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~~CONFIDENTIAL~~

To: Katie McGinty
Special Assistant to the President
(202) 456-6231

From: Rob Housman *RAH* Paul Orbuch (CIEL), Bill Snape
(Defenders)

Date: February 18, 1993

Re: NAFTA Protocol on the North American Commission on
the Environment and Letter to Ambassador Kantor

Transmitted herewith are a draft letter on NAFTA addressed to Ambassador Kantor and a draft protocol to NAFTA on the North American Commission on the Environment (NACE). These documents are being circulated by CIEL and Defenders of Wildlife for comment and co-signatures from other environmental organizations. They will be presented publicly to the Ambassador Kantor, and other relevant U.S. government personnel in the near future. It is our hope that these documents provide a foundation for the Clinton Administration to move forward and craft an environmentally sound NAFTA package. We are sending you these pre-release drafts to get your thoughts on our approach. As these are pre-release drafts, we would appreciate it if you could keep their circulation at a minimum.

Because the draft protocol's legal language makes it somewhat unwieldy, we would like to highlight the following sections of the protocol for you. Article XIII sets up the broad powers of the NACE. Of greater importance, however, is Article XIV, which provides the NACE the power to hear specific disputes on environmental matters. The specific procedures for these disputes are set forth in Article XVI. These two Articles provide a mechanism for the NACE to address the issue of weak or lax enforcement of environmental laws that continues to stand in the way of NAFTA progress. You will note that these provisions provide for two different types of cases to be brought before the NACE: 1) actual physical harms, or threats thereof, to the Parties, private

individuals, or groups; and, 2) competitiveness injuries to domestic producers. The mechanisms for each of these types of cases differ somewhat. Most notably, in competitiveness cases, the NACE would make a preliminary finding verifying the complaint (i.e. a domestic environmental law is not being enforced). The NACE would then certify the matter to the appropriate domestic administrative body to determine if a trade injury is occurring. (In the United States, the relevant agency would be the International Trade Commission.) If a trade injury is occurring, the Party would be authorized to use NAFTA Chapter 8's Emergency Action provisions which provide for tariff snap-backs. In all cases where a physical harm exists, but no trade injury is present, the protocol provides the NACE with the authority to levy fines. Monies from both tariff snap-backs and fines would be dedicated to funding remedial efforts to eliminate the harm complained of. In all disputes addressed by the NACE, appropriate procedures are provided for extensive consultations with the aim of settling the dispute prior to resorting to a NACE remedy.

Articles XIX and XX are also of particular importance. Article XX establishes the rules for public participation for the NACE. Article XIX uses the NACE as a means of democratizing NAFTA Chapter 20 disputes. These provisions provide a creative way of addressing the environmental community's concerns with the closed nature of NAFTA dispute resolution, while avoiding the need to re-open the provisions of Chapter 20.

We believe that the framework set out in the attached letter and draft protocol fully comports with President Clinton's statements on NAFTA and the environment. We look forward to your comments and would welcome the opportunity to work with you in addressing the outstanding NAFTA environmental issues. Please feel free to contact us at 202-332-4840.

WORKING DRAFT

Contact: Bill Snape, Defenders
Housman/Orbuch, CIEL

February 12, 1993

The Hon. Mickey Kantor
U.S. Trade Representative
600 17th Street, NW
Washington, D.C. 20506

Dear Ambassador Kantor:

Since your appointment as President Clinton's Trade Representative, you have undoubtedly received correspondence about the proposed North American Free Trade Agreement (NAFTA) and its effect upon environmental protection on this continent. We, the undersigned, hope that this letter clarifies the position of our groups with respect to NAFTA.

We support the President's call for an environmental supplemental agreement that will establish a strong North American Commission on the Environment (NACE). We also think it is crucial to clarify various other provisions of the existing NAFTA relating to environmental protection in a supplemental agreement. In our opinion, these elements of an environmental supplemental agreement should be in the form of a protocol to NAFTA, separate but equal to NAFTA itself.

I. ENFORCEMENT:

As then Governor Clinton stated on the campaign trail, "We need a supplemental agreement which would require each country to enforce its own environmental and worker standards ... and to give citizens the right to challenge objectionable environmental practices by the Mexicans or Canadians." We agree. Trade should not be based on weak enforcement of established standards. To ensure that another country's sovereignty is not infringed upon, we propose that a trilateral mechanism, the North American Commission on the Environment (NACE), be established with sufficient powers, outlined below, to ensure adequate enforcement of existing and future environmental laws. Enforcement is a crucial issue. We should not subject U.S. citizens to economic or environmental injury as a result of weak enforcement of environmental standards elsewhere. In light of sovereignty concerns, we do not envision a NACE that possesses powers of injunction or mandamus beyond that allowable under present or future law.

II. THE NORTH AMERICAN COMMISSION ON THE ENVIRONMENT (NACE):

As President Clinton has indicated, a strong and effective NACE is an essential component of any NAFTA environmental supple-

mental package. We support a NACE that will possess investigative, monitoring, and enforcement powers for all present and future parties of NAFTA, as well as a mechanism for meaningful public participation. A vibrant NACE would not only seize the tremendous opportunity to bring significant environmental benefits to this continent, but it would also identify and address environmentally degrading activities that create unfair competitive advantages.

STRUCTURE OF THE NACE:

1. NACE Commission: The Commission will be ultimately responsible for binding decisions by the NACE. Each NAFTA party will select a NACE Commissioner who will possess authority to effectively implement NACE policies and perform NACE functions. Under this framework, a majority, rather than consensus, will be the operative norm, unless explicitly stated otherwise by the protocol. The U.S. NACE Commissioner, equipped with a staff, should be selected by the President with Senate confirmation.

2. NACE Secretariat: A permanent Secretariat must also be created in order to realize NACE's substantial mandate. Thus, we recommend establishing a head of the Secretariat (Secretary General), selected unanimously by the Commission, who will serve a three-year term and rotate among NAFTA parties. The Secretariat should have staffed offices in the capitals of all NAFTA parties and possesses responsibility for implementing NAFTA's environmental provisions, though national courts would retain concurrent jurisdiction to enforce appropriate standards concerning imports and exports from their own country. The Secretariat should also be responsible for submitting an annual report to the parties on its various duties.

3. NACE Public Advisory Committee: Much, but not all, of the public participation in NACE will occur through and by a Public Advisory Committee, made up of four representatives from each country and one representative selected by the Secretariat. The four U.S. representatives should be picked by the President, and must include at least two individuals from non-profit environmental groups with appropriate trade/environment expertise.

FUNCTIONS OF THE NACE:

1. Dispute settlement: Disputes brought by NAFTA parties involving environmental issues will be decided by the NACE Commission. The parties' briefs, the Commission's decision, and the hearing itself must all be open to public participation. The Public Advisory Committee, through a public petition/notice/comment mechanism similar to the framework in the U.S. Administrative Procedure Act, will be permitted to file an amicus brief on a dispute. As with the NAFTA's existing dispute settlement procedures, parties would be encouraged to cooperate and consult in a manner so as to avoid formal environmental dispute settlement.

In addition, the public's ability to participate in NACE dispute settlement through Public Advisory Committee amicus briefs should not preclude direct citizen complaints to the NACE Commission. Yet, because NACE will be able to hear only a certain number of these direct public petitions (just as the U.S. Supreme Court is able to grant certiorari for only a certain number of cases), the Public Advisory Committee (through its public petition system) will also possess authority to bring environmental complaints to the NACE Commission directly.

Implementing legislation must also specifically acknowledge the right of U.S. citizens and groups to sue in federal court to invoke trade measures or other appropriate sanctions for violation of U.S. standards.

The NACE dispute settlement procedure will be the mechanism for NAFTA environmental enforcement. If NACE determines that an allegation of economic injury by a party or individual, as a result of sub-standard environmental practices in another country, is warranted, then that party or individual will be entitled to pursue the "snap-back" tariff provisions of NAFTA's Chapter 8 (though this mechanism would not be limited to the "transition period"). If NACE determines that a party or individual has suffered an environmental injury as a result of sub-standard environmental practices in another country, then NACE will possess the authority to levy fines or duties upon the violating entity. Funds generated by these mechanisms should be channeled back into the violating entity so that the applicable environmental standard(s) can be met.

2. Investigation: Although an individual may not be directly injured by violations of existing environmental standards or lack of sufficient environmental standards in a NAFTA country, that individual must nonetheless possess the right to address such allegations with the Public Advisory Committee through its public petition system. If the Public Advisory Committee determines that an environmental violation has occurred, then it can bring a complaint to the NACE Secretariat.

3. Monitoring: The Secretariat, in cooperation with the NACE Commissioners, will also possess authority to monitor the condition of the continent's environment. Consequently, the Secretariat will possess authority to request information from the NAFTA parties' governments, the Public Advisory Committee, the general public, and other NACE offices. Specific findings will be published in the Secretariat's annual report.

4. NAFTA Amendments and Accession: Because of the significant impacts that either NAFTA/NACE amendments or NAFTA accession would have upon the environment, the NACE Commission should make recommendations to the parties on these matters.

New parties to NAFTA would be required to adopt a schedule for achieving NACE standards, as well as submit an

"environmental report," which would be reviewed by the NACE.

5. Cooperative efforts: The Secretariat and Commissioners will possess authority to establish and promote cooperative efforts among NAFTA parties in order to address concerns relating to trade and the environment, such as providing technical assistance, training, and education programs.

III. NAFTA'S ENVIRONMENTAL OMISSIONS AND AMBIGUITIES:

We respect and honor the President's desire to not reopen the NAFTA text. Nonetheless, there are provisions in the present text that are either contradictory or unclear. The Bush NAFTA also fails to address several crucial environmental concerns. Therefore, the topics listed below are areas where a NAFTA environmental protocol must rectify present NAFTA omissions or ambiguities.

A. CLEAN-UP OF BORDER REGION:

Despite the fact that the several border agreements between Mexico and the U.S. have been considered separate from the present NAFTA, we do not believe that NAFTA should go forward until enforceable commitments have been made to clean up the border region. Abnormally high rates of death and disease in the border area merely underscore the environmental apocalypse that has gripped the maquiladoras region.

B. FUNDING:

Both in the border area and elsewhere, a secure source of funding is vital for proper infrastructure development, environmental enforcement, increased investigation, and clean-up. Because the appropriations process does not provide a secure source of funding for any of the three present NAFTA parties, we believe that designated funding sources must be developed as a prerequisite to implementation of NAFTA. Ideas that deserve attention include: a) a small transaction fee on all goods and services that could be phased out over a specified number of years; b) a directed "green" fee or environmental countervailing duty on economic activity that is environmentally unsustainable or below standard, administered by NACE (in a manner consistent with the OECD's "polluter pays principle"); c) "earmarked" tariffs, which could be phased out during the first 10-15 years of NAFTA and which could help finance environmental infrastructure; and d) development of a "green bank," which could utilize established trust funds to leverage additional money through bond proposals.

Regardless of which funding scheme(s) is eventually utilized, we believe it is imperative to channel such funds back into environmental infrastructure improvements, worker transition programs, and funding of the NACE itself.

C. PRODUCTION/PROCESS STANDARDS:

Trade law must recognize that how a product is produced is just as important as the quality of the product itself. Although Article XX of the General Agreement on Tariffs and Trade (GATT), provides for health and natural resource conservation exceptions, these provisions have been clouded by recent GATT panel decisions. In addition, Article 14 of the GATT Standards Code permits dispute settlement whenever technical requirements are stated in terms of production processes or methods. Without explicit clarification, NAFTA will repeat the mistake of GATT panels and the Dunkel draft by incorporating unacceptable provisions or interpretations of GATT (e.g., Article 103, NAFTA). The NACE Commission could also provide a schedule for periodic reviews of production methods, sector by sector.

For instance, the now infamous 1991 tuna/dolphin GATT panel decision was based, in large part, on the fact that the U.S. Marine Mammal Protection Act seeks to regulate the way tuna is caught (by killing thousands of dolphins per year), and not the tuna itself. Ironically, Mexico was the country that brought the GATT complaint against the U.S., and though it initially agreed to a Congressional program that would establish an international moratorium on the intentional killing of dolphins by tuna fishing nets, Mexico has since backed away from this commitment. See International Dolphin Conservation Act, P.L. 102-523. Such action only reinforces skepticism about the Mexican environmental commitment.

D. INVESTMENT:

Although Article 1114 of the existing NAFTA recognizes "that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures," it does nothing to actually prevent such an occurrence. In plain terms, Mexico must not become a "pollution haven" for unscrupulous investors. While we recognize that Mexico is concerned about sovereignty infringement, we note that Mexican officials have publicly stated that only "clean" technology will be utilized for new capital investments inside their country; thus, Mexico should be open to safeguards on this issue. Furthermore, Congress and the President frequently apply limitations to investment in countries for important national security reasons. In short, we want to make "polluters pay" so that U.S. economic interests subject to tough U.S. environmental standards are not injured by dirty, and hence subsidized, foreign investment.

E. INTERNATIONAL ENVIRONMENTAL AGREEMENTS:

At present, only three international environmental agreements clearly "prevail" if there is a conflict with NAFTA: CITES, the Montreal Protocol, and the Basel Convention. The Bush Administration's defense to this limit was that only these three agreements possess direct trade implications. Not only is this

assertion false, but the logic behind the argument is also needlessly narrow. We strongly believe that the U.S. must possess the ability to implement and enforce any international agreement by imposing trade restrictions, if such restrictions are the only way to effectuate complete compliance with the agreement in question. Therefore, we believe all international environmental agreements should be referenced in the protocol and added to Article 104, as soon as all three parties are signatories to such an agreement. In addition, a protocol must secure the right for any NAFTA party to appropriately enforce and implement any international agreement to which it is a signatory.

Furthermore, we propose that the 1942 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere be revitalized and specifically linked to NAFTA so that acceding countries to NAFTA make specific accommodations to habitat protection within their borders. The U.S., with its present system of public land protection, already satisfies the provisions of this Convention.

F. ENERGY:

We are concerned about Chapter 6's energy and basic petrochemicals provisions. Article 601.2 states that one of the goals of NAFTA is to "strengthen the important role that trade in energy and basic petrochemical goods play." Furthermore, Chapter 6 allows continuation of existing or future subsidies for oil and gas exploration. While these subsidies may be a way to lessen extra-continental dependence upon petroleum products, the NAFTA must address efforts to reduce the continent's dependence upon fossil fuels, and allow for government sponsored programs to research and encourage the use of renewable energy sources. One solution might be for the U.S. to aggressively seek a protocol to UNCED's global climate change convention, with timetables for reduction of greenhouse emissions.

G. AGRICULTURE:

Without adequate monitoring and infrastructure assistance, NAFTA could threaten many farm programs on this continent and jeopardize the movement toward sustainable agriculture. The dismantlement of import restrictions, as well as pressure upon legitimate food-safety standards, should not be a catalyst for centralized agriculture, based exclusively on agricultural exports and without regard to the relationship between producer and consumer.

H. IMPACT ON STATE AND LOCAL LAWS:

Because states and localities are not parties to NAFTA, they cannot directly defend their standards under Chapter 7 or 9. Although the federal government is allowed to set standards it deems "appropriate," states and localities do not explicitly possess this right, and are thus dependent upon the federal

government for defense. Furthermore, NAFTA Article 105 states "All parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this agreement ... by state and local governments." This situation might present a problem for a state like California, which often has standards more stringent than the federal government. Although we would like the sub-federal problem to be addressed in the protocol, U.S. implementing legislation could also prohibit the federal government from lowering state or local standards.

I. THE "NECESSARY" TEST AND OTHER PROBLEMATIC NAFTA LANGUAGE:

Like many other NAFTA provisions, Chapter 21's environmental "exceptions" incorporate GATT terminology and jurisprudence. Unfortunately, recent GATT panel decisions have interpreted the term "necessary to protect human, animal or plant life or health" as requiring "necessary" measures to be "least-GATT" or "least-trade" restrictive. Under this standard, many present federal and state trade measures could be found to be NAFTA-illegal, from bans on the trade in elephant ivory to state recycling mandates. In addition, such standards have had a chilling effect on new legislation that attempts to incorporate appropriate trade restrictions as an enforcement mechanism.

The environmental exceptions in NAFTA, therefore, need to be both clarified and strengthened by incorporating the "precautionary principle" found in the Biodiversity Convention, as well as the listing provisions of CITES that directs the parties to err on the side of caution when what is "necessary" from an environmental perspective is unclear. See also NAFTA Article 754.1.

Also potentially problematic is NAFTA Article 903, which could be read to incorporate GATT provisions and jurisprudence in a way that diminishes this country's ability to protect environmental resources. Furthermore, Annex 2004's allowance to seek dispute settlement if a party feels "any benefit it could reasonably have expected to accrue it ... is being nullified or impaired" practically invites attack upon U.S. environmental standards. Similarly, the "based on" language of Articles 754, 755, 757, and 905 could needlessly threatens U.S. laws like the Delaney anti-cancer clause in the federal Food, Drug and Cosmetic Act, which bans the addition of any amount of cancer inducing substances; a clarifying standard should be adopted in the protocol that protects all U.S. environmental and health standards, so long as they are not arbitrary or disguised trade barriers.

J. STANDARDS

As is implied by various other sections of this letter, U.S. environmental, health, or safety standards should in no way

be weakened by NAFTA or any other trade agreement.

K. SUSTAINABLE DEVELOPMENT:

While we laud the goal of "sustainable development" in the Preamble, we would like to see the promotion of sustainable development binding, and appear in Article 102's Objectives. The question of whether practices are sustainable, as well consistent with current standards, should also be raised and answered in NACE reports. If determinations of non-sustainability are made by NACE, alternative programs should be suggested to the violating party. By truly integrating the concept of sustainability into the NAFTA environmental protocol, the NAFTA parties will not only acknowledge that trade has profound impacts upon the environment, but also that these impacts need not and should not be negative.

We appreciate the opportunity to brief you on these matters and look forward to working with you over the coming months and years. We hope that the protocol outlined in this letter is merely the beginning of a larger process to incorporate sound environmental oversight into the NAFTA process. Please do not hesitate to contact us if you have any questions.

Sincerely

cc: The Honorable Bill Clinton
The Honorable Al Gore
The Honorable Bruce Babbitt
The Honorable Carol Browner
The Honorable Mike Espy
The Honorable Ron Brown
The Honorable Warren Christopher
The Honorable Tim Wirth
The Honorable George Mitchell
The Honorable Max Baucus
The Honorable Daniel Moynihan
The Honorable Sam Gibbons
The Honorable Gerry Studds
The Honorable Richard Gephardt
The Honorable Dan Rostenkowski
The Honorable Ron Wyden
The Honorable Henry Waxman

PROTOCOL TO THE NORTH AMERICAN FREE TRADE AGREEMENT
BETWEEN
THE GOVERNMENT OF THE UNITED MEXICAN STATES,
THE GOVERNMENT OF THE UNITED STATES OF AMERICA,
AND THE GOVERNMENT OF CANADA
REGARDING THE FORMATION OF A
NORTH AMERICAN COMMISSION ON THE ENVIRONMENT

The Government of the United Mexican States, the Government of the United States of America, and the Government of Canada recognizing the importance of environmental protection for the economic and social well being of present and future generations, are resolved to:

ENCOURAGE cooperative efforts to preserve and protect the environment, health and safety of the citizens of the Parties;

PROMOTE sustainable development;

ENSURE that expanded free trade and economic growth attendant to the North American Free Trade Agreement does not result from the diminishment of environmental protections;

STRENGTHEN the development and enforcement of environmental laws and regulations;

PROTECT the environment from degradation;

GUARANTEE that domestic health, safety or environmental measures are not waived, relaxed or otherwise derogated from as a means of encouraging investment;

FOSTER the transfer of environmentally sound technologies;

PROVIDE avenues for public participation in environmental decision making;

HAVE AGREED AS FOLLOWS:

ARTICLE I: ESTABLISHMENT OF THE NACE

THE GOVERNMENT OF THE UNITED MEXICAN STATES, THE GOVERNMENT OF THE UNITED STATES OF AMERICA, AND THE GOVERNMENT OF CANADA [hereinafter "the Parties"] hereby establish a North American Commission on the Environment [hereinafter "the NACE"].

ARTICLE II: STRUCTURE OF THE NACE

1. The NACE shall consist of:

A. A Commission made up of an appointed senior level representative of each Party ["the Commissioners"], whose appointment shall be subject to the respective domestic rules concerning the appointment of a cabinet level official for each Party [hereinafter "the Commission"];

B. A rotating Secretariat ["the Secretariat"], consisting of a Secretary General ["the Secretary General"] and a staff of appropriate size and qualifications to carry out the responsibilities of the NACE provided for below; and,

C. A Public Advisory Committee of non-governmental experts ["the Public Advisory Committee"].

ARTICLE III: MEMBERSHIP

1. Membership in this Agreement shall be limited to parties to NAFTA.

ARTICLE IV: APPOINTMENT OF THE COMMISSIONERS

1. Each Party shall appoint their NACE Commissioner within 60 days of the entry into force of this Agreement.

ARTICLE V: VOTING BY THE COMMISSION

1. On any matter brought to a vote before the Commission each Party shall have one vote that shall be exercised by the each Party's respective Commissioner.

2. All decisions of the Commission shall be by majority. In cases of a tie, pursuant to Article VI.3 of this Agreement, the Secretary General shall cast the deciding vote.

ARTICLE VI: SELECTION, AND RESPONSIBILITIES OF THE SECRETARY GENERAL

1. The Secretary General shall be selected by consensus vote of the Commission, within 150 days of the entry into force of this Agreement. The Secretary General shall serve for a three-year-term.

2. The Secretary General shall be responsible for managing the Secretariat.

3. The Secretary General shall serve as a non-voting member of the Commission, however, in the event of a tie vote by the Commission, the Secretary General shall be responsible for casting the deciding vote.

ARTICLE VII: REMOVAL OF THE SECRETARY GENERAL

1. The Secretary General shall be removed only by consensus vote of the Parties.

ARTICLE VIII: STRUCTURE AND LOCATION OF THE SECRETARIAT

1. The Secretariat shall consist of a staff of appropriate size and qualifications under the direction of the Secretary General. The Secretariat will maintain its principal office in the capital of the Party then responsible for hosting the rotating Secretariat.

The Secretariat shall also maintain a staffed office in the capital of each of the parties.

2. The rotating Secretariat shall alternate each year among the Parties, beginning upon entry into force of this Agreement, in Mexico City, Mexico.

3. The Secretariat shall not be hosted by any country for a term greater than one calendar year, and shall not return to that Party until it has completed a rotation through all other Parties.

4. The staff shall be appointed by the Secretary General and shall include primarily individuals who are citizens of the Parties.

5. The staff of the Secretariat shall be responsible for conducting any informational, cooperative, facilitation, monitoring or investigation activities requested by the Commission.

6. The Parties shall provide additional necessary logistical and technical support to the Secretariat as requested by the Secretary General.

ARTICLE IX: SELECTION, STRUCTURE, AND RESPONSIBILITIES
OF THE PUBLIC ADVISORY COMMITTEE

1. The Parties shall form a Public Advisory Committee within 120 days of the entry into force of this Agreement. The Secretary General shall select one at-large member. Each Party shall select four members of the Advisory Committee. Members of the Public Advisory Committee shall sit for a two year term.
2. Members of the Public Advisory Committee will be drawn from the non-governmental community of each Party, and should be representative of the following interests: a) environmental organizations; b) border communities; c) industry, in particular the environmental goods and services industrial sector; and, d) trade experts.
3. The Public Advisory Committee will be responsible for overseeing the activities of the Commission, providing advice and counsel to the Commission at their own initiative or by request of the Commission or of the public, and other responsibilities set forth in this Agreement.
4. At its first meeting the Public Advisory Committee shall select by majority vote a chair.
5. The chair will sit for a one year term. The chair shall serve as the Public Advisory Committee's liaison to the Commission and shall sit as a non-voting member of the Commission and shall participate in all of the Commission's activities.

ARTICLE X: VOTING BY THE PUBLIC ADVISORY COMMITTEE

1. On any matter brought to a vote before the Advisory Council, each member of the Public Advisory Committee shall have one vote, that shall be exercised by the member in their sole discretion.
2. All decisions of the Public Advisory Committee shall be by majority.

ARTICLE XI: MEETINGS OF THE COMMISSION

1. The Commission shall hold its first meeting within 90 days of the entry into force of this Agreement. Thereafter the Commission shall meet regularly, at a minimum of once every two months. The Commission's meetings shall be of a frequency necessary for it to carry out its designated tasks.

2. Any Party or the Secretariat or the Public Advisory Committee may also call for an emergency meeting.
3. Unless agreed upon otherwise, the Commission shall meet in the current location of the rotating Secretariat.

ARTICLE XII: MEETINGS OF THE PUBLIC ADVISORY COMMITTEE

1. The Public Advisory Committee shall hold its first meeting within 120 days of the entry into force of this meeting. Thereafter the Public Advisory Committee shall meet regularly, at a minimum of once every two months. The Public Advisory Committee meetings shall be of a frequency necessary for it to carry out its designated tasks.
2. The chair of the Public Advisory Committee, the Commission, the General Secretary, or any Party, may also call for an emergency meeting of the Advisory Council.
3. Unless agreed upon otherwise, the Advisory Council shall meet in the current location of the rotating Secretariat.

ARTICLE XIII: POWERS OF THE COMMISSION

1. The Commission shall have the authority to:
 - a. facilitate cooperation on environmental matters among and between the Parties;
 - b. monitor environmental matters or cases, including compliance and enforcement, by the Parties;
 - c. investigate environmental matters or cases;
 - d. request information from the Parties or other individuals, corporations, organizations, or groups relevant to the Commission's other powers;
 - e. conduct or assist in conducting training and technical assistance and information dissemination;
 - f. conduct efforts to strengthen bilateral and trilateral cooperative efforts on enforcement;
 - g. request a Party to where necessary subpoena information requested by the Commission;

- h. receive, hear and decide complaints on environmental matters, as set out below;
- i. facilitate consultations among and between the Parties to avoid or eliminate environmental disputes;
- j. report on matters under its jurisdiction;
- k. establish advisory committees necessary to perform its functions;
- l. conduct meetings, seminars, and conferences on matters under its jurisdiction;
- m. make recommendations on amendments to the NAFTA and this Agreement and on protocols to NAFTA and this Agreement; and,
- n. conduct other activities as agreed upon by the Parties.

ARTICLE XIV: MATTERS BEFORE THE COMMISSION

1. The Commission may take up any matter of environmental concern at its own initiative, at the initiative of one of the Parties, at the initiative of the Public Advisory Committee, or at the initiative of any private party or non-governmental organization affected by the environmental matter complained of.
2. The Commission will select the environmental matters it will address by vote upon a review of each petition submitted.
3. In selecting which matters shall be heard the Commission shall give first and equal priority to matters:
 - A. directly related to NAFTA;
 - B. arising in the Border Region;
 - C. with transboundary, hemispheric or global impacts;
 - D. with large-scale impacts on the environment or human populations;
 - E. trilateral in nature;
 - F. concerning other treaties or agreements to which one or more Parties are party to.

4. The Commission shall give second and equal priority to environmental matters:

A. indirectly related to NAFTA;

B. bilateral in nature and unrelated to matters set out in Section 3.a-.f of this Article.

5. The Commission shall give third and equal priority to all other types of environmental matters.

6. If the Commission votes not to address an environmental matter, the Public Advisory Committee can vote to compel the Commission to take up the matter refused. The Commission shall take up and fully pursue any matter referred back to the Commission by vote of the Public Advisory Committee.

7. The Commission shall set up appropriate procedures, in accordance with the other terms and conditions of this Agreement, to provide for the submission and acceptance of petitions. These procedures must be approved by a vote of both the Commission and the Public Advisory Committee.

8. The Commission shall approve the budget of the NACE.

ARTICLE XV: NAFTA PARTY CONSULTATIONS

1. Any Party may request in writing private consultations with any other Party regarding any actual or threatened environmental matter.

2. Any request for consultation shall be delivered to the other Parties to this Agreement, to the Commission and to the Public Advisory Committee.

3. A third-Party that considers that it has a substantial interest in the environmental matter shall be entitled to participate in the consultations on delivery of written notice to the other Parties and the Commission and the Public Advisory Committee.

4. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article. To this end, the consulting Parties shall:

a. provide sufficient information to enable a full examination of the environmental matter to the other consulting Party or Parties, the Commission, and to the Public Advisory Committee;

- b. treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the Party providing the information; and,
 - c. seek to avoid any resolution that adversely affects the interests of any non-consulting party, or the public of the Parties, or is contrary to the goals of this Agreement.
5. The Commission and the Public Advisory Committee shall treat any confidential or proprietary information provided in the course of consultations on the same basis as the Party providing the information.
6. The consulting Parties shall provide a written copy of any resolution of an environmental matter under this Article to the other Parties, the Commission, the Public Advisory Committee, and the public. The Commission and the Public Advisory Committee shall both then certify in writing that any resolution under this Article advances the goals of this Agreement.

ARTICLE XVI: RESOLUTION OF SPECIFIC DISPUTES

1. Any Party, or an individual residing in any Party, or any group of individuals residing, incorporated, or located in any Party, or the Public Advisory Committee may petition the Commission to address the failure of a Party to adopt, maintain or enforce an environmental, health or safety standard.
2. Petitions to the Commission concerning a specific dispute under section 1 of this Article, must state specifically:
- a. The harm complained of, or threat thereof, to the complaining individual, industry, organization or group, the action or failure to act by a Party giving rise to the harm complained of, and the nexus between the harm complained of and the action or non-action of the Party; or,
 - b. in the case of an industry alleging a competitive harm, unrelated to a physical injury to its products, facilities or personnel, it must include information sufficient to show all of the requirements under subsection (a) above, and that such harm is a cause of material injury or threat thereof to the industry.
3. Once the Commission accepts a petition pursuant to Article 14 of this Agreement, it will immediately advise the Parties, the Public Advisory Committee and the public of the petition and the factual allegations therein.

4. The Commission will permit and facilitate public review of the petition and accept amicus curiae briefs from interested parties.

5. Twenty-one days after the acceptance of a petition and should the parties to the dispute be unable to resolve the complained of acts through a negotiated settlement, as set out below in Article XVII of this Agreement, the Commission will commence an investigation of the complained of action or failure to act.

6. In conducting an investigation of a specific petition the Commission, and the staff of the Secretariat acting under the orders of the Commission, shall have the authority to: conduct site visits; request and review relevant documents of the Parties or involved private parties; and, conduct any other appropriate investigatory activities. At the conclusion of their investigation, the Commission shall make a preliminary report of its findings available to the Parties, the complaining party or parties, the Public Advisory Committee, and the public at large.

7. The Parties shall facilitate and cooperate in any investigation properly conducted by the Commission under the terms of this Agreement.

8. Within 120 days of the acceptance of a petition, the Commission shall conduct a public hearing that will review the results of its investigation, the merits of the original petition, and the submissions of any party, parties, the Public Advisory Committee, or amici curiae.

9. Within 20 days of the hearing, the Commission shall vote on whether the alleged action or non-action of a Party has caused the alleged harm and will provide to the public a written determination of its findings within 20 days of the vote.

10. Where the Commission makes a finding of harm, the Commission shall facilitate negotiated settlement discussions, as set out below in Article XVII of this Agreement, between the parties to the dispute with the goal of ending the dispute through the halting the complained of act or compelling action.

11. 21 days after the preliminary finding, and should the Parties be unable to reach a negotiated settlement, the Commission shall:

- a. in the case of actions brought under section 2.a of this Article, render a final determination in the matter and require the challenged party to pay an appropriate fine; or,

b. in the case of actions brought under section 2.b of this Article, certify its finding to the appropriate domestic agency of the complaining Party.

12. In all matters certified under section 11.b, within 21 days after certification, the domestic agency of the complaining Party or the Party in which the complaining party resides, shall then conduct an investigation, and certify to the Commission, whether the complained of action or non-action is a cause of material injury to the domestic producer of a like or directly competitive product.

13. Where the domestic agency makes a determination that the complained of action or non-action is a cause of material injury to the domestic producer of a like or directly competitive product to the Commission, the Party making this determination is authorized to use the Emergency Action provisions in NAFTA article 801.1(a), (b)(ii).

14. Emergency actions pursuant to this Article of this Agreement shall not be limited to the transition period of NAFTA.

15. Emergency actions pursuant to this Article of this Agreement shall be subject to the provisions of NAFTA article 801.2 (a), (b), (c)(1), (e).

16. Where the domestic agency of a Party finds that the complained of action or non-action is not a cause of material injury to the domestic producer of a like or directly competitive product, the Commission shall render a final determination in the case and may require the challenged Party to pay an appropriate fine.

ARTICLE XVII: NEGOTIATED SETTLEMENTS

1. The Parties shall make every effort to negotiate settlements of specific disputes under Article XVI of this Agreement, with any challenging party, with the goal of eliminating disputes through the elimination of any complained of action or failure to act.

2. Negotiated settlements shall advance the goals of this Agreement.

3. The settling parties in negotiated settlements shall provide a written copy of any resolution of an environmental matter under this Article to the other Parties, the Commission, the Public Advisory Committee, and the public. The Commission and the Public Advisory Committee shall both then certify in writing that any settlement under this Article advances the goals of this Agreement.

ARTICLE XVIII: MONIES OBTAINED IN DISPUTES

1. Any tariffs or other monies obtained through the use of emergency actions pursuant to Article 16.13, or fines pursuant to Article 16.11.a or 16.16 shall be used for the express and sole purpose of remedying the harm complained.
2. The Commission shall administer the use of tariffs and monies as appropriate to remedy the harm complained of in a particular matter.
3. Except where special circumstances exist, including a Party's continuing denial of any culpability, the Commission may delegate the administration of the remedy of the harm to the challenged Party. Where the Commission delegates the administration of a remedy, the delegated Party shall submit to the Commission and the Public Advisory Committee regular and detailed reports concerning the progress of the remedy and the use of monies provided.

ARTICLE XIX: RELATIONSHIP TO NAFTA CHAPTER 20

1. Pursuant to NAFTA article 2012.2, any request by a Party for a meeting of the Free Trade Commission (the "FTC"), under NAFTA article 2007, shall be provided to the Commission. The Commission shall be responsible for promptly providing a copy of the request to the Public Advisory Committee.
2. In conjunction with NAFTA article 2007.5, and pursuant to NAFTA article 2012.2, the FTC shall request assistance from the Commission in resolving any environmental matter under NAFTA article 2007. After review of the request for a meeting of the FTC, the Commission may also, at its own election, participate in the resolution of any dispute concerning an environmental matter.
3. Pursuant to NAFTA article 2012.2, any request for an arbitral panel pursuant to NAFTA article 2008 shall be provided to the Commission. The Commission shall be responsible for promptly providing a copy of the request to the Public Advisory Committee.
4. Pursuant to NAFTA article 2012.2, at the request of a NAFTA chapter 20 arbitral panel, or at its own election, the Commission shall participate in the proceedings of a dispute panel convened under NAFTA article 2008.2, to the following extent:
 - a. copies of all written submissions to and communications with the panel shall be provided to the Commission;

- b. the Commission may, at its own election, be present at the hearings of a panel, and may, on its own accord, or at the request of one of the Parties, or the panel, submit or provide written or oral testimony on environmental matters raised in a dispute. Any written submissions or oral testimony provided by the Commission to a NAFTA chapter 20 panel shall be agreed to by a vote of the Commission in advance of its submission or provision.
5. Where the Commission, or a NAFTA chapter 20 panel, determines that an environmental matter is central to the resolution of a dispute, the environmental matter shall be certified to the Commission for a determination. This determination will be returned to the NAFTA chapter 20 panel. The NAFTA chapter 20 panel shall defer to the decision of the Commission and shall use this determination in applying the provisions of NAFTA to the dispute.
6. The Commission shall establish procedures for deciding on environmental matters pursuant to section 5 of this Article, in NAFTA chapter 20 disputes that assure the parties to the dispute the right to at least one hearing before the Commission, as well as the opportunity to provide initial and rebuttal written submissions. These procedures shall also provide an opportunity for the Public Advisory Committee and affected private individuals and groups to provide written submissions to the Commission. At the election of the Parties to the dispute or at the Commission's own election, the Commission may also allow affected private individuals and groups the ability to provide oral testimony.
- ARTICLE XX: PUBLIC PARTICIPATION
1. Except when the Commission sits in executive session in deciding on a specific dispute, or where otherwise specifically provided for in this Agreement, all activities of the Commission shall be open to the public.
2. The Commission shall in a timely fashion establish procedures for publishing and providing to the public, except where expressly provided otherwise in this Agreement, all: decisions of the Commission and the Public Advisory Committee; rules or procedures of general applicability of the Commission or the Public Advisory Committee; submissions to the Commission or Public Advisory Committee from any source; budgets for the NACE; reports by the NACE; minutes or transcripts of the NACE; and, findings by the NACE.
3. The Commission shall establish and publish procedures for providing the public with access to all documents of the Commission

or the Public Advisory Committee. These procedures must be approved by the Public Advisory Committee.

4. The only documents exempted from section 3 of this Article shall be documents:

- a) related solely to the internal personnel rules and practices of the NACE;
- b) personnel and medical files of the NACE;
- c) that have yet to be finalized and the contents of which have yet to be publicly disclosed, except where otherwise provided for in this Agreement.

5. The Commission shall establish procedures for maintaining as confidential the proprietary information of private parties and information vital to the national security of one or more of the Parties. Such procedures should be narrowly tailored so as to not inhibit the goals of this Agreement or applicable international norms.

ARTICLE XXI: NAFTA ACCESSION

1. Upon preliminary notice that a country or group of countries wishes to accede to NAFTA in accordance with NAFTA article 2204 (the "Acceding Country"), the Commission shall undertake a comprehensive review of the environmental regime of the Acceding Country with an eye to highlighting disparities between the Acceding Country and the Parties that may impact trade and investment flows under NAFTA or environmental protection (the "Review").

2. The Public Advisory Committee and the public shall be given notice of the Review and will be provided the opportunity to comment on the draft Review. The Commission will also hold hearings on the draft Review in the Parties and in the Acceding Country. The written and oral comments of the public will be reflected, and where appropriate responded to, in the final Review.

3. The Review will be utilized by the Parties in setting the terms and conditions of accession under NAFTA article 2204.

4. No Acceding Country may be permitted to accede into NAFTA without simultaneously or previously becoming a Party to this Agreement.

ARTICLE XXII: BUDGET AND CONTRIBUTIONS

1. The NACE's fiscal year shall commence 120 days after the entry into force of this Agreement.
2. Each Party shall bear the costs of their own regular participation in the Commission.
2. The Secretary General shall submit to the Parties, prior to the commencement of each fiscal year, a budget for the coming fiscal year for the Commission's approval.
2. Each Party shall contribute an equal share of the NACE's budget prior to the commencement of the fiscal year.
3. If during the fiscal year, the NACE's costs exceed its remaining budget, the Secretary General shall, if necessary, submit a revised budget to the Commission. The Commission shall vote on extending the activities of the NACE and shall revise the budget and the shares of each Party accordingly to provide for these activities.

ARTICLE XXIII: REVENUES

1. The Commission shall consider establishing a reasonable and appropriate filling fee for Article XVI.2.b actions. Any such fee should take into account the financial resources of the party initiating a dispute.
2. Within 180 days after the first meeting of the Commission, the Commission shall also consider and report on alternative funding mechanisms as a means of supporting the activities of the NACE.

ARTICLE XXIV: REPORTING

1. The Secretariat shall issue an Annual Report on the NACE's activities.
2. This Annual Report shall include, but not be limited to, a:
 - a. review of matters brought before the Commission and the Public Advisory Committee;
 - b. review of environmental cleanup and infrastructure development in the Border Region; and,

c. funding of the NACE and NAFTA-related environmental initiatives.

3. Each Party shall submit to the NACE, at such times and in such manner as shall be determined by the Commission, reports on laws, regulations, and statistics related to the goals of this Agreement.

4. The Commission shall compile, review, and comment upon, all reports submitted under section 2 of this Article, with an eye towards achieving the goals of this Agreement.

ARTICLE XXV: NATIONAL COOPERATION

1. Each Party shall cooperate fully with the NACE in any activity provided for in this Agreement, or agreed to by the Commission.

2. Each Party shall designate an appropriate contact office within its domestic government to provide cooperation to the NACE in conducting its activities.

3. Each Party shall provide the NACE with appropriate facilities for the NACE satellite office in its capital, and shall provide appropriate facilities to the Secretariat during its rotation.

ARTICLE XXVI: WITHDRAWAL

1. No Party may withdraw from this Agreement without withdrawing from NAFTA.

ARTICLE XXVII: LEGAL STATUS

1. The NACE shall have the legal capacity in the jurisdiction of any Party to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Agreement.

2. Each Party undertakes, insofar as it may be possible under its constitutional procedures, to accord to the NACE all the immunities and facilities which it accords to diplomatic missions, including inviolability of premises and archives, immunity from suit and exemptions from taxation.

ARTICLE XXVIII: AMENDMENT OF THIS AGREEMENT

1. The Parties may amend this Agreement by vote of the Commission. No amendment to this Agreement may be offered which is inconsistent with the goals of this Agreement.

ARTICLE XXIX: RELATIONSHIP TO OTHER INTERNATIONAL
ORGANIZATIONS AND AGENCIES

1. The NACE may co-operate with other international organizations and agencies whose interests and activities are related to those of the NACE. To this end, the Secretary General may establish appropriate working relationships with such organizations and agencies, and may establish such joint committees or working groups necessary to assure effective cooperation. Any formal arrangements entered into with such organizations and agencies shall require a vote of the Commission.

2. The NACE may make arrangements with other international organizations and agencies for reciprocal representation at meetings. Any determination of reciprocal representation shall include a determination that, either: a) the public enjoys access to, and the ability to participate in, the other organization's or agency's activities that approach the level of access and participation the public enjoys in the NACE; or, b) the other organization or agency is in the process of undertaking a comprehensive effort to provide, in the near term, the public with enhanced participation in, and access to, its activities.

ARTICLE XXX: INTERPRETATION

1. The French, English and Spanish texts of this Agreement shall be accorded equal weight.

2. Any question or dispute concerning the interpretation of this Agreement shall be referred for determination to the International Court of Justice or to an arbitral panel agreed upon by the Commission. In a dispute over the interpretation of this Agreement the Parties agree to be bound by the decision of either the International Court of Justice or an arbitral panel.

ARTICLE XXXI: OFFICIAL LANGUAGES

1. French, English and Spanish shall be the official languages of the NACE.

2. All reports of the NACE, and all rules and procedures of the NACE shall be available in French, English and Spanish.