmental activities within North America. While this part of the Commission's mandate does not deal directly with trade issues, by promoting cooperative efforts among the NAFTA countries, and a higher and more harmo-

nized level of environmental protection among them, future trade and environmental conflicts could be avoided.

The Clinton Administration's earliest views on this Commission were spelled out in a speech delivered on the campaign trail on October 4, 1992. Though the speech did not provide a detailed view of what the Clinton Administration hoped to achieve through creation of the NACE, it was clear they intended to go beyond what had been proposed by the Bush Administration. Moreover, Vice President Gore was to play a lead role in articulating the Administration's position on the NACE, and would assure that negotiations with Canada and Mexico stayed on track.

Since the September 17 announcement, two preliminary meetings have taken place among representatives from the NAFTA countries, one in October and one in December, 1992, but official negotiations were put on hold until the Clinton Administration took office. At this point, the first step on the part of the Clinton Administration should be to revise the existing U.S. negotiating stance, which characterizes the NACE as more of an annual summit meeting, rather than a new institution capable of dealing with environmental and trade concerns in North America on a continual basis.

In this vein, the following description of the NACE may be useful in developing a new and stronger position for the U.S. with respect to this new and vital institution.

FUNCTIONS OF THE NACE

1. The NACE and Trade

■ Participate actively in the NAFTA dispute resolution process.

There are three phases to the NAFTA dispute resolution process: consultation between parties; meeting of the NAFTA Trade Commission in cases where consultation fails to resolve a dispute; and convening of a NAFTA panel in the case where the Commission cannot resolve a dispute. It is important that a specific role be spelled out for the NACE at every step in this process. The NACE should begin by helping to identify what is, or is not, an environmental dispute. This decision should not be left to NAFTA trade experts.

In cases where a dispute involves environmental concerns, a role for the NACE should be spelled out early, during the consultation process. If that process fails to resolve a dispute, the NACE should be able to provide recommendations as part of the

Panels formed to resolve environmental disputes under the NAFTA should consist of a majority of experts drawn from the NACE roster of environmental experts...

NAFTA Trade Commission deliberations. In environmental cases involving Articles 2005.3 and 2005.4, which refer to whether a dispute is heard under GATT rules or NAFTA rules, the NACE must be able to assure that NAFTA rules are applied.

If the dispute goes to a panel, the NACE should provide expertise either in the form of "friend-of-the-court" type briefs or in response to direct questions put to the

NACE Secretariat by any of the disputing parties. Disputing Parties may, in this respect, call for the NACE to issue recommendations at any point in the dispute resolution process.

The NACE should maintain a roster of capable and impartial environmental experts, similar to the roster of trade experts created by the NAFTA Free Trade Commission. Panels formed to resolve environmental disputes under the NAFTA should include a majority of experts drawn from the NACE roster of environmental experts. The same conditions of impartiality guiding the selection of NAFTA trade roster members should apply to the selection of those added to the NACE environmental roster, i.e. no conflicts of interest on the part of NACE environmental roster members will be permitted.

Creating and maintaining this roster of environmental experts may be the most important means of assuring an objective and credible role for the NACE as part of trade and environmental disputes. The Commission should not be considered complete without this new body of experts.

As part of issuing recommendations or "friend-of-the-court" commentary as part of a dispute resolution proceeding, the NACE should take responsibility for coordinating public comments submitted with reference to a given dispute. This relates to the NACE's role as an inquiry point on environmental matters, as discussed in another section of this report.

Some thought should also be given to situations where the NACE, rather than the NAFTA Trade Commission, would have the authority to resolve a dispute or question regarding NAFTA implementation. One example would be resolving questions about a NAFTA Party's obligations under an international environmental agreement as compared to its NAFTA obligations.

■ Investigate and report on environmental concerns related to implementation of the NAFTA, and trade in North America.

There are three parts to the reporting requirements of the NACE with respect to trade and environment.

The first part of a NACE Annual Report should evaluate the implementation of NAFTA environmental provisions, looking particularly at where provisions have not been carried out effectively, and identifying problems and possible solutions related to their implementation. In preparing this and other sections of the Annual Report, the NACE should respond to and investigate complaints made by citizens and the private sector regarding the implementation of NAFTA environmental provisions.

A second part of the NACE Annual Report should identify areas where the NAFTA may need to be supplemented or amended to better realize its stated goal of protecting the environment and promoting sustainable development. For example, NAFTA provisions on energy might be modified to enhance the contribution these provisions can make to protecting the environment, especially in light of important domestic policy changes, such as the adoption of a higher energy tax in the U.S. and Canada.

A third part of the NACE Annual Report should provide an overview of the adoption and enforcement of general environmental laws in all three NAFTA countries with an eye to identifying areas where lack of environmental protection laws or market incentives, or lax enforcement, might lead to trade and environmental conflicts. An example might be the undermining of U.S. Clean Air

legislation in an attempt to maintain investment in the U.S. and create a competitive advantage for U.S. industry based on lowered or unenforced standards. Identifying problems before they occur can help avoid future trade and environmental conflicts. This, and other sections of the Annual Report, should focus on concerns at the provincial and state level, as well as at the federal level.

- **Enhance the adoption and enforcement of environmental laws and regulations in NAFTA countries, particularly laws and regulations that may affect trade.**

There are some different views on what the role of NACE should be in this area. As noted earlier in this report, the National Wildlife Federation strongly supports granting the NACE the authority to make recom-

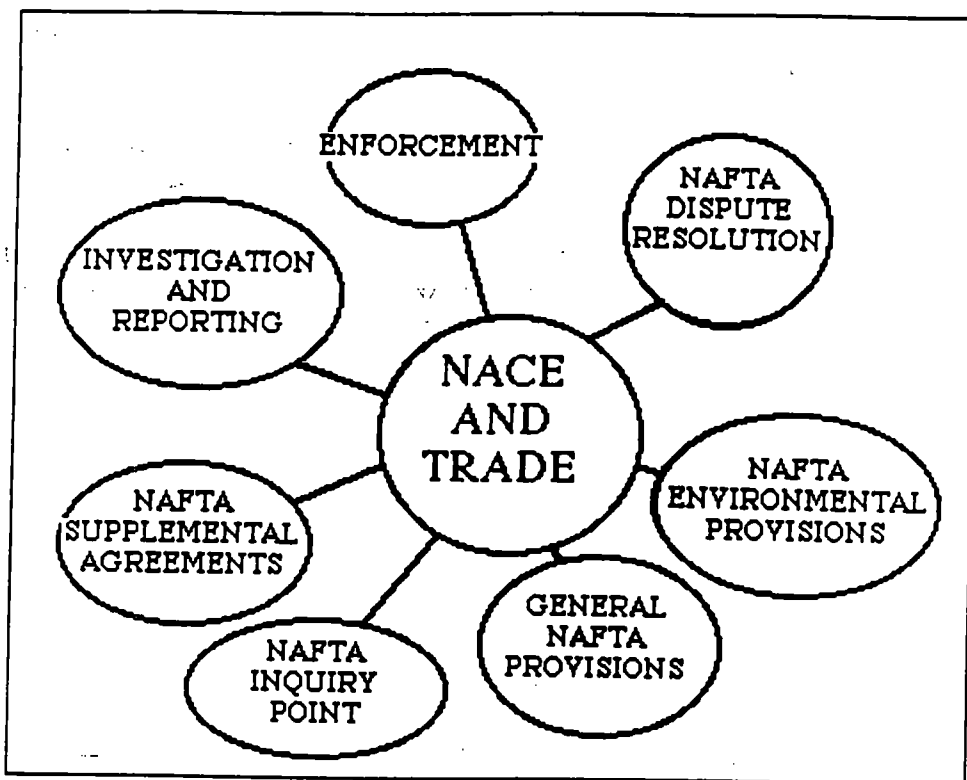


Figure 2: The NACE and Trade

recommendations for fines and other trade remedies in situations where a country has lowered its standards, or failed to enforce its environmental standards, in order to maintain or attract investment. A more sweeping proposal that also deserves consideration would grant the NACE the power to levy fines directly in situations where governments do not enforce their environmental laws effectively, or where they lack environmental protection regimes altogether.

In general, the supplemental environmental agreements should lead to the adoption of a system whereby trade sanctions can be employed to strengthen important provisions of the NAFTA, such as Article 1114.2, and to promote a greater degree of environmental protection, related to trade, in all three NAFTA countries. The NACE should have

an important role in the utilization of such sanctions.

- **Serve as the forum for negotiations on supplemental environmental agreements to the NAFTA.**

The NACE should play a lead role in the negotiation of NAFTA supplemental environmental agreements. Thus, the establishment of an effective NACE, one charged with a mandate to deal with trade and environmental issues, is a critical short-term priority. Over the long-term, the NACE should be responsible for any future changes to the NAFTA necessary to deal with environmental concerns not now envisioned, and explicit authority for the NACE to initiate such negotiations should be granted.

- **Oversee implementation of NAFTA provisions dealing specifically with environmental concerns.**

As with many of the 14 Committees and Working Groups established under the NAFTA which have responsibility for overseeing provisions relevant to their work areas, the NACE should have a role in monitoring the implementation of NAFTA environmental provisions. Some examples:

- ✓ Clarifying the relationship between international environmental agreements and the NAFTA. Article 104.2 outlines procedures by which challenges to such agreements can be waived. The NACE should be involved in this process.

- ✓ Assisting in the implementation of NAFTA provisions dealing with sanitary and phytosanitary (food safety) standards. Arti-

cle 755.5 discusses participation in international standardizing bodies, and Article 756 (equivalence) and Article 762 (technical cooperation) are relevant to the upward harmonization of standards among the three

The NACE should play a lead role in the negotiation of NAFTA supplemental environmental agreements...

NAFTA countries. The NACE can play an important role in assisting with the execution of these and other provisions dealing with sanitary and phytosanitary standards.

- ✓ Assisting in the implementation of NAFTA provisions dealing with environmental measures, as described in the NAFTA chapter on Technical Barriers to Trade. For instance, Article 906.1 and Article 906.2 commit the parties to work together to enhance environmental measures, and seek compatibility. Annex 913-A and Annex 913-C establish subcommittees which, among other functions, would set emissions and environmental pollution levels that affect land transportation in North America. A list of responsibilities delegated to the NAFTA Committee on Standards-Related Measures in Article 913 suggests a number of areas in which the NACE should also be involved.

- ✓ Assuring an effective implementation of NAFTA investment provisions which discourage the creation of pollution havens. Article 1114.2 commits the NAFTA countries to avoid lowering environmental standards or to fail to enforce environmental standards, as a means of attracting or main-

taining investment. This will be a difficult provision to implement, since governments must prove that a lowering of standards or lax enforcement resulted in attracting or maintaining investment. The NACE, which should have an important investigatory and reporting role, can play an important part in carrying out this provision.

■ **Participate in implementation of general NAFTA provisions that may affect the environment.**



Two examples of such provisions include Article 2202, which outlines procedures whereby amendments to the NAFTA can be made, and Article 2205, which sets the stage for other countries joining the NAFTA. The NACE should play a lead role in establishing the environmental criteria applied to those seeking to become party to the NAFTA.

■ **Serve as the inquiry point for NAFTA environmental issues.**

The NACE can serve as an inquiry point by answering questions from NAFTA Parties and citizens interested in trade and environmental matters. The establishment of inquiry points is an important feature of several chapters of the NAFTA text, such as the standards chapter. Assigning this task to the NACE on environmental issues will increase public participation and enhance the openness with which NAFTA environmental issues are engaged.

Openness and public participation will help assure a more effective realization of NAFTA's environmental and sustainable development goals.

2. Environmental Cooperation

One important functional requirement of the NACE will be to promote and help facilitate environmental cooperative ventures among the three NAFTA countries. In this role, the NACE should be thought of as a laboratory in which new ideas for environmental cooperative ventures can be developed, including the facilitation of technical cooperation among NAFTA countries.

However, the NACE's role in this area should not be to supersede bilateral or trilateral arrangements among the NAFTA countries. For example, the NACE should not take over any of the existing functions of the International Joint Commission (IJC) between Canada and the U.S., though it might make recommendations about how the IJC can better accomplish its goals. Likewise, the operations of the International Boundary Waters Commission (IBWC) and implementation of the U.S.-Mexico Border Plan should not be taken under the NACE's wing, though the NACE might entertain ideas as to how both can be made more effective. Implementation of the Migratory Bird Treaty would also not be a function of the NACE, but the Commission could direct issues arising from the agreement to the appropriate national agencies.

3. Sustainable Development

Sustainable development, a concept embraced by the family of nations meeting at the 1992 Earth Summit, is a vital concern in North America but lacks an institutional mechanism for promotion regionally. A new and additional function of the NACE should be to chart a course for sustainable



development in North America, and build on the national, regional, and local initiatives now underway in Canada, Mexico, and the United States.

For example, in Canada the province of Manitoba and the national government have created an Institute for Sustainable Development, an organization which is examining potential sustainable development strategies that can be employed locally, nationally, or

A new and additional function of the NACE should be to chart a course for sustainable development in North America...

globally. In the United States, individual states such as Colorado, Kentucky, Vermont, and Washington, have engaged in economic planning efforts which embrace sustainable development. Likewise, the Mexican government is exploring new ways of integrating ecological concepts and development planning.

The NACE should not intrude on any of these national or local initiatives but can help coordinate the promotion of sustainable development on a regional basis. Using documents, such as Agenda 21, which were adopted at the Earth Summit, the NACE should develop a work plan harnessing economic policies within North America to further the goals of sustainable development.

* * *

Although a host of bilateral and trilateral environmental programs already exist in North America, the NACE can help monitor

and coordinate their development, and implementation. **However, the NACE should be more than just a clearinghouse for cooperative environmental ventures, or an annual summit meeting on environmental issues. A central role for the NACE must be to follow through on trade and environmental issues in North America. Removing this function from the NACE's mandate will seriously undermine Congressional support for the NAFTA itself.**

4. Structure of the NACE

The NACE should be chaired by the environmental ministers in the three NAFTA countries, with the Administrator of EPA representing the United States. Given that the NACE will in some respects serve as a counterweight to the North American Free Trade Commission, the presence of national environmental ministers on the NACE is essential.

The work of the NACE Commissioners should be complemented by the establishment of a permanent NACE Secretariat. Each government will contribute an equal number of staff to the NACE Secretariat to enable the Commission to carry out its mandate. The daily operations of the Secretariat will be governed by a three-person directorate comprised of one nominee from each NAFTA country.

Notwithstanding that the NAFTA Trade Commission envisions the creation of a permanent Secretariat, architects of the current U.S. negotiating position have argued against the creation of a permanent Secretariat for the NACE. However, the lack of support for a NACE staff undermines the commitment of the U.S. to a

fully-functioning Commission and suggests instead that the NACE will be nothing more than an annual meeting of environmental ministers. Again, without a Secretariat, the NACE will not be adequate to garner needed support in the U.S. Congress for the NAFTA package.

The establishment of a citizens' advisory board is a necessary complement to the NACE Secretariat, and the NACE Commissioners, and should be thought of as an entirely independent body. National

The Citizens' Advisory Board will be responsible for coordinating citizen input to the NACE Secretariat, especially related to the NACE's involvement in environmental disputes arising under the NAFTA. Working with the NACE Secretariat, the Board can help increase public participation in implementation of the NAFTA as well as in cooperative environmental ventures among the three NAFTA countries.

In addition to these responsibilities, the Citizens' Advisory Board will be charged with issuing its own annual report on the operations of the NACE, including suggestions for how the NACE can be improved.

The NACE cannot achieve its goals without full and meaningful citizen participation. The Citizens' Advisory Board will be an important mechanism for accomplishing this objective.

While more work needs to be done to spell out the exact relationship between the NACE Commissioners, the Secretariat, and the Citizens' Advisory Board, the Commissioners might

be thought of as the Board of Governors of the NACE. As members of the Board, the Commissioners will meet as needed, but at least twice annually, to review the day to day operations of the Commission and make other decisions related to its mandate. The Secretariat will be responsible for the daily operations of the NACE and carry out most of the work charged to this new entity. The

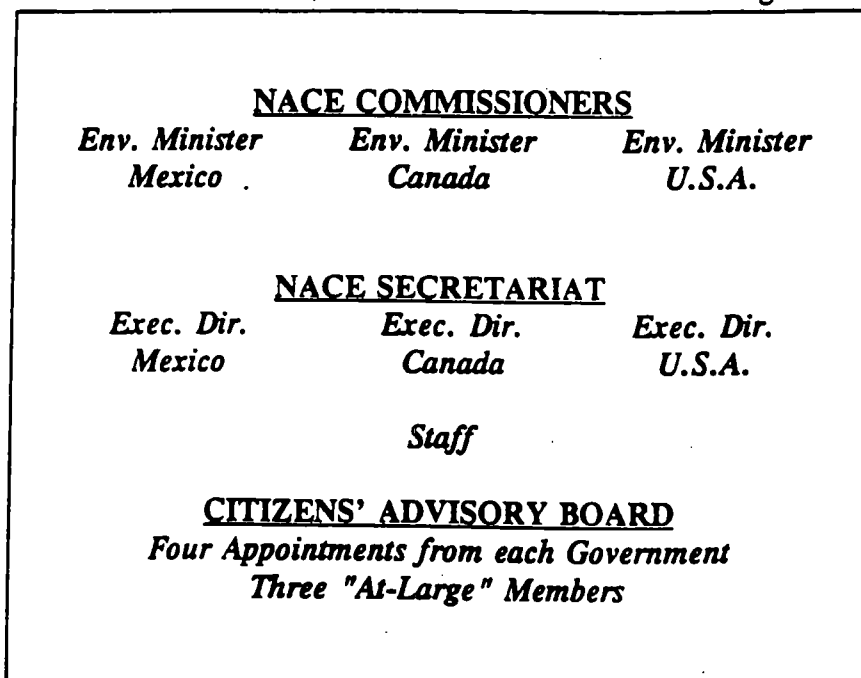


Figure 3: Structure of the NACE

governments will each appoint four members of the board, and the board itself will choose the other three. National governments will provide the resources for the Board to convene on a quarterly basis.

Citizens' Advisory Board will help facilitate citizen participation in the operations of the NACE, and review the NACE itself on an annual basis.

SUPPLEMENTAL ENVIRONMENTAL AGREEMENTS TO THE NAFTA

Some of the residual environmental concerns associated with the NAFTA stem from issues which were not addressed adequately in the NAFTA text. The need for institutional follow-up on NAFTA environmental provisions, and trade in general in North America, (described above) is only one example. Other issues included the treatment of trade measures involving process and production methods (PPMs), and a much-needed clarification of NAFTA trade provisions, such as the so-called "necessary" test, which affects the treatment of environmental standards under the agreement.

These outstanding environmental concerns can be dealt with as part of NAFTA supplemental agreements, assuming those agreements are comprehensive in scope and negotiated effectively, without opening the NAFTA text to substantive review. Aside from the above mentioned North American Commission on Environment (NACE), there are five additional elements essential to the supplemental agreements, which together form the second part of the NAFTA package.

1. Establishment of a timetable and process for the continued upward harmonization of environmental standards in North America, relating to products as well as PPMs.

NAFTA provisions affecting sanitary and phytosanitary standards, (e.g. food safety standards), and other more general standards-related measures, seek to "harmonize" or pursue some degree of "equivalence" in the establishment and maintenance of these levels of protection. Though environmentalists raised concerns that this process would result in the adoption of the lowest possible standards existing in the NAFTA trade area, provisions in the NAFTA, such as Article 756.1 dealing with sanitary and phytosanitary measures, and Articles 906.1 and 906.2 dealing with more general standards, suggest otherwise. Rather than seeking the lowest level, the NAFTA text commits the Parties to an upward harmonization of standards in North America, in essence establishing a process where ever-higher floors, rather than too-low ceilings, will be adopted in the NAFTA trade area.

Given the Parties agree to a process of upward harmonization, a critical deficiency remains in that the text fails to establish a timetable and process by which the upward movement of standards can occur.

This shortcoming is addressed in a recent analysis of the NAFTA undertaken by Gary Hufbauer and Jeffrey Schott of the Institute for International Economics (IIE)¹. To remedy the inadequacies of the NAFTA text, Hufbauer and Schott set out a timetable for the upward harmonization of standards among the three NAFTA countries. The timetable allows three years for standards to be harmonized; after that period of time, countries failing to meet these harmonized standards or enforce the standards effectively, may be subject to dispute resolution and trade sanctions. The threat of trade sanctions, which might be spelled out as well in U.S. implementing legislation for the

NAFTA, may be an important means of keeping governments at the table during this process.

The proposal made by Hufbauer and Schott may not be the optimal way for dealing with harmonization issues, and could be strengthened by suggesting that this harmonization process reoccur on a periodic basis, i.e. perhaps every three to five years. Their proposal also should give greater emphasis to the harmonization of PPMs, which is another important component of the NAFTA supplemental environmental agreements (described below). Nevertheless, the suggestions made by Hufbauer and Schott demonstrate that a credible and effective process can be established for the upward harmonization of standards among the NAFTA countries.

2. Establishment of criteria for the use of trade measures related to PPMs.

As opposed to the upward harmonization of national and sub-national standards which affect products, and permission for countries to restrict the importation of products that do not meet these standards, the NAFTA text fails to deal with trade measures based on the way goods are produced or processed. By failing to establish criteria affecting the use of trade measures based on what are known as PPMs, the NAFTA does nothing to prevent the kind of kind of conflicts created by the GATT's recent treatment of the U.S. Marine Mammal Protection Act (MMPA).

The MMPA, which, among other things, regulates the methods by which tuna are caught, (certain methods of fishing for tuna in the eastern tropical Pacific, for example, involve the incidental taking of dolphin),

was held to be trade illegal by a recent GATT panel. The debate over GATT's treatment of the MMPA continues to this day, and has led to a great deal of criticism of the GATT's role in regulating the international trading system. NAFTA's failure to address this issue invites similar conflicts between trade and environment in North America.

Simply prohibiting the use of trade measures based on processes is bad policy...

To be sure, permitting the use of trade barriers based on PPMs can create a slippery slope of "green protectionism." At the same time, simply prohibiting the use of trade measures based on PPMs is bad politics and bad policy, and fails to acknowledge that the globalization of commerce will also lead countries to be concerned about natural resources beyond their own borders. For those reasons, trade measures based on PPMs are necessary to conserve natural resources in North America, and guidelines for their use should be established in NAFTA supplemental agreements by the Parties.

The Organisation for Economic Cooperation and Development (OECD) has for the last year been working on guidelines in this area, and these may prove useful to those negotiating supplemental agreements to the NAFTA.

3. Creation of funding mechanisms to finance environmental infrastructure, and pollution prevention and remediation

activities, related to trade activities in Canada, Mexico, and the U.S.

Appropriated amounts will be difficult to obtain from the U.S. Congress for these purposes, and require an annual battle to maintain funding levels. A transaction tax, or a green investment fee as NWF has

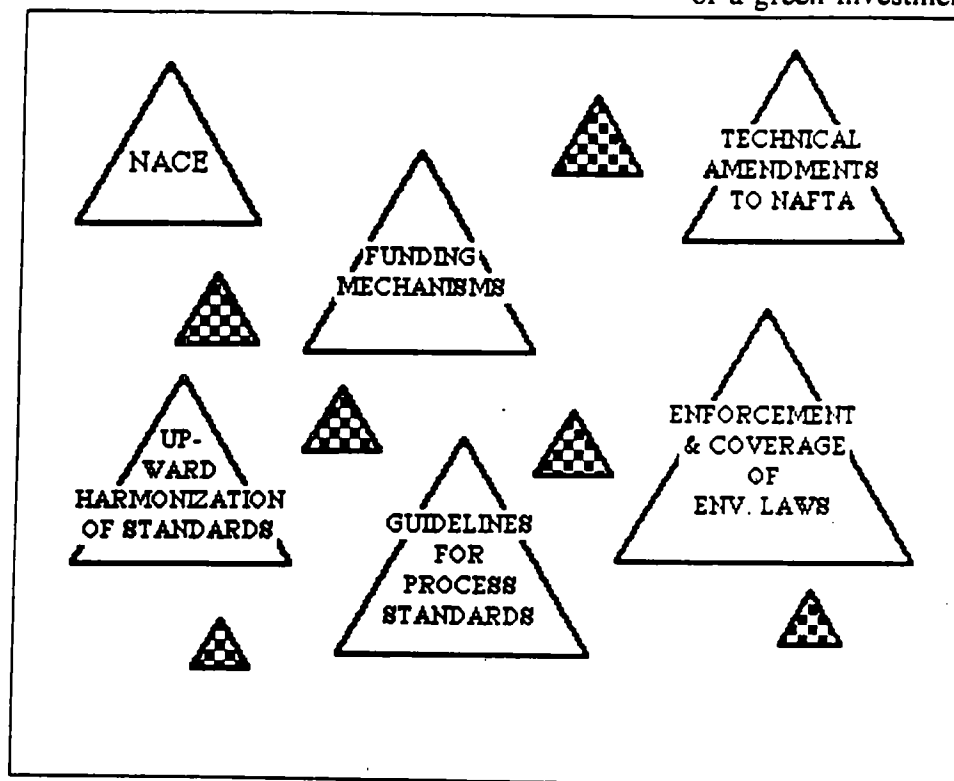


Figure 4: Supplemental Environmental Agreements

A recent Greenpeace report² on the NAFTA suggests that the price tag for environmental clean-up caused by "trade-driven development in the U.S.-Mexico Border Region", and the financing of infrastructure necessary to prevent future environmental damage, begins at over US\$9 billion, a figure which presumably does not account for NAFTA-driven growth in the interior of Mexico, or on the border between Canada and the U.S.

Finding ways to pay for even a portion of the environmental costs associated with free trade is a daunting task, made even more difficult by the budget constraints facing each of the NAFTA countries.

proposed³, may be effective alternatives, but are vigorously opposed by free traders as running counter to the goals of the NAFTA.

The NAFTA countries must recognize, however, that free trade is not cost free with respect to the environment. While economic growth inspired by the NAFTA may create funding sources--from tax revenues--in the future, there is no guarantee that

governmental appropriations will be dedicated to trade-related environmental concerns. Moreover, waiting until the damage has already occurred is far more expensive than a pay-as-you-go system that meets these funding needs up-front.

As part of a supplemental agreement on funding for environmental concerns related to trade in North America, the NAFTA countries should develop an estimate of the environmental costs associated with environmental clean-up, and the prevention of environmental damage due to trade-related activities. Working backwards from such a price-tag, the governments should indicate

the funds that they are willing to provide through annual appropriations over the next five years.

In addition, the NAFTA countries should agree to the establishment of a transaction tax, or a green investment fee, that would help generate funds for environmental programs through the trade activity generated by the NAFTA. These funds can complement the amounts provided through national appropriations, and the taxes or fees can be established at rates low enough to avoid any distortion of trade or investment activities.

Finally, ample consideration should be given to the establishment of a trilateral North American Development Bank (NADB) that would finance environmental infrastructure, such as water treatment plants, necessary to deal with the environmental wear and tear associated with increased trade. The Bank, as described by Albert Fishlow, Sherman Robinson, and Raul Hinojosa-Ojeda of the University of California-Berkeley⁴, would finance itself through issuing bonds.

There are a number of attractive aspects to this proposal, not the least of which is that it represents a dedicated source of funding which avoids an annual fight over appropriations. A Bank of this kind would also involve all three of the NAFTA countries in setting funding priorities.

Working together, the parties to the NAFTA should be able to come up with a funding strategy that can be included as part of a supplemental environmental agreement.

4. Development of mechanisms for enhancing the adoption and more effective enforcement of national environmental laws, particularly those affecting trade.

During debate on the NAFTA much was heard about the lack of environmental laws and regulations in Mexico and, more importantly, the spotty record of that government in enforcing existing laws. Though the activities of the Competitiveness Council headed by former Vice President Quayle provides a good example of how lax enforcement is not confined to any particular NAFTA country, concerns were raised that NAFTA-induced economic activity, combined with relaxed enforcement of environmental laws in Mexico, would intensify the degradation of that country's natural resources and its environment.

Lax enforcement is not confined to one country...and NAFTA Parties will need to assure greater coverage of environmental laws

Moreover, some argued that holes in the environmental safety net in Mexico would encourage the relocation of Canadian and U.S. businesses to take advantage of so-called "pollution havens."

By lowering standards, or failing to enforce them, governments can reduce costs for local producers thus creating a trade advantage with respect to their foreign competitors. This competitiveness concern, along with the direct environmental consequences of free trade unfettered by environmental protection, is dealt with only partially in the NAFTA text. For Example, Article 1114.2 of the trade agreement commits the NAFTA countries to avoid creating pollution havens, but requires only consultation when this commitment is violated.

While the provision creates an effective avenue for bringing public pressure and moral suasion to bear in order to discourage the creation of pollution havens, it may be more effective to tie it to the dispute resolution mechanisms already spelled out in the NAFTA text. In addition, Article 1114.2 deals only with situations where countries derogate from existing standards in order to attract or maintain investment, and it does nothing to deal with cases where the lack of existing standards might also lead to the creation of pollution havens.

X An important element of the NAFTA supplemental environmental agreements will be mechanisms to assure greater coverage of environmental laws and regulations in all three of the NAFTA countries, an effort that will be given a boost by an agreed upon timetable and process for harmonizing both product and process standards (see above). The NAFTA governments should agree to analyze their national and state environmental laws and regulations and identify where gaps occur with respect to needed environmental protection and enforcement measures not currently in place.

To add incentives to this process, negotiators should agree on a set of trade remedies that can be brought to bear in cases where lax enforcement, or the lack of environmental laws or regulations, creates unwarranted competitive advantages for local producers. This task will not be easy, as it requires a means of identifying where trade effects occur, and a listing of trade remedies most appropriate for resolving such cases.

The National Wildlife Federation strongly supports a role for the North American Commission on Environment (NACE) to help resolve disputes arising under NAFTA

Article 1114.2. At a minimum, the NACE should have the authority to make recommendations for fines and other trade remedies in response to cases that it participates in.

Another more far-reaching proposal would grant the NACE the power to levy fines directly in situations where governments do not enforce their environmental laws effectively, or where they lack environmental protection regimes altogether.

In whatever form they ultimately take, it is clear that NAFTA supplemental environmental agreements must address the need for better environmental laws, and enhanced enforcement, in each of the three NAFTA countries.

One final means of doing so would be to act on a proposal made in President Clinton's October 4, 1992 campaign speech that, "...permits citizens of each country to bring suit in their own courts when they believe their environmental protection and worker standards aren't being enforced," thus securing an equal level of enforcement in each country.⁵

5. Provide technical amendments and clarifications of existing NAFTA text necessary for the agreement to more effectively realize its stated environmental objectives.

The preamble of the NAFTA states that its provisions will be carried out, "...in a manner consistent with environmental protection and conservation," and that the agreement will, "Strengthen the development and enforcement of environmental laws and regulations." To assure these laudable objectives are realized, several technical amendments

and clarifications of NAFTA text will need to be made in supplemental environmental agreements:

■ For example, one of the most significant provisions in the NAFTA, is Article 1114.2 which says the NAFTA countries will, "not derogate from" existing standards. From what we know of the negotiations on this Article, that phrase is intended to refer to the relaxed enforcement of environmental laws and regulation, and not just a parliamentary or legislative change. Nevertheless, in order to ensure the provision is correctly interpreted, the definition of this phrase should be made explicit in a supplemental agreement to the NAFTA.

NAFTA Article
 ■ Article 104.1 suggests that a NAFTA Party's obligations under international environmental agreements will prevail in the case of an inconsistency with the NAFTA, "provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement."

This seems to imply a new burden on the negotiation or implementation of international environmental agreements, and creates license for attacking a country's obligations under international agreements. Rather than leave interpretation of this provision up to future dispute resolution panels, a supplemental environmental agreement to the NAFTA should define this provision clearly, in a way that does not present an undue burden on country's obligations under current or future international environmental agreements.

■ Another area in need of clarification relates to provisions in the NAFTA employing what is known as the "necessary" test. Under this test, standards not deemed "necessary" are subject to increased scrutiny under NAFTA rules. While this so-called necessary test may seem innocuous, it is subject to wide interpretation, and could encourage NAFTA panels to rule against legitimate environmental standards. A more precise interpretation of what this test is supposed to mean, in practice, should be part of ensuing negotiations with Canada and Mexico.

■ One of the important aspects missing from the dispute settlement procedures in the NAFTA is any meaningful attempt to open the process to public participation. For example, Article 2012.1 (b) requires that a dispute panel's, "hearings, deliberations, an initial report, and all written submissions to and communications with the panel shall be confidential." While some confidentiality may be necessary in the resolution of disputes, there is no reason to maintain the level of secrecy called for in this provision. On the contrary, the dispute panel procedures established by the NAFTA must provide for appropriate public input including notice and opportunity to comment. A further important technical amendment to the NAFTA should assure that a transcript of panel hearings and deliberations be made available to interested parties.

Furthermore, while Article 2017.4 of the NAFTA suggests that the final report of a dispute resolution panel "shall be published 15 days after it is transmitted to the Commission" there is no guarantee this will occur since to do so requires unanimous approval by the Commission itself. Release

to the public of these final reports should be mandatory.

CONCLUSION

While some continue to debate whether the NAFTA text addresses environmental concerns adequately, the most likely scenario unfolding over the next several months will be a concerted effort on the part of the NAFTA governments to negotiate supplemental environmental agreements related to, but not requiring major surgery on, the NAFTA itself.

These supplemental agreements will be critical in determining whether or not Congress approves the NAFTA. If the agreements are negotiated according to the blueprint presented in this report, they will go a long way toward satisfying Congressional expectations. If not, the NAFTA itself will be endangered.

ENDNOTES

1. Gary Clyde Hufbauer and Jeffrey J. Schott. NAFTA: An Assessment. Assisted by Robin Dunnigan and Diana Clark. Institute for International Economics. Washington, D.C. February 18, 1993.
2. NAFTA Threatens the Environment: Greenpeace Proposals for a New Agreement. Greenpeace. Washington, D.C. December 1992.
3. Memo from Jay D. Hair, President, National Wildlife Federation, to Ambassador Carla Hills, USTR. "Environmental Impact of NAFTA Investment Provisions: Problems and Solutions." November 20, 1991.
4. Albert Fishlow, Sherman Robinson, Raul Hinojosa-Ojeda. Proposal for a North American Regional Development Bank and Adjustment Fund. University of California, Berkeley. May, 1991.
5. "Expanding Trade and Creating American Jobs." Governor Bill Clinton. North Carolina State University, Raleigh, North Carolina. October 4, 1992.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

FEB 17 1993

OFFICE OF
INTERNATIONAL ACTIVITIES

MEMORANDUM

To: Katie McGinity (White House) Chuck Fox
Dick Smith (Department of State) Pat Koshel
Joe Winkle, Reg. 6 Wilson Riley
John Wise, Reg. 9 Richard Kiy
Linda Fisher David van Hoogstraten
Scott Fulton Doug Turner
Dan Magraw

From: Alan Hecht *ah H*

Subject: North American Institute Meeting on Trilateral
Cooperation and NACE. Santa Fe, NM, February 12-14.

The NAMI sponsored meeting, chaired by John Wirth, provided an informal opportunity for government, industry and NGO representatives to discuss NAFTA, areas of Trilateral cooperation and possible elements of NACE. Key points made by participants are summarized below followed by a master list of possible NACE elements.

Canadian side (Len Good, Ambassador Arthur Campeau)

NAFTA is not widely supported in Canada over fears of job loss. Timing is essential since elections will be held in September. Canadian views of NACE favor two part mandate, one related to NAFTA and one related to broader issues of Trilateral cooperation, trade and the environment and sustainable development. I believe the Canadians favors a NACE with a stronger emphasis on non-NAFTA related elements. Both Good and Campeau said NACE would be necessary even in the absence of NAFTA. *Good*

Good made several references to the Canadian Green plan and suggested several elements as a basis for Trilateral cooperation: good science, environmental assessment, public outreach, and global stewardship.

Ambassador Campeau, who will be the lead Canadian negotiator on NACE, called for a strong but flexible NACE structure. He identified the following possible elements of NACE:

- information exchange on environmental technologies,
- promotion of pollution prevention practices,
- promotion of cooperation among scientists and engineers,

- use of economic instruments on continent-wide basis,
- promotion of consistent standards and enforcement practices
- addressing long range transport of pollution, such as in the Arctic

Both Good and Campeau noted that the Canadian government is waiting for consultation with U.S. on NACE. Both recognized existing parallel agreements between US-Mexico, US-Canada and Canada-Mexico. Canada should not be expected to be a player in infrastructure financing along US-Mexico border.

Mexican Side: (Sergio Reyes Lujan and Mario Aguilar)

The Mexicans were very forthcoming. Sergio Reyes Lujan gave recognition and thanks to the U.S. and Canada for their technical assistance and cooperation. Without, U.S. help, he said, Mexico could not adequately address their environmental problems. He reiterated Mexico's commitment to environmental enforcement and urged a realistic assessment of what Mexico can do over in short term. Lujan underscored the importance of the border plan and in dealing with adequate border financing.

Aguilar said that NAFTA was essential to improve the quality of life in Mexico. He said that Mexico emphasizes and supports public participation and blamed the press for portraying an opposite view. He reiterated Mexican concern for respect for sovereignty, especially with regard to enforcement. He identified the following elements for NACE:

- formal channel for public participation —
- consultative body with "sunshine enforcement"
- respect for each countries own standards
- high ranking environmental representatives
- providing a monitoring assessing and reporting role to governments
- promotion of general ecological principles —

U.S. Side (Tim Atkeson, Linda Fisher and Alan Hecht)

Tim Atkeson in a non-government role reviewed past history and urged immediate signing of the U.S.- Mexico bilateral agreement, development of financial plans for border infrastructure, updated and expanded border plan and expanded citizen participation.

Linda Fisher discussed elements of the enforcement issue, particularly with respect to the investment clause in NAFTA. It was clear from the meeting that there is a poor understanding (among many NGOs) of enforcement implementation, criteria for enforcement and how to address charges that lack of enforcement may be viewed as an unfair labor practice.

Hecht emphasized that activities discussed extended over several time horizons. In the short term, (now until July) we need to finalize elements of NACE and conclude negotiations of any parallel track activities. Hecht emphasized that many Congressman will look to NACE as a mechanism to address weaknesses in NAFTA. Phase two of the border plan and issues of border financing will be addressed in the mid term and issues of sustainable development and broad based environmental standards will be addressed in the longer term.

NGO views (Stewart Hudson, Bill Futrell, Paul Portney, Gary Hufbauer and others)

There was a tendency among speakers to view NACE as serving both a monitoring as well as enforcement role, with enforcement being achieved through public participation and fact finding. NACE would need a strong secretariat and funds to carry out its work with respect to fact finding, monitoring and other functions, including setting continent-wide environmental goals. Both environmental and industry NGOs expressed desire to be part of NACE structure.

Several participants recognized the diversity of federal and state responsibilities among the three countries. NAFTA implementation will have to reflect the varying degrees of authority of federal and state government.

Master list of possible NACE element: Where NACE would address, promote or deal with:

- Issues related to the investment provision in NAFTA
- Dispute settlement
- Enhance enforcement through public exposure
- Fact finding, monitoring and information exchange
- Continental wide environmental goals
- Recommendations to government
- Citizen participation
- Role for private sector
- Forum for public access and complaint
- Broader issues of sustainable development
- Continent wide ecological and transboundary issues
- Environmental assessments
- Technical assistance, personnel exchange, pollution prevention

Attached reading:

Agenda and Participants

Gary Clyde Hufbauer and Jeffrey Schott: Excerpt from NAFTA: An assessment.

Stewart Hudson and Rodrigo J. Prudencio. NACE and other supplemental environmental agreements: a report.

February 24, 1993

MEMORANDUM

TO : Katie McGinty
FROM : Leon G. Billings
SUBJECT: NAFTA

Attached is a draft Memorandum of Law on the North American Free Trade Agreement. This memorandum was prepared by the legal staff of the South Coast Air Quality Management District and addresses specifically the question of NAFTA and preemption of state and local laws which establish environmental standards and regulations. If you have any questions or comments on this memorandum, I would appreciate receiving them so I can pass them along to Ted Handel and Peter Greenwald. It is important to note that the attached is a draft and will be modified to reflect any comments that you have.



**South Coast
AIR QUALITY MANAGEMENT DISTRICT**

21865 E. Copley Drive, Diamond Bar, CA 91765-4182 (909) 396-2000

February 18, 1993

VIA TELECOPIER

Mr. Leon Billings
Suite 570
901 15th Street, N.W.
Washington, D.C. 20005

Re: Analysis Of The Legal Implications Of The North American Free Trade Agreement On The South Coast Air Quality Management District

Dear Leon:

This is in response to your request for an analysis of the legal implications of the North American Free Trade Agreement ("NAFTA") on the South Coast Air Quality Management District ("District"). I regret the delay in responding to your request.

Please find attached a draft memorandum prepared by Ted M. Handel of my staff which identifies the key provisions of NAFTA which could have a significant impact on the regulatory programs of the District. As his memorandum indicates, there are certain NAFTA provisions which are ambiguous as to whether or not they would allow the District to proceed with its regulations and others that have the potential for preempting the District. The resolution of these issues will clearly depend on any Environmental Protocol that may be adopted by the signatories to NAFTA, as well as the implementing legislation adopted by Congress.

As you indicated, please feel free to circulate this memorandum to any person or organization whom you believe may be interested in this issue. If you receive any comments or questions regarding this document, please contact me or, during my absence the week of February 22nd, Mr. Handel. In the meantime, I intend to distribute this memorandum to the rulewriting staff of the District for their thoughts on NAFTA, particularly the section on adoption of standards-related measures under the Agreement. Once we have comments from District staff and you, I will have Mr. Handel finalize his memorandum and then use it for preparing testimony for the upcoming Senate hearing on NAFTA.

Thank you for your cooperation in this matter.

Sincerely,

Peter M. Greenwald
District Counsel

Attachment

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

OFFICE OF DISTRICT COUNSEL

MEMORANDUM

DRAFT

DATE: February 17, 1993

TO: Peter M. Greenwald
District Counsel

FROM: Ted M. Handel
Senior Deputy District Counsel

SUBJECT: Analysis Of The North American Free Trade Agreement And Its Legal
Implications For The South Coast Air Quality Management District

This memorandum responds to the request of Leon Billings, the South Coast Air Quality Management District's ("District") Washington representative, for an analysis of the North American Free Trade Agreement ("NAFTA" or "Agreement") and its potential legal implications for the District if it is implemented by the United States Congress.

**I.
ISSUE PRESENTED**

Does NAFTA preempt state or local environmental laws, or otherwise impair the ability of government agencies to adopt or enforce such laws?

**II.
SUMMARY CONCLUSION**

Although NAFTA pays homage to environmental protection, and states an intent to respect the authority of state and local governments to pursue this objective, the language of the Agreement is either ambiguous as to how this will be accomplished or, in certain instances, appears to preempt the authority of such jurisdictions to enact or enforce environmental regulations. For this reason, consideration should be given to the United States entering into an Environmental Protocol with the other signatories which clarifies and strengthens NAFTA's environmental provisions. Also, the legislation implementing NAFTA should clearly state that the United States government will defend any valid environmental law whether adopted by itself or by state or local governments.

III. BACKGROUND

In June 1991, the United States began negotiating a comprehensive trade accord with Canada and Mexico to establish a free trade area among these countries. An agreement was reached by these parties on August 12, 1992, and a final legal text was prepared and initialed by former President George Bush on October 7, 1992. NAFTA was signed by President Bush and his Canadian and Mexican counterparts on December 17, 1992.

NAFTA was negotiated under the "fast track" procedures of the Trade Act of 1974 (19 U.S.C. §§ 2191-2193), as amended by the Trade and Tariff Act of 1984 (Pub. L. No. 98-573) and the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. No. 100-418, the "1988 Trade Act"). Essentially, these procedures:

authorize . . . the President to initiate a foreign affairs action (for example, negotiation of an international trade agreement), but requires him to notify, consult, and subsequently submit the product of that action back to Congress for final, accelerated approval. Under modified House and Senate rules, Congress 'promises' the President that it will automatically discharge the completed initiative from committee within a certain number of days, bar floor amendment of the submitted proposal, and limit floor debate, thereby ensuring the President and our trading partners that the submitted legislative package will be voted up or down without alteration within a fixed time period. Koh, *The Fast Track and United States Trade Policy* (1992) 18 Brooklyn J. Int'l. L. 143-144.

The 1988 Trade Act accomplishes this by requiring that:

- the President must notify the Congress of his intention to enter into a trade agreement at least 90 days before the date on which he formally signs the agreement [19 U.S.C. § 2903(a)(1)(A)];^{1/} and
- after entering into the agreement, the President must submit the final legal text of the Agreement together with implementing legislation, a statement of any administrative action proposed to implement the agreement, and supporting information as set forth in 19 U.S.C. § 2903(a)(2).^{2/} 19 U.S.C. § 2903(a)(1)(B).

^{1/} President Bush gave Congress notice of his intention to sign NAFTA on September 18, 1992.

^{2/} This supporting information consists of (1) an explanation as to how the legislation and administrative action will change or affect existing law, (2) a statement that the agreement is consistent with the purposes of the 1988 Trade Act, and (3) a description whether any foreign country that is a party to the agreement maintains any non-commercial trading enterprises that could impair or nullify the benefits of the agreement to the United States.

Once it is introduced, Congress has 90 session days in which to enact this legislation. 19
U.S.C. §2191(e). As described above, Congress also may not amend this legislation. 19
U.S.C. §2191(d).

We have been advised by the Office of the United States Trade Representative ("Trade Representative") that the Clinton Administration is currently drafting the implementing legislation for NAFTA in consultation with the two congressional committees that have primary jurisdiction over trade issues, the Senate Committee on Finance and the House Committee on Ways and Means. The Trade Representative has indicated that he does not anticipate that this legislation will be submitted to Congress before late spring or early summer of this year. If enacted, NAFTA would most likely go into effect on January 1, 1994.

IV. NAFTA PROVISIONS THAT MAY AFFECT IMPLEMENTATION OF ENVIRONMENTAL LAWS

1. The Preamble

At the onset, the Parties resolve in the Preamble to "[u]ndertake each of the preceding in a manner consistent with environmental protection and conservation" and "strengthen the development and enforcement of environmental laws and regulations."

In a document released shortly after the NAFTA negotiations were completed, the Bush Administration argued that the agreement met certain environmental principles, such as those described immediately below, that had been agreed upon by the environmental community:

"Maintain the right to impose and enforce through trade restrictions product standards and technical regulations that are more stringent than international standards when these standards have a scientific basis and reflect the level of risk a Party judges as appropriate.

NAFTA allows the parties, including states and cities, to enact standards that are stricter than international or national standards. . . .

Maintain the right to impose trade restrictions pursuant to U.S. health, environmental, conservation, and endangered species legislation and international agreements.

NAFTA maintains existing U.S. federal and state health, safety, and environmental standards, and preserves our right to ban non-conforming imports" *Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments*, September 18, 1992, at 138. (emphasis in the original and added.)

2. Standards-Related Measures

NAFTA establishes certain requirements for "standards"^{3/} that are adopted to protect human health or the environment, as well as the "technical regulations"^{4/} and "conformity assessment procedures"^{5/} used to support and enforce those standards.

NAFTA states that:

"[e]ach Party may, in accordance with this Agreement, adopt, maintain or apply any standards-related measure, including any such measure relating to . . . protection of human . . . life or health, the environment . . . and any measure to ensure its enforcement or implementation. Such measures include those to prohibit the importation of a good of another Party or the provision of a service by a service provider of another Party that fails to comply with the applicable requirements of those measures or to complete the Party's approval procedures." Art. 904.1.

Parties are supposed to use international standards as the basis for developing standards-related measures, except where these standards would be ineffective or inappropriate to fulfill the "legitimate objectives"^{6/} of a party. Art. 905.1. NAFTA explicitly states that this paragraph is not intended to prevent any party from adopting, maintaining, or applying any measure that results in a higher level of protection than would be achieved if the relevant international standard were used. Art. 905.3.

At the same time, however, NAFTA Chapter Nine imposes certain limitations on the right of Parties to adopt these types of measures. First, a party is prohibited from adopting, maintaining or applying any measure which creates an "unnecessary obstacle to

^{3/} The term "standard" is defined to mean "a document, approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for goods or related processes and production methods, or for services or related operating methods, with which compliance is not mandatory. Art. 915.1.

^{4/} The term "technical regulation" is defined to mean "a document which lays down goods characteristics or their related processes and production methods, or services characteristics or their related operating methods, including the applicable administrative provisions with which compliance is mandatory." *Ibid.*

^{5/} A "conformity assessment procedure" is defined as "any procedure used, directly or indirectly, to determine that a technical regulation or standard is fulfilled, including sampling, testing, inspection, evaluation, verification, monitoring, auditing, assurance of conformity, accreditation, registration or approval used for such a purpose, but does not mean an approval procedure." *Ibid.*

^{6/} A "legitimate objective" is defined to include such objectives as protection of human health or the environment where consideration is given to fundamental climatic or other geographical factors, technological or infrastructural facts, or scientific justification, but does not include the protection of domestic production. *Ibid.*

trade" unless the party can demonstrate that the measure is designed to achieve a "legitimate objective" and it does not exclude the goods of another party that can meet that objective. Art. 904.4. Second, a party is required to make its standards-related measures compatible with those of the other parties to NAFTA. Art. 906.2. Third, an importing party must treat a technical regulation adopted by an exporting party as "equivalent" to its own regulation, provided the exporting party demonstrates that its measure fulfills the same objectives. Art. 906.4. If a party does not treat a technical regulation as equivalent, then it must, on request, provide a written explanation to the exporting party why it will not accept this regulation. Art. 906.5.

In the pursuit of its "legitimate objectives," a party may conduct a risk assessment consistent with the requirements of Article 907. A risk assessment may give consideration to available scientific evidence, intended end uses, processes or production, or environmental conditions.

With regard to conformity assessment procedures, NAFTA acknowledges that there are substantial differences in these procedures among the parties. Nevertheless, the Agreement encourages the parties to make these procedures compatible to the greatest extent possible. NAFTA then goes on to require that each party not adopt or maintain a procedure that is stricter "than necessary to give it confidence that a good or standard conforms with the applicable technical regulation or standard Art. 908.3(a). Lastly each party is obligated to accept the conformity acceptance procedures conducted by another party,

provided that it is satisfied that the procedure offers an assurance, equivalent to that provided by a procedure it conducts or a procedure conducted in its territory the results of which it accepts, that the relevant good or service complies with the applicable technical regulation or standard adopted or maintained in the Party's territory. Art. 906.6.

The District does use standards to set the emission limits in technical regulations for products used in the South Coast Basin ("Basin") or to regulate emissions from industries that engage in certain manufacturing processes. Standards are also used for determining compliance which would appear to fall within NAFTA's definition of a conformity assessment procedure. While these standards may or may not be based on international standards, the District's use of these standards have been tailored to meet the specific environmental needs of the South Coast Basin ("Basin"). Thus, in these instances, the District's regulations and procedures may be acceptable as the agency's pursuit of a "legitimate objective."

Nevertheless, there are certain issues with regard to these standards that are of concern. First, the District is not a party to NAFTA and it is unclear whether the United States, as a party, would defend the District's interests in the event of a challenge to its emission regulations, even if they conformed to applicable standards or met a "legitimate objective." Even if the federal government were to defend the District's interests there is no assurance that such defense would be adequate. In addition, since certain District regulations are not based on standards, but, rather, are intended to force the development

of cleaner technology, there is no certainty that the federal government could defend these latter types of regulations, even if, again, they were intended to meet a "legitimate objective".

3. Preemption of State and Local Authority

As a party to NAFTA, the United States is obligated to comply with its terms, provided it is implemented by Congress. Former U.S. Trade Representative Carla Hills stated that NAFTA "explicitly . . . maintains our right to enforce existing U.S. health, safety, and environmental standards." Carla Hills, *The Free Trade Pact Is Good For All of Us: Americans, Mexicans, and Canadians*, Roll Call, Sept. 28, 1992, at 50 - 51 quoted in Charnovitz, *NAFTA: An Analysis of Its Environmental Provisions*, *supra*, 23 Envntl. L. Rep. at 10069. However, as Mr. Charnovitz points out, since no analysis has been made by the federal government regarding whether or not NAFTA preempts federal environmental law, Ms. Hill's statement "is a prediction about the outcome of future challenges, not a description of any right enshrined in the agreement." *Ibid*.

Although state, provincial, and local governments of each of the signing countries are not parties to NAFTA, the Agreement states that:

[t]he Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state . . . governments.
Art. 105.

According to Mr. Charnovitz, this language is similar to a provision in GATT. He indicates that under a recent interpretation of GATT, this agreement can preempt state law. He also provides the following hypothetical in analyzing the potential impact of NAFTA on state laws:

Assume that California enacts a food safety measure that is more stringent than either international or federal government standards. Furthermore, this measure effectively excludes certain agriculture from Mexico. In response, Mexico lodges a complaint. Consider the following issues:

Can California rely on NAFTA Article 712.2 to declare that the food standard is "its appropriate level of protection"? No, California cannot, because this right is only available to parties. To extend such a right to California, NAFTA would have to be amended to define states . . . as "parties"

Can the United States, which is a party, declare that the California standard is the appropriate level for California? Yes, it can, however nothing in NAFTA compels the federal government to do so, or permits California to defend itself before a dispute panel. . . .

If the U.S. Trade Representative agrees to defend California's standard, will the United States automatically win? No, because the final decision depends on the facts of the case. . . . [S]tate laws run into a potential hurdle in NAFTA's requirement that parties 'avoid arbitrary or unjustifiable distinctions' in levels of protection in different circumstances. The U.S. government could be called upon to justify why California needs a higher standard than the other 49 states. . . .

If a NAFTA panel rules against the United States, will California have to lower its standard? Although Ambassador Hills told the U.S. House of Representatives House Ways and Means Committee that 'there will be *no* preemption,' that is merely one facet of the problem. Whether NAFTA prevails over state law will depend upon the terms of the implementing legislation Charnovitz, *NAFTA: An Analysis of Its Environmental Provisions*, *supra*, 23 Envntl. L. Rep. at 10069-10070. (emphasis in the original and added.)

If the food standard were replaced with a District rule regulating, for example, the volatile organic compounds in a paint manufactured in Mexico, this analysis could apply with equal force to the agency's emission standards.

4. Dispute Resolution Procedures

NAFTA establishes a dispute settlement process that incorporates the same general process as that used under GATT. Specifically, the Agreement requires that if any dispute cannot be resolved by consultations between the parties, or by the Commission on Free Trade established under the Agreement, then the dispute is to be heard by an arbitral panel. Art. 2008. The arbitral panel is comprised of five members with two members to be selected by each party from a panel of citizens from the other party and the fifth member to be the chair as designated by both parties. Art. 2011. The panel may request a report on any environmental issue. Art. 2015. Once the panel has received all the evidence on the dispute, it then issues an initial report upon which a disputing party may provide written comments. Art. 2016. Thereafter, the panel must present its final report to the parties [Art. 2017], and the parties must agree on how they will resolve their dispute based on the determinations and recommendations of that report. Art. 2018.1.

The NAFTA dispute resolution process is more favorable, in certain respects, than the one established under GATT. First, unlike GATT, the party who alleges that a standards-related measure violates NAFTA has the burden of proof in establishing that violation. Second, the party whose environmental law is being challenged has the right of forum selection, provided that its measure is to protect its human life or environment. Stated differently, if the measure is to protect the global environment, then this provision is inapplicable. Third, NAFTA provides for the dispute resolution process to obtain scientific advice [Art. 2015]; however, there is no requirement that a panel hearing an environmental dispute have a member with expertise in this field.

5. Procedural Requirements

Article 909 imposes certain notice obligations with respect to the parties. If a party proposes to adopt or modify a measure, then it must publish a notice and notify in writing the other parties of its intention to take this action. This notice must also be provided to interested persons and allow them to comment on the measure. This obligation is not only imposed on the federal governments of each party, but is extended to their state and provincial governments as well. Art. 909.3.

The requirements of this article could prove to be burdensome to the District and the California Air Resources Board ("ARB"). It appears that any time the District or ARB intended to adopt or approve a rule, both would be obligated to notify their foreign counterparts in Canada and Mexico and any interested parties within those countries. In the absence of assistance from the U.S. Environmental Protection Agency, it is unclear, as a practical matter, as to how this would be accomplished without significant delays being experienced.

6. Investment Measures

NAFTA provides that any measure regulating investors or investments which is necessary to protect human health is permissible, provided the measure is not applied in an arbitrary or unjustifiable manner or does not constitute a disguised restriction on international trade or investment. Art. 1106.6

7. NAFTA and The Montreal Protocol

The Montreal Protocol requires signatories to this agreement to phase out the use of certain ozone depleting substances. With regard to any inconsistencies between the Montreal Protocol and NAFTA, the latter states:

[i]n the event of any inconsistency between this Agreement and the specific trade obligations set out in:

* * *

(b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as amended June 12, 1990,

* * *

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative

that is the least inconsistent with the other provisions of this Agreement.
NAFTA Art. 104.^{2/}

On the one hand, this provision seems to give precedence to the environmental obligations imposed by the Montreal Protocol. At the same time, this language is ambiguous in its requirement that where a Party has a choice among alternatives that are equally effective and reasonably available in meeting these obligations, it must choose the alternative which is least inconsistent with NAFTA. NAFTA, however, does not define what constitutes an "equally effective and reasonably alternative means of complying," nor is there any definition of the term "least inconsistent." One commentator has suggested that the "least inconsistent" test has also been applied under the General Agreement on Tariffs and Trade ("GATT") with unspecified, yet troubling, results against environmental statutes. See, Charnovitz, *NAFTA: An Analysis of Its Environmental Provisions*, (1993) 23 *Envntl. L. Rep.* 10067, 10070.

V. CONCLUSION

While the preamble of NAFTA and certain of its requirements appear to meet the previous Administration's stated intent of protecting the environment and respecting the authority of state and local governments to adopt rules which accomplish this objective, the actual language of the Agreement is ambiguous in certain places or contradicts this intent. For this reason, consideration should be given to the United States entering into an Environmental Protocol with the other signatories which clarifies and strengthens NAFTA's environmental provisions. Also, the legislation implementing NAFTA will be critical. In a previous instance involving the Canada-United States Free Trade Agreement of 1988, Congress explicitly provided in the implementing legislation that state laws were preempted. Here, as suggested in a conversation with Mr. Charnovitz, the legislation implementing NAFTA should clearly state that the United States government will defend any valid environmental law whether adopted by itself or its state and local governments. If the law is enacted one of the latter two bodies, then the federal government should coordinate its legal actions with the state attorney general or local equivalent.

^{2/} All article citations are to NAFTA unless otherwise noted.