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NAFTA [North American Free Trade Agreement] Side Agreements

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SEP 21 1993

NOTE TO KATIE, CATHY AND OEP STAFF
FROM DAN
RE: NAFTA INFO-PACK

Attached is the latest draft of the information package of why NAFTA is good for the environment. You should feel free to speak from these points and/or summarize them in letters relating to this issue. However, until the info-pack is finalized it should not go out into the public domain as such.

If you have any questions, please don't hesitate to ask me.

cc: Eileen

SEP 21 1993

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THE NAFTA PACKAGE: SIGNIFICANT BENEFITS FOR THE ENVIRONMENT

The NAFTA package provides major environmental benefits for North America. We cannot afford to let this opportunity pass us by. Why? Defeating the NAFTA means reverting to the status quo, which is not acceptable. Consider the benefits of the NAFTA:

The NAFTA agreement itself sets a new environmental standard for trade agreements. Negotiated with significant input from major environmental groups, the NAFTA makes unprecedented links between trade and environmental protection:

- NAFTA commits countries to promote sustainable development, undertake trade in a manner consistent with environmental protection and conservation, and to strengthen the enforcement of environmental laws.
- NAFTA ensures federal, state and local governments can maintain environmental standards as high as they wish. It also contains commitments by countries to work together to enhance the level of environmental protection. NAFTA also contains provisions to support environmentally sensitive investment, and discourage lowering standards or relaxing enforcement to attract investment;
- NAFTA recognizes that trade obligations of important environmental agreements like the Montreal Protocol and the Convention for Trade in Endangered Species take priority over those in the NAFTA.

The Environmental Agreement signed by the three NAFTA parties creates the Commission for Environmental Cooperation--the first environmental institution of its kind. It obligates countries to enforce their environmental laws, and offers penalties if they don't. The commission has the power to investigate and discuss a broad range of pressing trilateral environmental issues, and contains unprecedented opportunities for public participation. We do not have any forum that can compare in serving to bring environmental problems to the attention of the North American public. If we lose NAFTA, we lose this forum, and the status quo continues.

A new Border Financing Authority under the NAFTA will provide billions of new dollars to help communities address the serious environmental problems they are facing. The Border Action Program will build on the work EPA and other agencies are already doing there. The program will address critical issues, like environmental justice, eco-system protection and partnerships with States and communities.

All of this adds up to an environmental package that the U.S. can be proud of. NAFTA has been endorsed by Conservation International, Environmental Defense Fund, National Audubon Society, Natural Resources Defense Council, World Wildlife Fund and National Wildlife Federation, representing eighty percent of membership of national environmental groups. They would not be actively supporting the NAFTA unless they felt that this package was a major step forward in efforts to integrate environmental protection and economic growth, and that defeating it would be a significant step backward.

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NAFTA PROTECTS THE ENVIRONMENT

WITH NAFTA:

-- An Innovative Approach to Integrating Trade and Environment Objectives: The NAFTA contains a number of innovations designed to ensure that increased trade is accompanied by environmental safeguards--making it the greenest trade agreement ever negotiated. NAFTA protects our our high federal, state and local standards, and provides a model for future trade negotiations. Major environmental groups have endorsed the agreement.

-- A Precedent Setting Commission for Environmental Cooperation: The NAFTA creates a pathbreaking trilateral commission committed to raising the level of environmental protection--the first organization of its kind. It sets the standard for public input in an international forum.

-- Fines and Trade Sanctions for Countries that Do Not Enforce Their Domestic Environmental Laws: For the first time ever, the U.S. has the right to seek penalties before a commission panel if our NAFTA partners persistently fail to effectively enforce their environmental laws.

-- Ambitious New Funding for the Border: The Border Environmental Authority and its financial arm will create billions of dollars in new investment to address the urgent problems at the border. It--and the increased resources generated by the NAFTA--will create the momentum needed to put the border environment back on the right track.

WITHOUT NAFTA

-- No "green" trade provisions. We lose precedent setting provisions, such as commitments to enhance environmental standards and measures in support of environmentally sensitive investment.

-- The status quo in North America continues. We lose a major forum that would dramatically increase environmental cooperation on the continent and along the borders.

-- No way to ensure our neighbors enforce their environmental laws. The binding commitment by countries to enforce their environmental laws, and avenue that we fought hard for under the NAFTA for bringing complaints before an independent body would be lost--perhaps forever.

-- Continued deterioration along the U.S.- Mexico Border. Without the resources and spirit of cooperation generated under the NAFTA package, the status quo at the border continues, with far less hope for long-term improvement.

NAFTA IS GOOD FOR THE ENVIRONMENT

- o NAFTA itself, by promoting economic development, will help alleviate the greatest contributor to environmental degradation -- poverty.
- o Environmental side agreement
 - + establishes a North American **Commission for Environmental Cooperation** to facilitate cooperation on the full range of environmental issues, including a central Secretariat with broad information gathering authority and a Joint Public Advisory Committee;
 - + includes such crucial issues as lifecycle impacts (like **PPMs**) and community right-to-know; and
 - + provides for **dispute settlement** procedures to ensure **effective enforcement of environmental laws** with substantial transparency, public participation and "teeth" in terms of fines and either court standing or trade sanctions.
- o Plans for border clean-up include as key objectives: strong institutional arrangements to provide for cross-border cooperation, public accountability, and technical support in the design and execution of environmental infrastructure projects; a secure source of financing to ensure that these needs can be met; and maximum participation of private capital with reliance to the extent feasible on fees paid by those causing pollution and those benefitting from the improved environment.
- o Plans for conservation funding include joining with Mexico to **strengthen local capacity** for conserving forests, watersheds and biodiversity.
- o Environmental technology needs in Mexico will expand, creating a **market for exports** of American pollution control technologies.
- o Long-term implications of NAFTA represent for the first time a **meaningful integration of trade policy and environment policy** with momentum that can be carried forward to the GATT.
- o Environmental organizations including National Wildlife Federation, World Wildlife Fund, Audubon Society, Environmental Defense Fund, Natural Resources Defense Council, Conservation International and others representing **over 7.5 million members** have strongly endorsed NAFTA.

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NAFTA: INNOVATIVE "GREEN" PROVISIONS IN A TRADE AGREEMENT

NAFTA is the **first** trade agreement negotiated with extensive input from EPA, FDA, the environmental community, and the public at large. The result is an agreement that sets the standard for integrating international trade and environmental protection goals.

- o The NAFTA was specifically negotiated to protect federal, state and local health, environmental and safety standards. It contains further provisions to ensure that trade between NAFTA countries will be environmentally sensitive. The innovative environmental provisions of the NAFTA further establish an important precedent for future trade negotiations. These "green" provisions are unique to the NAFTA:
 - the NAFTA preamble call on parties to promote sustainable development, to undertake NAFTA activities in a manner consistent with environmental protection and conservation, and to strengthen enforcement of their environmental laws.
 - provisions that discourage parties from attempting to attract investment by lowering or relaxing health, safety or environmental standards, and to ensure that investment activities are undertaken in an environmentally sensitive way.
 - NAFTA explicitly gives precedence to obligations in important international environmental agreements (the Montreal Protocol, Basel Convention on the Transboundary Movement of Hazardous Waste, and the Convention for International Trade in Endangered Species).
 - NAFTA preserves the right of countries, and their states and localities, to choose the level of health, safety, or environmental protection **they** consider appropriate, including measures more stringent than international standards.
 - NAFTA promotes the use of international standards while containing explicit safeguards to ensure that these provisions do not result in a reduction in the level of health, safety or environmental protection. Furthermore, NAFTA exhorts countries to work together to **enhance** the level of protection, and establishes committees to facilitate this enhancement.
 - in NAFTA dispute settlement procedures involving environmental, health and safety standards, the party challenging U.S. standards has the burden of proof in establishing that a measure is inconsistent with NAFTA provisions.

The Environmental Agreement adds to these benefits by providing an organization--led by NAFTA countries' environmental ministers--that will, among other activities, monitor the environmental effects of the NAFTA, address environmental issues that relate to trade (such as trade measures to address processes and production methods), and seek to resolve environmentally-related trade disputes before they go before NAFTA panels. This activity will further ensure that NAFTA remains the greenest trade agreement in the world.

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NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

The North American Agreement on Environmental Cooperation promotes environmental cooperation among the three countries on a scale we have never seen before. Like the NAFTA Agreement, the Environmental Agreement was negotiated with unprecedented input from environmental groups. The Agreement contains a number of innovations designed to foster enhanced environmental protection, including:

- **a Commission for Environmental Cooperation**, which will promote cooperation between countries on the full range of environmental issues, both at the border and throughout the three NAFTA countries. This will result in earlier and more effective solutions to environmental problems, whether trade-related or not.
- **a Council of Environmental Ministers** under the Commission, represented by the EPA Administrator from the U.S., to regularly address and make recommendations on environmental issues on the continent.
- **an independent Secretariat**, which will report on significant environmental questions confronting the countries, as well reporting regularly on the state of the North American continent as a whole. The Secretariat will also monitor the environmental effects of the NAFTA and will work together with the NAFTA Free Trade Commission to ensure that trade and environment are environmentally sensitive. This function is unprecedented and its effects will be far-reaching.
- **unprecedented obligations for NAFTA countries to enforce their environmental laws** supported by a pathbreaking dispute settlement mechanism that offers penalties for countries that persistently fail to effectively enforce their laws. Just as importantly, the agreement contains a number of mechanisms through which countries will enhance cooperation on enforcement of environmental laws.
- o The Agreement allows citizens of all three countries access to and rights and remedies before courts and administrative agencies for persons in another party's territory who suffer damage from transboundary pollution. It also allows any private citizen or group to petition the Secretariat to investigate a country's failure to effectively enforce any environmental laws under its jurisdiction.
- o The Agreement contains many other provisions designed to promote public participation and citizen access as well. For example, it allows citizens to serve as independent experts to assist the Secretariat in the preparation of reports submitted to the Council of the environmental ministers. It creates a Public Advisory Committee, made up of prominent environmentalists, to help ensure proper enforcement of environmental laws and to settle disputes in an environmentally favorable manner.

In these and other ways, the Commission will not only protect the environment of Canada, Mexico and the U.S. but will also exert a strong influence on future international environmental relations, particularly those relating to trade.

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BORDER FINANCING: FUNDAMENTAL ADVANCES FOR THE BORDER ENVIRONMENT UNDER NAFTA

The U.S.-Mexico Border is in need of urgent attention. NAFTA will make possible fundamental advances in our efforts to address problems on the border in a far more comprehensive way than they have until now. New institutions and investments will be put in place under the NAFTA package which will make it possible for communities to meet their environmental needs. The plan will create:

- **A Border Environmental Administration (BEA)** to provide technical assistance and coordination of project development, financing and implementation. Initial projects will focus on addressing the serious wastewater treatment and water pollution problems along the border.
- **A Border Environmental Finance Facility (BEFF)** to provide the money for some of these projects through direct loans and guaranties. With the Mexicans, we will be providing enough funds to leverage eight billion dollars, the amount that a number of studies have concluded is adequate to address the border's current problems.
- **An EPA guaranty program** to provide credit enhancements to further attract private sector investment.
- o The institutional structure strongly emphasizes a combination of public and private sector financing; building local financial capability through user fees and the creation of Special Purpose Corporations (SPCs) to own and operate environmental projects; using appropriate technologies to efficiently achieve environmental gains; and drawing on the expertise of existing organizations such as International Boundary and Water Commission and the Inter-American Development Bank.
- o [In keeping with the rest of the NAFTA, the Border Environmental Authority will provide significant opportunity for public input. A]

These investments will result in significant improvements along the Border, which would not have been possible without NAFTA. Furthermore, NAFTA will ensure that over time funds are generated at the border so that border communities can pay for their own environmental protection needs.

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FURTHER PROGRESS AT THE BORDER: THE INTEGRATED BORDER PLAN

EPA is leading an effort to design and implement a border strategy to harness the expertise of the U.S. government and the private sector to address serious problems at the border. A cornerstone of the strategy is a new EPA office at the border to respond effectively to critical environmental concerns. This office is a symbol of the importance we are attaching to ensuring that the environmental needs of the border are adequately addressed.

- o The plan will continue to build on unprecedented U.S.-Mexico cooperation over the last two years in the U.S.-Mexico border area. An initial border plan was developed with significant public input and released in February 1992. That plan focused on identifying problems and describing ongoing attempts to address them. The new plan will be directed toward more comprehensive action, and will focus on such key administration priorities as environmental justice, eco-system protection and building partnerships with the States and local communities.
- o EPA has underscored its commitment to action by accelerating many of the projects called for in the current border plan. An example of this is a binational database, for tracking hazardous waste shipments from the maquiladora industry on both sides of the border. This database promises to be an essential tool for monitoring compliance with Mexican and American hazardous waste shipment laws, and it has already proven its usefulness: On June 22 of this year, the U.S. brought its first three enforcement cases for hazardous waste tracking violations developed from using this database.
- o EPA has also been working to increase binational interaction in investigating environmental violations. This cooperation has already led to an increasing number of enforcement actions against illegal hazardous waste shippers. Now Mexico has created a professional environmental enforcement program, which will ensure that cooperation continues to grow.
- o In 1994, EPA will be expanding air monitoring, identifying control strategies near the larger border cities, and intensifying its focus on water sanitation projects near the Tijuana, Laredo/Nuevo Laredo, El Paso/Nogales and other areas--including the Rio Grande, which has been identified by the group American Rivers as one of America's most endangered rivers. It will also build on our current efforts at more effective monitoring and enforcement of border environmental problems.

EPA's new border office will enhance our capability to respond rapidly and effectively to the region's environmental needs. The rest of the NAFTA package will also help--by generating resources communities need for border cleanup, by creating a Border Environmental Authority with financing mechanisms to generate investment, and through the Commission for Environmental Cooperation, which will become a high-visibility forum for identifying and addressing problems at the border and elsewhere in North America.

US Support for the Mexican Conservation Fund

Sustainable development and quality of life in the border region and throughout Mexico depend on the wise management of the country's forests, watersheds and biodiversity. To address these issues, the US will join with the Government of Mexico to create the Mexican Conservation Fund (Fondo Mexicano para la Conservacion de la Naturaleza). The US will commit up to \$20 million to initiate capitalization of the Fund. Leaders from Mexico's public and private sectors have indicated to US private sector representatives that they strongly endorse the creation of the Fund and that the Government of Mexico could contribute some matching funds.

The US contribution would build on a previous seed grant to the World Wildlife Fund to support the consultative committee of prominent Mexican businesspeople, academics and conservationists to design the Mexican Conservation Fund. The objective of the Fund is to provide long-term, sustained financing to strengthen the capacity of Mexican agencies and NGOs for conserving the country's biological resources and protected areas. Specific activities will be selected after broad public consultation, but will likely include:

- o long-term, stable financing of ecosystem-level protection activities in at-risk areas of highest biological diversity;
- o environment and natural resource management training for private sector, local government, academic and NGO conservation leaders; and
- o establishment of strong public and private institutional arrangements that promote cross-border cooperation, accountability and technical support (i.e., cross-border sister parks).

The World Bank, the Inter-American Development Bank, and members of the international donor community have taken interest in the development of the Mexican Conservation Fund. It is expected that the US and Mexican contributions to the Fund will leverage participation of these other sources of finance to help in the conservation of some of the world's most significant biodiversity and help address issues of natural resource management arising from the NAFTA.

SEP 17 1993

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9/16/93 Draft

NAFTA: SANITARY AND PHYTOSANITARY MEASURES

- o The Sanitary and Phytosanitary (SPS) Measures chapter applies only to measures designed to protect from risks associated with import of plants, animals, foods and beverages (this includes the presence of food additives and contaminants such as pesticide residues).
- o NAFTA explicitly guarantees the U.S. ability to choose its own level of protection in enacting SPS measures.
- o NAFTA calls on parties to use international standards as a basis for establishing their own SPS measures, but explicitly allows parties to set standards that are more stringent than international standards. In addition, NAFTA is the first trade agreement to call for harmonization of standards "without reducing the level of protection" and establish a committee to promote enhancement of food safety and improvement of sanitary and phytosanitary conditions. The agreement also will require countries to facilitate access to their domestic production facilities--this means that the U.S. inspectors will be able to tour Mexican facilities.
- o While opponents of NAFTA argue that it undermines our ability to set high domestic health and safety standards, the truth is that NAFTA does not threaten domestic standards, even those that are more stringent than international standards. The NAFTA does subject SPS measures to a number of requirements, all of which are met by domestic regulatory processes:
 - NAFTA requires that SPS measures be based on scientific principles and a risk assessment (as appropriate to the circumstances), and not be maintained when there is no longer a scientific basis. (Scientific basis is defined as merely "a reason based on data or information derived using scientific methods"). It is important to note that the question is not whether the measure was based on the "best science" or the "preponderance" of science.
 - NAFTA does not limit regulatory agencies to using the least trade restrictive measure available. It does address the manner in which SPS measures are applied - they cannot be applied more strictly than necessary to achieve our chosen level of protection.
 - Should any party challenge a U.S. SPS measure, that party would bear the burden of proof.
- o NAFTA does not infringe on state and local authority to regulate. [note that a state or local regulation that is inconsistent with the requirements spelled out above could subject the U.S. to trade sanctions. However, like federal regulatory processes, virtually all state and local regulatory processes should have no trouble satisfying these requirements].

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NAFTA: STANDARDS RELATED MEASURES

- o The Standards-Related Measures (SRM) chapter of NAFTA covers regulation of goods in commerce other than those covered by the S & P chapter. These include regulations pertaining to emissions controls requirements for motor vehicles and safety of consumer goods and chemical products (including pesticide products).
- o The SRM chapter explicitly guarantees the U.S. ability to choose its own level of protection in enacting SRMs dealing with the protection of health, consumers, or the environment.
- o The SRM chapter calls on parties to use international standards as a basis for establishing SRMs, but allows the U.S. to set more stringent standards whenever the U.S. chooses a higher level of protection than the international standard would provide.
- o The NAFTA does subject SRMs to a number of requirements, all of which are met by domestic regulatory processes:
 - Measures must not discriminate between domestically produced and imported products or among products imported from different countries. Also, measures must not create unnecessary obstacles to trade. Unnecessary obstacles are by definition not created when the purpose of a measure is to achieve a legitimate objective, and the measure does not exclude imported goods that meet that legitimate objective. The NAFTA recognizes protection of human health, the environment, consumers, as well as sustainable development as legitimate objectives.
 - NAFTA guarantees the U.S. right to prohibit imports of goods that do not comply with U.S. requirements or fail to complete mandatory approval procedures.
- o NAFTA does not infringe on state and local authority to regulate. [note that a state or local regulation that is inconsistent with the requirements spelled out above could subject the U.S. to trade sanctions. However, like federal regulatory processes, virtually all state and local regulatory processes should have no trouble satisfying these requirements].

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TEN ENVIRONMENTAL REASONS TO SUPPORT NAFTA

- 10. Environmental Jobs:** The \$200 billion world market for environmental goods and services has been identified as one of the core technologies for the 21st century. NAFTA opens up a major new market for U.S. environmental producers, and enhances our ability to compete in this critical industry.
- 9. Investment:** NAFTA and its side agreement contain pathbreaking measures in support of environmentally sensitive investment, as well as measures to discourage countries from lowering their standards or relaxing environmental laws to promote investment.
- 8. Innovation:** NAFTA provides many precedents that can be used to further the cause of environmental protection in international agreements relating to both environment and trade. The NAFTA provides a model for legal mechanisms that integrate trade and environment goals.
- 7. Increased Resources:** Economic growth spurred by NAFTA will generate resources--at the border and elsewhere in Mexico--needed to pay for the costs of environmental protection.
- 6. Protection for U.S. Standards:** NAFTA provides a framework that ensures that federal, state and municipal governments can choose the level of environmental protection that they feel is appropriate, and can adopt measures to meet that level of protection. Furthermore, it and the Environmental Agreement contain measures to encourage enhanced levels of environmental, safety and health.
- 5. Public Participation:** NAFTA and the Environmental Agreement--and the Border Environmental Authority--set the standard for public participation and right-to-know in international agreements.
- 4. Border Remediation:** NAFTA will provide major new funding--eight billion dollars--for environmental infrastructure projects at the border. The Border Plan provides a framework for addressing current and future border problems; an EPA Border Office will enhance responsiveness to problems.
- 3. Enforcement:** The NAFTA side agreement obligates, for the first time, countries to enforce environmental laws, and backs these obligations up with punishments. It creates mechanisms for trilateral cooperation on enforcement issues; the Border Plan will provide resources for Mexican enforcement at the border.
- 2. Cooperation:** The NAFTA package lays out a framework for unprecedented cooperation on the full range of environmental issues facing the North American continent over the coming years.
- 1. The Alternative:** The environmental status quo, which is simply unacceptable in the face of the opportunities NAFTA provides.

INV. AGREEMENT FACT SHEET

Facimile Cover Sheet

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

**Executive Office of the President
Washington, DC 20506**

To: dan blank

From: Bryan Samuel

Date: Friday, Aug 13, 1993 2:58 a.m

Pages: (including cover page)

MESSAGE

If there are any problems receiving this fax, please call (202) 395-3419.

ENV. AGREEMENT Q&A

Facimile Cover Sheet

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

**Executive Office of the President
Washington, DC 20506**

To: DAN BLANK

From: JENNIFER HAVERKAMP 3955663

Date: Friday, Aug 13, 1993 3:00 a.m

Pages: (including cover page)

MESSAGE

MORE DOCS -- QUESTIONS AND ANSWERS

If there are any problems receiving this fax, please call (202) 395-3419.

FACT SHEET:**NAFTA SUPPLEMENTAL AGREEMENT ON
ENVIRONMENTAL COOPERATION**

Historic Undertaking This is the first environmental agreement negotiated specifically to accompany and build on a trade agreement. NAFTA will create the largest market in the world, grow jobs in America, and enhance the region's competitiveness. The Agreement on Environmental Cooperation will ensure that economic growth takes place in a manner consistent with goals of sustainable development.

New Independent Organization The Agreement creates a new Commission on Environmental Cooperation. The three countries' top environmental officials (the EPA Administrator for the United States) will comprise the Commission's Council.

- o A *Joint Advisory Committee* made up of nongovernmental organizations from all three countries will advise the Council in its deliberations.
- o The heart of the Commission is its *Secretariat*, housed in a single location and operating under the direction of an Executive Director. He will take broad direction from the Council, but maintain a high degree of independence.

Environmental Obligations

The NAFTA partners commit themselves to undertake important environmental policies regarding the development, implementation, and enforcement of their environmental laws.

- o In the first instance, countries guarantee to grant their citizens access to national courts to petition governments to undertake enforcement actions and to seek redress of harm.
- o Countries will ensure the openness of judicial and administrative proceedings and transparent procedures for the creation of environmental laws and regulations.
- o Canada, Mexico and the United States pledged to ensure that their laws and standards continue to provide high levels of environmental protection and to work cooperatively in enhancing protections.
- o They have committed to effectively enforce those laws, a commitment backed up by a dispute settlement process.
- o The agreement does not affect the rights of states and provinces under the NAFTA to maintain standards at levels higher than the federal governments.

- o Countries are obligated to *report on the state of their environments*, and to promote environmental education, scientific research, and technological development.
- o They will work toward *limiting trade in toxic substances* that they have banned domestically.

The Commission's Agenda A major goal of the Commission is to broaden cooperative activities among the NAFTA partners. The Commission will have an aggressive and important workplan.

- o It will consider the environmental implications of process and production methods, or, in the agreement's language, "environmental implications of products throughout their lifecycles."
- o It will promote greater public access to information about hazardous substances (what we call "community right-to-know").
- o It will consider ways to promote the assessment and mitigation of transboundary environmental problems.
- o The Commission will serve as a point of enquiry for public concerns about NAFTA's effect on the environment, and be an avenue for NAFTA dispute settlement panels to obtain environmental expertise when faced with environmental issues.

Public Participation and Dispute Settlement Transparency is the hallmark of the agreement, and citizens of all three countries will be free to make submissions to the commission on their concerns related to the full range of environmental issues.

- o The Commission's secretariat will act on submissions appropriately to develop fact-finding reports. The reports will be made public if two of three Parties concur (i.e., the complained against party cannot bar publication).
- o The agreement creates a consultative process for the Council to discuss issues, including those brought to light through the public submission process and the Secretariat's fact-finding activities.
- o Special attention is given to matters involving non-enforcement of a nation's environmental law when consultations fail to resolve the matter.
- o In the event that one Party considers that another Party has persistently failed to effectively enforce its environmental laws (affecting a sector involving traded goods or services), the matter may be referred to a dispute settlement panel.

- o The dispute settlement process provides, in the end, for sanctions if countries have failed to correct problems of nonenforcement.

Scope The Agreement has a broad, inclusive scope.

- o Any environmental or natural resource issue may be addressed through the work program, and any environmental concern or obligation of the agreement may be the subject of consultations between parties.
- o Understandably, the realm of issues subject to dispute settlement panels and possible sanctions is more circumscribed, focused on whether the Parties are effectively enforcing their environmental laws, and whether that nonenforcement is related to trade or competition among the Parties.

QUESTIONS AND ANSWERS ON THE SUPPLEMENTAL AGREEMENTS

I. ENVIRONMENTAL AGREEMENT

Q: Is border funding part of the environmental side agreement?

A. No, it will be developed as a separate bilateral agreement between the U.S. and Mexico.

Q. Will the Secretariat really be independent?

A. Yes. The parties have agreed to create one central, independent Secretariat. Its executive director, appointed by the Parties, will be able to select his or her own staff.

The Secretariat has a large degree of discretion in setting its priorities and organizing its work, subject to appropriate oversight by the Council. For instance, the Secretariat prepares its own annual program and budget, and enjoys broad responsibility for implementing the Commission's workprogram.

The Secretariat receives and considers submissions from the public on any matter, including allegations regarding a Party's failure to effectively enforce its environmental laws. The Secretariat determines which enforcement-related submissions warrant the development of a factual record, based on a combination of mandatory and discretionary criteria, and subject to the Council's approval. That factual record is used by the Parties in deciding whether to take a matter to dispute settlement.

The Parties have not yet finalized the size and location of the Secretariat.

Q. Will the Secretariat have access to facilities when investigating nonenforcement?

A. The Secretariat has broad authority to gather the information it needs to prepare reports and investigation allegations of nonenforcement. This includes information provided by the Parties and by public submissions, gathered from independent experts, or otherwise developed by the Secretariat. (Article 5(8) & (17), Article 31.)

Parties are to promptly provide information in their possession, and to take all reasonable steps to make other information available. "All reasonable steps" could include arranging for the Secretariat to visit facilities as appropriate.

- Q. Are Canada's provinces covered by this Agreement?
- A. This Agreement binds Canada for all matters subject to its federal control, including the enforcement of national environmental laws throughout the provinces.

Canada's constitutional system limits its ability to accept the Agreement's obligations on behalf of a province for matters under provincial control. To redress this imbalance among the Parties and to encourage provincial participation, the Agreement commits Canada to take all necessary measures to bring the provinces into this Agreement, and limits its ability to take advantage of dispute settlement procedures according to the extent of provincial participation. For instance:

- o Canada may not take an issue to consultations or dispute settlement on behalf of a province who is not participating in the Agreement.
- o Canada may not seek dispute settlement against another Party for an issue that would, in Canada, be subject to provincial control, unless provinces responsible for at least 55% of Canada's GDP have joined the Agreement.

We fully expect Canada's provinces to be brought on board, and will be following closely their progress in this regard.

- Q. Does this Agreement ensure that states can have more stringent standards than federal?
- A. This Agreement does not alter States ability to have standards more stringent than the federal standards, consistent with the NAFTA. No specific provisions were considered necessary to address this point because the NAFTA itself, similarly, does not prevent states from having more stringent standards.

The NAFTA is drafted as a set of prohibitions. Unless the NAFTA prohibits a certain type of measure or practice, a NAFTA country is free to maintain or impose it.

Since nothing in the NAFTA precludes states from maintaining or adopting standards that are higher than federal rules, they will continue to have the right to do so.

The NAFTA's language is not meant to suggest — and has not been interpreted under the related CFTA to mean — that state or provincial regulation must conform with federal standards.

- Q. What role will States play in this new Commission?
- A. The U.S. federal government will work closely with the States throughout the implementation and operation of this Agreement.

The Agreement recognizes each Party's right to create a governmental advisory committee for subfederal governmental representatives.

It is the practice of the federal government to notify state governments directly and promptly upon learning that another government intends to challenge a state measure, including an environmental law, under the dispute settlement procedures of our international trade agreements. This practice will continue under both the NAFTA and this Agreement: The U.S. Council Member [EPA?] will work closely with state government representatives at all stages of a dispute settlement proceeding in preparing the defense of any state enforcement action or inaction challenged under this Agreement.

- Q. Does the Agreement require the Parties to address Process and Production Methods (PPMs)?
- A. The Agreement calls on the Council to consider, as part of its cooperative workprogram, the issue of "the environmental implications of goods throughout their lifecycles". We believe that this concept, which is actually broader than PPMs, also covers them. We thus anticipate that the Council will be able to address environmental questions relating to process and production methods.

We are also continuing to work with Mexico, in other fora, to address the related tuna/dolphin question.

II. DISPUTE SETTLEMENT

Question: How does the trade-related test fit into dispute settlement?

Response: Under the environment agreement, the Parties, in deciding whether to establish an arbitral panel, will look to see if the alleged persistent pattern of failure to effectively enforce the law is trade-related. Under the labor agreement, an Evaluation Committee of Experts is to be established only if the matter is trade-related.

"Trade-related" merely means that the good or industry sector involved is traded within the NAFTA Parties or competes with a traded good or service.

Question: Will the panel proceedings be open to the public?

Response: There is nothing in either agreement that requires the panel proceedings to be confidential. These and other questions regarding the precise operations of the panels will be decided in the Model Rules of Procedure called for under the agreements.

Question: How big is the fine under the agreements?

Response: A panel can impose a monetary enforcement assessment against the government of up to \$20 million in the first year. The maximum monetary enforcement assessment is up to .07% of total trade among the Parties in the following years.

Question: Who determines the amount of the fine?

Response: The panel will determine the amount of the monetary enforcement assessment, taking into account such factors as the pervasiveness and duration of the Party's failure to enforce or the reasons for non-implementation of an action plan.

Question: Who pays the fine?

Response: The government of the country that has failed to enforce its law pays the monetary enforcement assessment.

Question: Where does the fine go?

Response: Any monetary enforcement assessments go into a fund established by the Council and are to be spent to improve law enforcement.

Question: Is a country off the hook once it pays its fine?

Response: No. If a Party is not fully implementing the action plan, it remains liable to ongoing enforcement actions.

Question: Why is there a different rule for Canada than there is for the United States and Mexico on enforcing the payment of fines and implementation of action plans?

Response: Canada, which has a tradition of domestic court enforcement of orders of other tribunals, preferred to make available its domestic courts in this instance rather than be subject to potential suspension of NAFTA benefits. We, however, were unwilling to cede our sovereignty and take the unprecedented step of granting standing under domestic law to the decisions of an international tribunal.

Question: How do you decide what sector is involved for purposes of applying trade sanctions?

Response: If the failure to enforce involved enforcement in a particular sector, then a Party would first look to that sector in deciding what benefits to suspend. However, if it is not practicable or effective to suspend benefits in the sector involved in the non-enforcement (for example, because there is no identifiable sector involved), then a Party could look to suspend benefits in any sector.

STANDARDS Q & A

Facimile Cover Sheet

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

**Executive Office of the President
Washington, DC 20506**

To: Dan Blank

From: John Melle (202) 395-3412

Date: Wednesday, Aug 11, 1993 5:06 p.m

Pages: (including cover page)

MESSAGE

Per Jennifer Haverkamp, here are cleared Q & A's on NAFTA and
SPS standards.

If there are any problems receiving this fax, please call (202) 395-3419.

STANDARDS-RELATED MEASURES AND SANITARY AND PHYTOSANITARY MEASURES

The North American Free Trade Agreement (NAFTA) includes an agreement on standards-related measures and on sanitary and phytosanitary measures.

Standards-related measures ("SRMs") deal with voluntary and mandatory product standards and the procedures used to determine whether a particular product meets the standard. Sanitary and phytosanitary measures ("S&P") generally deal with protecting human, animal and plant life and health from risks of plant- and animal-borne pests and diseases, and additives and contaminants in foods and feedstuffs.

The NAFTA explicitly recognizes that countries have a legitimate need for product standards and for regulations to protect human, animal and plant life and health. The NAFTA provisions are designed to preserve the ability of governments to act in this area while guarding against the unjustified use of these types of measures as a way to protect domestic industry. In each case, the NAFTA sets up requirements and procedures that will help to distinguish legitimate measures from protectionist measures.

Question:

Will the NAFTA "harmonization" provisions weaken U.S. food safety by creating strong pressure for the United States to use less stringent Codex Alimentarius standards or Mexican standards?

Answer:

No. The NAFTA SPS provisions were specifically negotiated to be clear that there would be no "downward harmonization" of SPS measures.

While Parties are required to use international standards as "a basis" (but by no means the only basis) for their SPS measures, the NAFTA text explicitly states that this is to be done "without reducing the level of protection of human, animal or plant life or health."

It also explicitly provides that **nothing** in this requirement "shall be construed to prevent a Party from adopting, maintaining or applying...a sanitary or phytosanitary measure that is more stringent than the relevant international standard, guideline or recommendation."

Question:

Will the NAFTA severely restrict a country's ability to establish the level of protection it considers appropriate for human, animal and plant life and health? In particular, does it only allow a country to establish **one** level of protection for all its food safety standards?

Answer:

No. The NAFTA explicitly recognizes the right of each country to establish whatever levels of protection from risk that country deems appropriate.

Question:

Will NAFTA lead to challenges to food safety standards that are not based on risk assessment, but rather on policy determinations, such as the Delaney clause zero risk of cancer standards for food additives and pesticide residues which are based on policy not science?

Answer:

No. This concern is unfounded because it confuses two basic concepts.

The level of protection of human health that a society deems appropriate, such as that there should be a zero risk of cancer from food additives and pesticide residues, is not a scientific question and there is no requirement in the NAFTA that it be based on science.

As noted above, NAFTA specifically allows a country to determine the levels of risk it is willing to tolerate, including zero risk. So the Delaney clause, in establishing a zero **level of risk**, is consistent with the NAFTA.

However, in general NAFTA does require that before we ban a particular food additive or pesticide residue under the Delaney clause, we should have at least some scientific basis for concluding there is a cancer threat.

Question:

Does the NAFTA require that S&P measures be the least trade restrictive?

Answer:

No. This concern arises because of the inclusion of the word "necessary" in the S&P text.

Some GATT panels have construed the GATT Article XX general exceptions, which refer to "necessary" measures, to mean that in order for a measure to be determined to be "necessary" measures for purposes of qualifying for the exception, no GATT consistent measure is reasonably available and of the GATT-inconsistent measures available, the country chose the measure that is the least inconsistent with the GATT.

Some groups mistakenly read this as meaning we must adopt the "least trade restrictive" possible health, safety and conservation measures. In the NAFTA, the United States successfully resisted the inclusion of any "least trade restrictive" test in the NAFTA.

Furthermore, although the term "necessary" appears in the NAFTA S&P text, the way in which

the term is used makes clear that there it does not create any "least trade restrictive" test.

Question:

Does the NAFTA prohibit S&P measures based on the manner in which food or other agricultural products are produced?

Answer:

No. There is no such prohibition in the NAFTA. In fact, the definition of an S&P measure specifically includes "a product-related processing or production method."

Question:

Will the NAFTA undermine state S&P measures because of its least trade restrictive obligation and because countries can only have one level of protection?

Answer:

No. The NAFTA safeguards the rights of states to have S&P measures, but these measures are subject to the same requirements as federal measures (e.g., are based on scientific principles, are not disguised restrictions on trade, do not arbitrarily discriminate).

As noted above, there is no least trade restrictive obligation in the NAFTA nor are countries limited to only one level of protection.

Question:

Does the NAFTA standards text give precedence to the existing GATT Standards Code over the NAFTA standards text where the two conflict?

Answer:

No. The Parties merely agreed that they would not disturb their rights and obligations under the GATT standards code. NAFTA uses very different language when it gives precedence to other international agreements.

Question:

Would the NAFTA's procedural harmonization provisions eliminate public notice and comment on standards?

Answer:

No. Nothing in the NAFTA would eliminate existing U.S. public notice and comment requirements. In fact, the standards text in general **requires** public notice and comment for standards and is modeled after U.S. practice.

Question:

Will the NAFTA limit environmental standards to the lowest common denominator and inhibit the development of more stringent regulations if they are needed to protect human health or the environment?

Answer:

No. The NAFTA is specifically drafted to ensure the ability of each country, including its state and local governments, to maintain stringent environmental standards.

In particular, the NAFTA recognizes the right of each country to enact and enforce laws and regulations that protect human health and the environment.

Furthermore, the agreement specifically provides that each country may establish those levels of safety and protection of human, animal and plant life and health, of the environment and of consumers that it considers appropriate.

Where the NAFTA calls on the three countries to collaborate on health and environmental standards it deliberately refers to joint efforts to **"enhance"** protection, not lower it.

In addition, the agreement states clearly that any efforts to make environmental or health standards compatible among the three countries should be undertaken **"without** reducing the level of safety or of protection of human, animal or plant life and health, the environment and consumers.

Furthermore, the NAFTA also specifically preserves each country's right to apply more stringent environmental or health measures than those provided under internationally-agreed standards.

Question:

Does the NAFTA's language that requires the federal government to take "all necessary measures" to give effect to NAFTA's provisions "including their observance by state and provincial governments" mean that if, for example, California's Proposition 65 toxic labeling requirement was challenged as a non-tariff trade barrier, the "all necessary measures" provision would require the federal government to pre-empt California's more stringent regulation?

Answer:

No. Nothing in the NAFTA would cause or require federal environmental or health standards to preempt California's standards.

The NAFTA requires each country to take "all necessary measures" to ensure that state and provincial governments observe those provisions of the agreement that apply to them. This language is drawn directly from the U.S.-Canada Free-Trade Agreement, which has been in effect since 1989 and has never been construed to preempt state measures.

The language simply reflects an understanding among the three countries that they intend to apply the agreement equally at the federal and state level, with exceptions to that general rule in certain areas. Thus, for example, the S&P text applies fully to federal, state, and provincial government measures.

One area in which there is somewhat less stringent application at the non-federal level is that of standards. In the SRMs text, the federal government is simply obligated to "seek, through appropriate measures" to ensure that states observe the relevant NAFTA rules.

This lesser degree of obligation, set out in Article 902, reflects an understanding among the three countries that the NAFTA should not intrude unduly on the ability of states to regulate in this important sphere.

Neither Article 105 nor Article 902 — nor any other provision of the NAFTA — creates an obligation that states adopt the same measures as the federal government. Accordingly, there is no basis under the NAFTA for challenging a state measure simply because it is more stringent than a relevant federal measure.

Furthermore, nothing in the NAFTA requires the federal government to take legal action against state measures that NAFTA dispute settlement panels may determine to be inconsistent with trade obligations.

Under the NAFTA, panel opinions are advisory only. If the defending country loses, it is not required to remove or change the offending measure.

It may offer trade compensation instead or simply permit the other country to take retaliatory action of equivalent effect.

As has been the case under the GATT, in those rare instances where state rules may be successfully challenged under the NAFTA, the federal government will work cooperatively with the states to seek a satisfactory resolution of the matter. Under the NAFTA, each country will retain full discretion, under our own political and legal system, to determine how to satisfy our trade obligations.

Question:

Is it true that the harmonization process does not require that we come to final agreement on particular standards? That is, if Canada and Mexico refuse to change their standard, can we insist on retaining ours as well?

Answer:

Yes. The NAFTA does not require that the United States change any particular standard.

Instead, the NAFTA creates a process by which the three countries can try to reach greater compatibility of standards among the three countries, but that does not require us to agree to any particular change in our standards.

Further, if the Administration believed that changes were desirable, whether because of discussions under the NAFTA or for any other reason, we would consult fully with Congress and domestic interests. Congress alone votes to change U.S. laws.

No "harmonization" process can ever force us to agree to standards we find unacceptable, nor could Congress be bound by any result it found unacceptable. Congress would need to pass specific legislation to effect a change.

Question:

Does the NAFTA preserve state standards that are more stringent than federal standards?

Answer:

Yes. From the beginning of the NAFTA negotiations, a fundamental objective of U.S. policy was to ensure that the NAFTA did not result in lowering U.S. health and environmental protection standards, including state and local standards. The Agreement secured that objective.

The agreement does apply to state laws and regulations in most respects. But it does so not by mandating compliance with **federal** law but by requiring that state measures comply with the rules set out in the **agreement**. Just as the federal government will be free to maintain or change its laws, subject to NAFTA rules, so will state and local governments.

The NAFTA is drafted as a set of prohibitions. Unless the NAFTA prohibits a certain type of measure or practice, a NAFTA country is free to maintain or impose it.

Since nothing in the NAFTA precludes states from maintaining or adopting standards that are higher than federal rules, they will continue to have the right to do so.

The NAFTA negotiators specifically used the plural "levels" (in Article 904(2) and in the equivalent provision of Chapter Seven (Article 712(2)), which talk in terms of each Party's right

to set the **levels** of health, safety, or environmental protection that it sees fit), in part in order to account for the fact that each country may have a multiplicity of levels due to differences among the states and between the states and federal government.

Article 105 requires each country to take "all necessary measures" to ensure that state and provincial governments observe those provisions of the agreement that apply to them. This language is drawn directly from the U.S.-Canada Free-Trade Agreement ("CFTA"), which has been in effect since 1989.

It simply reflects an understanding among the three countries that they intend to apply the agreement equally at the federal and state level, with exceptions to that general rule in certain areas.

This language is not meant to suggest — and has not been interpreted under the CFTA to mean — that state or provincial regulation must conform with federal standards.

Question:

How, when, and by whom will a state be notified if one of its environmental laws is challenged under NAFTA? What forum and procedures will be utilized in hearing such challenges? In what way will a state be allowed to defend its laws under NAFTA?

Answer:

It is the practice of the federal government to notify state governments directly and promptly upon learning that another government intends to challenge a state measure, including an environmental law, under the dispute settlement procedures of our international trade agreements. This practice will continue under the NAFTA.

The NAFTA dispute settlement procedures are the avenue for formal government challenges against a state measure. Those procedures are detailed in Chapter 20 of the NAFTA.

These include consultations between the countries involved, recourse to the good offices of the NAFTA Trade Commission and, if no settlement can be reached, referral of the matter to non-binding arbitration.

In addition, there are a number of other procedures available to try to resolve disputes over either state or federal measures. For example, the NAFTA establishes trilateral committees to facilitate consultations and avoid or settle disputes regarding standards.

In the case of agricultural and food safety standards, the countries concerned may also have recourse to the good offices of relevant international organizations for purposes of resolving their differences.

As is the case under existing international trade agreements, USTR will work closely with state government representatives at all stages of a dispute settlement proceeding in preparing the defense of any state measure challenged under the NAFTA.

ENV. AGREEMENT SUMMARY

Facimile Cover Sheet

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

**Executive Office of the President
Washington, DC 20506**

To: dan blank

From: Bryan Samuel

Date: Friday, Aug 13, 1993 2:47 a.m

Pages: (including cover page)

MESSAGE

If there are any problems receiving this fax, please call (202) 395-3419.

SUMMARY OF THE AGREEMENT ON ENVIRONMENTAL COOPERATION

INTRODUCTION

On August 13, 1993, Canadian Minister for International Trade Thomas Hockin, Mexican Secretary of Trade and Industrial Development Jaime Serra and United States Trade Representative Mickey Kantor completed negotiations on a proposed North American Agreement on Environmental Cooperation. Officials of the three governments have been directed to complete the legal drafting of the Agreement as soon as possible. The final text will be made public when completed.

By strengthening environmental cooperation and the effective enforcement of domestic environmental laws and regulations, the environmental agreement will support the achievement of the economic, trade and environmental goals and objectives of the NAFTA. The two agreements will work in a complementary manner to promote sustainable development, to create jobs, and to make the region more competitive.

The following description does not itself constitute an agreement between the three countries and is not intended as an interpretation of the text.

PREAMBLE AND OBJECTIVES

The Preamble sets out the goals, principles and aspirations on which the Agreement is based. It recognizes a tradition of cooperation on the environment, and expresses a commitment to support and build on international environmental agreements and on existing institutions. The Objectives of the Agreement include the promotion of sustainable development, cooperation on the conservation, protection and enhancement of the environment and the effective enforcement of and compliance with domestic environmental laws. The Agreement promotes transparency and public participation in the development and improvement of environmental laws and policies.

OBLIGATIONS

While affirming the right of each Party to establish its own levels of protection, policies, and priorities, the Agreement requires that each Party ensure that its laws provide for high levels of environmental protection and strive to continue to improve those laws. This agreement also protects the rights of states and provinces to set high levels of protection, consistent with the NAFTA.

To achieve high levels of environmental protection and compliance, each Party agrees to effectively enforce its environmental law through appropriate government actions such as: appointment and training of inspectors; monitoring compliance and examining suspected violations of law; seeking voluntary compliance agreements; and, using legal proceedings to sanction, or to seek appropriate remedies for, violations of its environmental law. The Agreement does not empower one Party's authorities to undertake environmental law enforcement activities within the territory of another Party.

Each Party undertakes, with respect to its territory, to:

- report on the state of the environment;
- develop environmental emergency preparedness measures;
- promote environmental education, scientific research and technological development;
- assess, as appropriate, environmental impacts; and
- promote the use of economic instruments for the efficient achievement of environmental goals.

Each Party will notify the other Parties of a decision to ban or severely restrict a pesticide or chemical and will consider banning the export to another Party of toxic substances, the use of which is banned within its own territory.

Parties agree to ensure that their procedures for the enforcement of environmental law are fair, open and equitable. Each Party undertakes to ensure appropriate public access to procedures for the enforcement of their environmental law. Such access includes the right to:

- request action for the enforcement of domestic environmental law; and
- sue another person under that Party's jurisdiction for damages.

COMMISSION FOR ENVIRONMENTAL COOPERATION

The Agreement establishes a Commission for Environmental Cooperation, comprising a governing Council, a central Secretariat, and a Joint Public Advisory Committee.

The Council

The Council, the governing institution of the Commission, will be composed of cabinet-level officers or equivalent representatives of the Parties. It will oversee the implementation of the Agreement, serve as a forum for discussion of environmental matters, promote and facilitate cooperation, oversee the Secretariat and address questions and disputes that may arise regarding the interpretation or application of the Agreement. The Council has key responsibilities related to the agreement's dispute settlement provisions concerning persistent patterns of failure by any Party to enforce its environmental laws.

The Council will strengthen cooperation on the development and continuing improvement of environmental laws and regulations, by:

- promoting the exchange of information on criteria and methodologies used in establishing domestic environmental standards; and
- without reducing the level of environmental protection, developing recommendations on greater compatibility of environmental standards.

The Council will cooperate with the Free Trade Commission to achieve the environmental goals and objectives of the NAFTA, by:

- contributing to the prevention or resolution of environment-related trade disputes; and
- maintaining a list of experts who could provide information or technical advice to NAFTA institutions.

The Council will consider and develop recommendations with respect to assessing the environmental impact of proposed projects likely to cause significant adverse transboundary effects. It will also consider and may develop recommendations on:

- ° public access to information, including information on hazardous materials and activities;
- ° appropriate limits for specific pollutants, taking into account differences in ecosystems; and
- ° reciprocal access to rights and remedies for damage or injury resulting from transboundary pollution.

The Council may develop recommendations on a wide variety of environmental issues, including:

- ° pollution prevention techniques and strategies;
- ° the environmental implications of goods throughout their life-cycles;
- ° transboundary and border environmental issues;
- ° protection of endangered and threatened species; and
- ° approaches to compliance and enforcement.

The Council will meet at least once a year. There will be public meetings at all regular sessions.

The Secretariat

The Agreement establishes a central Secretariat responsible for providing technical, administrative and operational support to the Council and to committees and groups established by the Council. The Secretariat will prepare an annual budget and program, including proposed cooperative activities. The Secretariat will also prepare reports on matters within the scope of the annual program.

The Secretariat will consider submissions from any person or non-governmental organization or association alleging a Party's failure to effectively enforce its environmental law. Provided the submission meets criteria set out in the Agreement, the Secretariat may propose that a factual record be developed. In developing this record the Secretariat can seek information from a variety of sources, including submissions from interested persons and information developed by independent experts.

The size and location of the Secretariat will be determined by the Parties.

The Joint Public Advisory Committee

The Joint Public Advisory Committee will include five members of the public from each country. It will meet at least once a year, concurrent with the regular session of the Council. The Joint Committee will advise the Council and provide technical, scientific or other information to the Secretariat. It will also provide input to the annual program and budget of the Council as well as the annual and other reports.

CONSULTATIONS

A Party may request consultations regarding any matter that affects the operation of the Agreement. Should the consultations fail to resolve the matter, any Party may call a meeting of the Council. In seeking a resolution, the Council may consult technical advisors or create working groups or expert groups and make recommendations.

RESOLUTION OF DISPUTES

If the Council cannot resolve a dispute involving a Party's alleged persistent pattern of failure to effectively enforce an environmental law relating to a situation involving the production of goods or services traded between the Parties, any Party may request an arbitral panel. A panel will be established on a two-thirds vote of the Council.

Panelists will normally be chosen from a previously agreed roster of experts, including experts on environmental matters. With the approval of the disputing Parties a panel may seek information and technical advice from any person or body that it deems appropriate. The report of the panel will be made publicly available five days after it is transmitted to the Parties.

If a panel makes a finding that a Party has engaged in a persistent pattern of failure to effectively enforce its environmental law, the Parties may, within 60 days, agree on a mutually satisfactory action plan to remedy the non-enforcement.

If there is no agreed action plan, then between 60 and 120 days after the final panel report, the panel may be reconvened to evaluate an action plan proposed by the Party complained against or to set out an action plan in its stead. The panel would also make a determination on the imposition of monetary enforcement assessments on the Party complained against.

The panel may be reconvened at any time to determine if an action plan is being fully implemented. If it is not being fully implemented, the panel is to impose a monetary enforcement assessment on the Party complained against.

In the event that a Party complained against fails to pay a monetary enforcement assessment or continues in its failure to enforce its environmental law, the Party is liable to ongoing enforcement actions. In the case of Canada, the Commission, on the request of a complaining Party, collects the monetary enforcement assessment and enforces an action plan in summary proceedings before a Canadian court of competent jurisdiction. In the case of Mexico and the United States, the complaining Party or Parties may suspend NAFTA benefits based on the amount of the assessment.

HIGHLIGHTS FOR TALKING ABOUT NAFTA ENVIRONMENTAL AGREEMENTS

1. Independent Secretariat

The Agreement establishes an independent Secretariat which has broad information gathering authority. It can receive submissions from the public and issue reports on any subject in the broad scope of the agreement. It will also consider submissions from any person or NGO alleging a failure to effectively enforce its environmental law.

2. Dispute Settlement

The dispute settlement procedures include substantial transparency and public participation. They also have "teeth" in terms of fines and either court standing or trade sanctions. Even after paying a fine or accepting a trade sanction the Party is not off the hook -- it is still responsible for ongoing enforcement.

3. Border Authority

Mexican Secretary of Trade and Industrial Development Jaime Serra and USTR Mickey Kantor have agreed on principles for negotiating an agreement to establish coordinating and financing mechanisms for environmental infrastructure projects in the border region. The hallmark of the new institutional framework will be transparent processes. It will also include financing through mobilizing private sector, direct government support and a border environmental financing facility.

- 1) What paper do we have?
 - env agreement summary (6pp)
 - env agreement fact sheet (3pp)
 - env agreement Q&A (5pp)
 - standards Q&A (8pp)
 - border funding summary and fact sheet (3pp)
 - 9 August draft env agreement (29pp)
- 2) What do we need?
 - names and phone numbers of who to call
 - Katie's phone and fax numbers
 - to call Jen for an update on what, where and when
 - to decide who should call whom
 - (including VPOTUS, KM, CZ, DB)
 - roadmap
 - talking points

10 am Kantor big press conference at Madison Hotel: env, labor,
import surges and border
Still to come: worker adjustment, more details on border

USTR calling to NGO/faxing agreed summaries

OEP/VPOTUS calls to NGO CEOs explicitly to ask for positive
statements to the press.

May 4, 1993

M E M O R A N D U M

TO: NAFTA DISTRIBUTION

FROM: KENNETH BERLIN

Re: Kantor letter

Attached for your information and review is a copy of the letter on the NAFTA supplemental agreements sent to Ambassador Mickey Kantor by Defenders of Wildlife, National Wildlife Fund, Environmental Defense Fund, the Nature Conservancy, National Audubon Society, and the World Wildlife Fund.

K.B.

May 4, 1993

Ambassador Mickey Kantor
U.S. Trade Representative
600 17th Street, N.W.
Washington, D.C. 20506

Re: NAFTA -- Supplemental Agreements

Dear Ambassador Kantor:

As you are aware, the undersigned environmental groups have each consulted with your office about and made recommendations concerning the North American Free Trade Agreement (NAFTA) supplemental agreements on the environment. In order to clarify the positions that we believe are critical to the supplemental agreement negotiations and to help the President achieve his objectives on NAFTA, we have come together to define those provisions which if included in the supplemental agreements would secure the support of all of our organizations for the NAFTA.

In developing the positions set forth below, we were guided by several key principles: (a) that the supplemental agreements must establish a North American Commission on the Environment (NACE) which is given meaningful responsibility and the resources to undertake its role; (b) that the Signatories must give NACE the power to play an important role in helping ensure that the Signatories enforce their environmental laws; (c) that the NACE have the ability to discuss, evaluate and report on important environmental and conservation issues; (d) that the Signatories agree to a dedicated source of funding for the NACE, border infrastructure and cleanup, and conservation programs; (e) that there be meaningful public participation in the environmental aspects of the NAFTA, including the NACE; and (f) that ambiguities in certain provisions of the NAFTA text, particularly the standards provisions, be clarified.

Based on these principles, we have agreed that the undersigned groups will support the NAFTA if the supplemental agreements include the following provisions:

I. The NACE.

- ✓ **A. Structure.** The Signatories would establish a North American Commission on the Environment (NACE) that, in addition to Commissioners, is staffed by a permanent

Secretariat headed by a Secretary General who has the independent power to prepare reports and conduct investigations, and which is advised by a Citizens Advisory Board that includes representatives of nongovernmental organizations from each Signatory.

- ✓ **B. Power to Prepare Reports.** The NACE would have the responsibility for preparing specific reports set forth in the supplemental agreements. The NACE would also have the power to act as a policy forum to debate and report on environmental and conservation issues.

- **C. Power to Investigate.** The NACE would have the power to conduct investigations on its own initiative or in response to citizen petitions in a manner consistent with priorities set by the supplemental agreements and the Secretary General. It would also prepare reports on the results of such investigations.

- **D. Contents of Reports and Follow-up.** The reports of the NACE would include suggested action plans; the Signatories involved would respond in writing to such action plans; the NACE agreement would require the Secretary General at regular intervals to follow up and report on the status of the implementation of an action plan; and the Secretary General would make all its reports and responses public.

II. Enforcement.

- ✓ **A. Gathering Information.** To gather information, the Secretary General would have the power to hold public hearings and request that the relevant Signatory government gather information that the Secretary General finds is necessary. A Signatory responding to a request from the Secretary General for information would seek to obtain such information pursuant to and consistent with the Signatory's laws and regulations. The Secretary General would have the power to request verification of data by visits by its staff to the relevant facilities accompanied by enforcement personnel of the Signatory. The visits would be conducted consistent with the laws and regulations of the Signatory and be of sufficient scope to meet the information objectives of the Secretary General. All denials of requests for information or verification would be made public unless the Signatory certifies that this would interfere with an ongoing civil or criminal investigation.
- ✓ **B. Individual Facilities and Operations.** The Secretary General would have the power to gather information about individual facilities and operations, and be able to use such information to evaluate enforcement of law by the Signatories.

- o **C. Sanctions.** The Signatories agree that any Signatory who believes that another Signatory has engaged in a pattern of failing to comply with NACE recommendations embodied in an action plan or with requests for information and verification by the Secretary General could initiate a dispute settlement proceeding under Chapter 20 of NAFTA on the basis that such repeated failures nullify and impair the concessions granted in the NAFTA. Article 2019 sanctions would be implemented where a dispute panel finds a pattern of a Signatory failing to comply with NACE recommendations embodied in an action plan and/or a pattern of failing to respond to NACE requests for information and verification.
- o **D. Domestic Law Enforcement.** The Signatories would agree to make available to their own citizens under their domestic laws enforcement procedures similar to those in Article 1714 of NAFTA so as to permit effective enforcement of environmental laws.

III. Funding.

- 2 **A. Funding for NACE and Border Projects.** The supplemental agreements would provide for a secure source of funds in an amount sufficient to enable the NACE to undertake each of its responsibilities and functions, as well as for cleanup and infrastructure programs on the U.S/Mexican and U.S./Canadian borders.
- 2 **B. Funding for Conservation Programs.** The supplemental agreements would provide for a secure source of funds for conservation, biodiversity and ecosystem protection programs.

IV. Standards.

- X **A. Negotiation of Process Standards.** The Signatories would agree to enter into negotiations within six months of the implementation of the NAFTA to discuss criteria for setting process standards. In addition, the Signatories would agree to place a moratorium on bringing cases to dispute settlement panels if the law at issue is designed to protect fish, animals or wildlife outside the territorial land of the Signatories until these negotiations develop applicable criteria for process standards. The implementing legislation would include a provision specifying that arbitral panel decisions adverse to a U.S. fish, animal or wildlife law or regulation would not result in the repeal or amendment of any such law or regulation.

- o **B. Chapter 9.** The Signatories would clarify that Chapter 9 was intended to allow challenges to an environmental standard-related measure only on the ground that it is discriminatory or was designed as a disguised barrier to trade, not on the ground that it is too strict.

[Customs territory]?

no real problem
statement of
administration
#60020473.1

- proposed barrier?*
- x C. **Chapter 7.** The parties would either agree on language clarifying certain key terms in Chapter 7 that remain ambiguous, including but not limited to the term "necessary," or agree that they will not bring cases under Chapter 20 challenging a sanitary or phytosanitary standard for pesticide residues or contaminants in food under Chapter 7 except on the ground that the standard is discriminatory or was designed as a disguised barrier to trade.

USR - no way

x D. **Challenges to State Laws.** The Administration would agree that it will seek in the U.S. implementing process a provision preventing the preemption of or interference with states' or other subnational entities' laws or policies on the basis of Articles 105 or 902.

V. **Dispute Settlement.**

- 2 A. **Dispute Settlement Protocol.** The Signatories would enter into a protocol which clarifies the procedures of arbitral panels; which sets forth the deference such panels will give to a Signatory's agency and judicial decisions and a Signatory's laws concerning the setting of standards; which increases the transparency of arbitral panel proceedings by providing, consistent with criteria set in the supplemental agreement, documents to the public and the opportunity for interested persons to file amicus briefs; and which specifies the opportunity for public participation and the use of environmental experts in such proceedings.
- 2 B. **Input Into U.S. Positions During Dispute Settlement Proceedings.** The implementing legislation would provide for public input (and, where appropriate, input from state and local governments) into U.S. government decisions relating to: (i) the defense of cases before arbitral panels challenging environmental laws, and (ii) decisions whether to bring a dispute settlement proceeding alleging that a Signatory has not complied with NACE recommendations or requests.

o VI. **Public Participation.** In addition to the public participation provisions described above, the Signatories would agree to enact "community right-to-know" laws consistent with Principle 10 of the Rio Declaration.

✓ VII. **International Environmental Agreements.**

The Signatories would add additional environmental and conservation agreements to Annex 104:1 and list automatically on that annex all amendments to the agreements on that annex and in Article 104. Dispute resolution panels would give deference to a Signatory's decision that it has properly interpreted the relationship between the NAFTA and another international environmental agreement. We will provide a list of the Agreements that we believe should be added to Annex 104:1.

BACK UP MEMORANDUM

This memorandum sets forth a more detailed description of each of the points referenced in the letter to Ambassador Mickey Kantor dated May 4, 1993. The organizations that signed the letter believe that these points, if achieved, would successfully implement the broader provisions set forth in the letter.

I. The NACE.

A. The Structure of NACE.

1. Organization.

The NACE structure would include: (a) as Commissioners the chief environmental officers of each of the Signatories; (b) a Secretariat headed by a Secretary General with a permanent staff; and (c) a permanent Citizens Advisory Board.

2. The Secretary General.

The supplemental agreement would provide criteria for the choice of the Secretary General, including a requirement that the Secretary General have trade and environmental experience, management experience and sufficient stature. The supplemental agreement would provide term limits for the Secretary General as well as criteria for the removal of the Secretary General, including, but not limited to, a requirement that the Secretary General be subject to removal only for cause.

3. The Citizens Advisory Board

The Citizens Advisory Board would be made up of six representatives from each Signatory and one representative selected by the Secretary General. The six U.S. representatives would be picked by the President and would include at least two representatives from non-profit environmental, conservation, health and safety groups and one representative from a non-profit border group.

4. The Commissioners.

Each Signatory would appoint its senior environmental official as one of the three NACE Commissioners.

5. Role of Commissioners and Secretary General.

The Commissioners would oversee the operation of the NACE by setting policy guidelines for the Secretary General and by reviewing annual work plans prepared by the Secretary General. The Secretary General would have the power to propose the annual work plans, to implement independently the work plans reviewed by the Commissioners, to issue the reports described below, to

include in those reports recommendations to the Signatories, and to respond to citizen petitions as described below.

B. The Powers and Responsibilities of the NACE.

1. Initial Reports.

No later than two years after the NAFTA becomes effective, the Secretary General would issue separate reports that evaluate and make recommendations concerning the enforcement of environmental laws by the Signatories; the implementation of NAFTA and the side agreements; the relationship of natural resources, biodiversity, agriculture and energy to trade and sustainable development; the status of environmental protection on the borders of the Signatories; and the status of upward harmonization of the environmental laws of the Signatories. An example of a specific description of what would be included in the initial reports is annexed as Exhibit A.

2. Annual Reports.

After the issuance of these initial reports, the Secretary General would issue an annual report on enforcement of environmental laws by the Signatories, the status of the environment of the Signatories, and the implementation of NAFTA and the supplemental agreements, as well as any other reports consistent with the work plans for the NACE proposed by the Secretary General.

3. Investigations.

The Secretary General would investigate, report on the results of investigations, and make recommendations based on investigations he or she initiates or undertakes in response to public petitions. The Secretary General would grant priority to petitions that allege significant harm to the environment and that relate to transboundary pollution, the global commons and failure to enforce the law against facilities or industries that are involved in the import or export of goods among Signatories. The Secretary General may in his annual work plans set forth additional criteria for setting priorities for conducting investigations and responding to public petitions.

4. Policy Fora.

In addition to preparing reports and conducting investigations, the NACE would act as a policy fora to debate and report on environment and conservation issues. To advise these fora, the Secretary General may form ad hoc groups of policy experts and would consult with the Citizens Advisory Board.

C. Citizen Access.

Any person or organization may petition the Secretary General to undertake investigation of allegations that a Signatory's law is not being enforced, to hold policy fora and to

investigate allegations of damage to the environment or biodiversity as a result of trade.

II. Enforcement.

A. Information Gathering.

To gather information necessary to prepare any of the above reports or to evaluate citizen petitions, the NACE would have the power to request that the relevant Signatory government gather information that the Secretary General finds necessary. The Signatories would agree in the supplemental agreements to cooperate fully with these requests and a Signatory responding to a request from the Secretary General for information would seek to obtain such information pursuant to and consistent with the Signatory's laws and regulations. A signatory would notify the Secretary General in writing if the Signatory refuses to or cannot provide the information, with an explanation for its decision.

B. Verification

If the Secretary General finds that the information it receives about an enforcement of law issue is inadequate, the Signatories agree that they would permit the NACE staff to verify the data by visiting, accompanied by enforcement personnel of the Signatory, the relevant facilities, operations or government officials. The visits would be conducted consistent with the laws and regulations of the Signatory and be of sufficient scope to meet the information objectives of the Secretary General. If a Signatory does not permit such verification, it would notify the Secretary General in writing and provide an explanation for its decision.

C. Confidentiality

The Signatories and the Secretary General would provide confidential treatment to business records in accord with the law of the relevant Signatory. All notices required by this section would be made public unless the Signatory certifies that making the notice public would interfere with an ongoing criminal or civil investigation.

D. Public Hearings.

The Secretary General is authorized to hold public hearings in connection with the preparation of reports or the investigation of citizen petitions.

E. Individual Facility Information.

In preparing general reports and in responding to petitions, the NACE would be able to gather information about individual facilities, and be able to use such information to evaluate enforcement of law by the Signatories.

F. Recommendations in Reports and Follow-up.

The recommendations in the reports prepared by the NACE would include an action plan for addressing the issues raised in the report. No later than six months after submitting an action plan to a Signatory (or sooner if so recommended in the action plan) and at regular intervals thereafter until the Secretary General finds that the Signatory has implemented the action plan or a plan that the Secretary General finds would achieve a similar result, the Secretary General would request information on the implementation of the action plan, conduct verification if necessary, and would issue a publicly available report on the status of the implementation of the plan.

G. Response to Reports.

The Signatories would respond in writing to the recommendations and fact findings in each report issued by the NACE, and the Secretary General would make public all reports produced by NACE and all responses from Signatories denying the NACE information or verification requested by the Secretary General.

H. Chapter 20 Proceedings.

The Signatories would agree that any Signatory who believes that another Signatory has engaged in a pattern of failing to comply with NACE recommendations embodied in an action plan or requests for information and verification by the Secretary General could initiate a dispute settlement proceeding under Chapter 20 of the NAFTA on the basis that such repeated failures nullify and impair the concessions granted in the NAFTA. The parties would agree that Article 2004 of NAFTA provides recourse to the dispute settlement process for these proceedings. Article 2019 sanctions would be implemented where a dispute arbitral panel finds a pattern of a Signatory's failing to comply with NACE recommendations embodied in an action plan and/or failing to respond to NACE requests for information or verification. The supplemental agreements would set forth the factors the arbitral panel would consider in determining whether a pattern of noncompliance had occurred, including but not limited to, the frequency of the failures of the Signatory to comply, the severity of the harm to the environment resulting from the failures, and the time period within which the failures occurred.

I. Domestic Law Enforcement.

The Signatories would agree to make available to their own citizens enforcement procedures under their domestic law similar to those in Article 1714 of the NAFTA so as to permit effective enforcement of environmental laws. A sample set of such provisions is annexed as Exhibit B.

III. Funding.

A. Funding for NACE and Border Projects.

The supplemental agreements would provide for a secure source of funds in an amount sufficient to enable the NACE to undertake each of its responsibilities and functions, as well as for infrastructure and cleanup programs on the U.S./Mexican U.S./Canadian borders. In determining border infrastructure and cleanup program needs and priorities, procedures would be established to ensure input from local communities that are affected by the program.

B. Funding for Conservation Programs.

In addition to funding the NACE and border infrastructure and cleanup programs, the supplemental agreements would provide a secure source of funds for conservation, biodiversity and ecosystem protection programs.

IV. Standards.

A. Negotiation of Process Standards.

The Signatories would agree to enter into negotiations within six months of the implementation of the NAFTA to discuss criteria for the use of process standards. In addition, the Signatories agree to place a moratorium on bringing cases to dispute settlement panels if the law at issue is designed to protect fish, animals or wildlife outside the territorial land of the Signatories until these negotiations develop applicable criteria for process standards. The implementing legislation would include a provision specifying that arbitral panel decisions adverse to a U.S. fish, animal or wildlife law or regulation would not result in the repeal or amendment of any such law or regulation.

B. Dolphin Conservation Act.

The U.S. negotiators would formally request the Mexican government to agree to the International Dolphin Conservation Act moratorium on the practice of setting nets on dolphin to harvest tuna.

C. Chapter 9.

The Signatories would clarify that Chapter 9 was intended to allow challenges to an environmental standard-related measure only on the ground that it is discriminatory or was designed as a disguised barrier to trade, not on the ground that it is too strict.

D. Chapter 7.

The parties either would agree on language clarifying certain key terms in Chapter 7 that remain ambiguous, including

but not limited to the term "necessary," or would agree that they would not bring cases under Chapter 20 challenging a sanitary or phytosanitary standard for pesticide residues or contaminants in food under Chapter 7 except on the ground that the standard is discriminatory or was designed as a disguised barrier to trade. Sample language clarifying the terms of Chapter 7 is annexed as Exhibit C.

E. Challenges to State Laws.

The Administration agrees that it would seek in the U.S. implementing legislation a provision preventing the preemption or interference with states' or other subnational entities' laws or policies on the basis of Articles 105 or 902.

V. Dispute Settlement.

A. Dispute Settlement Procedure Protocol.

The Signatories would agree to enter into a protocol setting dispute settlement procedure guidelines for arbitral panels, including but not limited to provisions that: (1) ensure that the burden of proof by a preponderance of the evidence is on the challenging party in a dispute over standards and on a Signatory in a case in which the Signatory is defending an allegation that it failed to comply with NACE recommendations or request for information or verification; (2) provide deference to agency and judicial decisions (except to the extent they conflict with NACE recommendations) and to the laws and regulations of the Signatories concerning the setting of standards; (3) provide that at least one environmental expert would sit on arbitral panels when the dispute involves environmental issues and that the expert would be chosen from a panel of such experts established by the NACE; (4) provide access to all briefs filed before arbitral panels in environmentally-related cases with appropriate protection for national secrets and security interests and confidential business information; (5) make arbitral panels decisions available to the public except when the panel finds it is necessary to redact the decision to protect confidential business information or national secrets and security interests; (6) permit interested persons or organizations to petition an arbitral panel for permission to file amicus briefs and set guidelines for the arbitral panel as to when to accept such petitions; and (7) open hearings on environmentally-related cases to the public with appropriate protection for national secrets and security interests and confidential business information.

B. Input Into U.S. Positions During Dispute Settlement Proceedings.

The implementing legislation would provide for public input (and, where appropriate, for input from state and local governments) into decisions relating to: (1) the defense of cases in the dispute settlement process of Chapter 20 of NAFTA challenging environmental laws; and (2) whether to bring dispute

settlement proceedings alleging that a Signatory has not complied with NACE action plans or requests.

VI. Public Participation.

In addition to the public participation provisions set forth above, the Signatories would agree to enact "community right-to-know laws" consistent with principle 10 of the Rio Declaration.

VII. Relation to other environmental and Conservation Agreements.

The parties agree pursuant to Article 104:2 to add to Annex 104:1 additional environmental and conservation agreements, and to list automatically on Annex 104.1 all amendments to the environmental and conservation agreements listed in that annex or in Article 104. Dispute resolution panels would give deference to a Signatories' decision that it has properly interpreted the relationship between the NAFTA and another international environmental agreement. A list of the Agreements that we would like to see added will be supplied in the near future.

VIII. Supplemental Agreement.

The Signatories would agree consistent with their domestic law, to take actions that give the supplemental agreements on the environment the same status and effect as the NAFTA itself.

Exhibit A

INITIAL REPORTS

1. Compliance with Law Report - This report will generally analyze enforcement of environmental law within each Signatory. The first report shall for each Signatory: (a) describe the resources available for enforcement of environmental laws; (b) describe the permit programs for discharge of substances into the air and water and the disposal of substances on the land; (c) determine whether enforcement resources are adequate and what steps can be taken to improve enforcement; (d) determine, after review of a sample of facilities, whether and how the permit program is being implemented and suggest measures to improve implementation; and (e) reach preliminary conclusions as to whether and how well environmental laws are being enforced and recommend steps that can be taken to improve enforcement.

2. Crossborder Report - The crossborder report shall analyze generally the status of crossborder pollution, environmental compliance by maquiladora facilities, the need for additional waste water treatment facilities, and the adequacy of existing agreements relating to crossborder pollution among the Signatory nations. The report shall make recommendations with respect to each of these matters.

3. The Transborder Investment Report - This report shall include (a) a review of compliance with environmental law by firms that are partially or fully-owned by persons (including ultimate parent corporations, partnerships and individual investors) from another Signatory [alternatively, another "nation"] and have industrial, agricultural, mining or natural resource operations or facilities in the territory of a Signatory (except for operations by maquiladora facilities which will be covered by the crossborder report) and (b) an analysis of whether any additional steps need to be taken to ensure that foreign-owned facilities come into compliance with or stay in compliance with the environmental laws of the Signatory.

4. Natural Resources, Biodiversity Energy and Agriculture Report - This report shall analyze the effect of increased trade and development on natural resources, energy and agriculture and species diversity beginning with a general analysis of the status of natural resource protection and the threats to biodiversity as of the date of the first report. It shall consider the effect of NAFTA on natural resources and species and make recommendations to alleviate any significant adverse effects it finds.

5. The Side-Agreement Report - This report will monitor compliance with side agreements, including any agreements requiring that the legal systems of the Signatories give citizens effective rights to enforce environmental laws.

6. The Harmonization of Standards Report - This report would analyze whether the Signatories are making progress in achieving upward harmonization of their standards.

EXHIBIT B

Environmental Enforcement

(Prepared by Justin Ward, Natural Resources Defense Council)

DRAFT 4/7/93

PREAMBLE

The Governments of Canada, the United Mexican States and the United States of America (the Parties),

Reaffirming Principle 10 of the Rio Declaration on Environment and Development as agreed to by the Parties, and that it is the right of every citizen to take part in decisions that will affect their personal health and welfare;

Convinced that citizen participation is essential to development and enforcement of environmental laws is essential to sound environmental policy making; and

Deciding to provide for an effective and enduring mechanism that will permanently ensure the rights of citizens to participate in environmental decisions and enforcement of environmental laws;

Have agreed as follows:

**Article I: Enforcement of Environmental Laws and Regulations:
General Provisions**

1. Each Party shall ensure that enforcement procedures, as specified in this Article and Articles II through IV, are available under its domestic law so as to permit effective action to be taken against any act that violates national environmental laws and regulations, including expeditious remedies to prevent imminent environmental degradation and remedies to deter further infringements. Such enforcement procedures shall be applied so as to avoid the creation of barriers to legitimate trade and to provide for safeguards against abuse of the procedures.
2. Each Party shall ensure that its procedures for the enforcement of environmental laws and regulations are fair and equitable, are not unnecessarily complicated or costly, and do not entail unreasonable time-limits or unwarranted delays.
3. Each Party shall provide that decisions on the merits of a case in judicial or administrative enforcement proceedings shall:
 - (a) preferably be in writing and preferably state the reasons on which the decisions are based;
 - (b) be made available at least to the parties in a proceeding without undue delay; and
 - (c) be based only on evidence in respect of which such parties were offered the opportunity to be heard.
4. Each Party shall ensure that parties in a proceeding have an opportunity to have final administrative decisions reviewed by a

judicial authority of that Party and, subject to jurisdictional provisions in its domestic laws concerning the importance of a case, to have reviewed at least the legal aspects of initial judicial decisions on the merits of a case. Notwithstanding the above, no Party shall be required to provide for judicial review of acquittals in criminal cases.

5. Nothing in this Article or Articles II through IV shall be construed to require a Party to establish a judicial system for the enforcement of environmental laws and regulations distinct from that Party's system for the enforcement of laws in general.

6. For the purposes of Articles II through IV, the term "right holder" includes but is not limited to individuals, federations, associations, and non-governmental organisations that are deemed to have legal standing to assert a right of action to enforce environmental laws and regulations in a representative capacity or on their own behalf.

Article II: Specific Procedural and Remedial Aspects of Civil and Administrative Procedures

1. Each Party shall make available to right holders civil judicial procedures for the enforcement of any national environmental law or regulation. Each Party shall provide that:

- (a) defendants have the right to written notice that is timely and contains sufficient detail, including the basis of the claims;
- (b) parties in a proceeding are allowed to be represented by independent legal counsel;
- (c) the procedures do not include imposition of overly burdensome requirements concerning mandatory personal appearances;
- (d) all parties in a proceeding are duly entitled to substantiate their claims and to present relevant evidence; and
- (e) the procedures include a means to identify and protect confidential information.

2. Each Party shall provide that its judicial authorities shall have the authority:

- (a) where a party in a proceeding has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to the substantiation of its claims that is within the control of the opposing party, to order the opposing party to produce such

evidence, subject in appropriate cases to conditions that ensure the protection of confidential information;

- (b) where a party in a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide relevant evidence under that party's control within a reasonable period, or significantly impedes a proceeding relating to an enforcement action, to make preliminary and final determinations, affirmative or negative, on the basis of the evidence presented, including the complaint or the allegation presented by the party adversely affected by the denial of access to evidence, subject to providing the parties an opportunity to be heard on the allegations or evidence;
- (c) to order a party in a proceeding to desist from a violation of environmental laws and regulations;
- (d) to order the violator of national environmental laws and regulations to pay the right holder damages adequate to compensate for the injury the right holder or community at-large has suffered because of the violation where the violator knew or had reasonable grounds to know that it was engaged in a violative activity;
- (e) to order a violator of national environmental laws and regulations to pay the right holder's expenses, which may include appropriate attorney's fees; and
- (f) to order a party in a proceeding at whose request measures were taken and who has abused enforcement procedures to provide adequate compensation to any party wrongfully enjoined or restrained in the proceeding for the injury suffered because of such abuse and to pay that party's expenses, which may include appropriate attorney's fees.

3. With respect to the authority referred to in subparagraph 2(c), no Party shall be obliged to provide such authority in respect of subject matter that is acquired by a person before that person knew or had reasonable grounds to know that the production of subject matter would entail the violation of environmental laws and regulations.

4. With respect to the authority referred to in subparagraph 2(d), a Party may, at least with respect to pollution clean-up, authorize the judicial authorities to order recovery of profits or payment of pre-established damages, or both, even where the violator did not know or had no reasonable grounds to know that it was engaged in a violative activity.

5. In respect of the administration of any law or regulation pertaining to environmental protection or enforcement, each Party shall only exempt both public authorities and officials from liability for appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of such laws.

6. Each Party shall provide that, where a civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set out in this Article.

Article III: Provisional Measures

1. Each Party shall provide that its judicial authorities shall have the authority to order prompt and effective provisional measures:

- (a) to prevent environmental degradation due to the alleged violation of a national environmental law or regulation; and
- (b) to preserve relevant evidence in regard to the alleged infringement.

2. Each Party shall provide that its judicial authorities shall have the authority to require any applicant for provisional measures to provide to the judicial authorities any evidence reasonably available to that applicant that the judicial authorities consider necessary to enable them to determine with a sufficient degree of certainty whether:

- (a) the applicant is the right holder;
- (b) a national environmental law or regulation is being violated or such violation is imminent; and
- (c) any delay in the issuance of such measures is likely to cause irreparable harm to the right holder (or the community at-large), or there is a demonstrable risk of evidence being destroyed.

Each Party shall provide that its judicial authorities shall have the authority to require the applicant to provide a security or equivalent assurance sufficient to protect the interests of the defendant and to prevent abuse.

3. Each Party shall provide that its judicial authorities shall have the authority to order provisional measures on an ex parte basis, in particular where any delay is likely to cause irreparable harm to the right holder (or the community at-large), or where there is a demonstrable risk of evidence being destroyed.

4. Each Party shall provide that where provisional measures are adopted by that Party's judicial authorities on an ex parte basis:

- (a) a person affected shall be given notice of those measures without delay but in any event no later than immediately after the execution of the measures;
- (b) a defendant shall, on request, have those measures reviewed by that Party's judicial authorities for the purpose of deciding, within a reasonable period after notice of those measures is given, whether the measures shall be modified, revoked or confirmed, and shall be given an opportunity to be heard in the review proceedings.

6. Without prejudice to paragraph 4, each Party shall provide that, on the request of the defendant, the Party's judicial authorities shall revoke or otherwise cease to apply the provisional measures taken on the basis of paragraphs 1 and 3 if proceedings leading to a decision on the merits are not initiated:

- (a) without a reasonable period as determined by the judicial authority ordering the measures where the Party's domestic law so permits; or
- (b) in the absence of such a determination, within a period of no more than 20 working days or 31 calendar days, whichever is longer.

7. Each Party shall provide that, where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where the judicial authorities subsequently find that there has been no violation or threat of a violation of an environmental law or regulation, the judicial authorities shall have the authority to order the applicant, on request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. Each Party shall provide that, where a provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set out in this Article.

Article IV: Criminal Procedures and Penalties

1. Each Party shall provide criminal procedures and penalties to be applied at least in cases of willful violation of an environmental law or regulation for a commercial purpose. Each Party shall provide that penalties available include imprisonment or monetary fines, or both, sufficient to provide a deterrent,

Exhibit C

(Prepared by Justin Ward, Natural Resources Defense Council)

III. CLARIFICATION OF NAFTA PROVISIONS AFFECTING HEALTH AND ENVIRONMENTAL STANDARDS

Throughout the NAFTA process, we have repeatedly expressed concern that the trade agreement not become a vehicle for undercutting the ability of our society to protect public health and the environment. We accept the concept in NAFTA that environmental and health standards should neither unjustifiably discriminate against imported goods nor create disguised trade restrictions. We also recognize that it may be very difficult to document and prove intent on the part of a country to misuse health and environmental standards to restrict trade.

Chapter 7 of NAFTA attempts to address this problem by establishing a more objective test of the validity of "sanitary and phytosanitary" (S & P) measures, including standards to protect human health from pesticides and other food contaminants. Unfortunately, the current NAFTA text, although improved over earlier versions and proposed GATT language, still goes too far. It would allow NAFTA dispute panels to second guess the democratic decisions made at the federal, state, or local levels in our country as to 1) the existence and acceptability of environmental and health risks, and 2) the choice of appropriate protective measures. Administrative agencies most often make such "risk assessments," but legislatures, courts and the electorate have both legal rights and important roles to play in making these choices.

Language in the NAFTA side agreements should make it clear that health and environmental decisions are not subject to full reconsideration under NAFTA, but can only be challenged as lacking a rational basis or as "arbitrary or capricious" resulting from an unfair or unreasonable decisionmaking process. U.S. standards adopted in conformity with the Administrative Procedure Act or similar laws would be free from such scrutiny. We also must recognize the inevitable uncertainty associated with health and environmental risks, and nonetheless act to prevent injury to health and the environment -- the so-called "precautionary principle."

As currently drafted, NAFTA fails to recognize fully that food safety standards involve judgments about both technical evidence and social policy. Instead, NAFTA treats them as solely within the province of "science," a term that is not defined in the text, and the result of administrative "risk assessment," a term that is defined in detail (Articles 715, 724). Our concern is that NAFTA might be interpreted by dispute panels as requiring that health and environmental measures rest upon the kind of certainty

generally associated in many people's minds with scientific experiments or as requiring the support of all or most scientific opinion.

In a side agreement, the NAFTA Parties should explicitly recognize the entire range of governmental institutions at the national and subnational levels that may be involved in the adoption and application of health and environmental measures and in carrying out "risk assessments." These include administrative agencies, legislatures, the courts, and electoral referenda. The side agreement should also adopt a "dictionary" definition of "science" such as the "systematic pursuit of knowledge through observation and experimentation." These definitions would permit challenges to measures only in those cases where there is simply no supporting analyses, where supporting analyses can be shown to have no factual basis or to be fundamentally flawed, or where the decision-making process is totally unfair. The clarifications we are proposing would be consistent with the way NAFTA's intent has been interpreted by trade and environmental officials in each country.

We are well aware and indeed share some of the concerns regarding the closed nature of the dispute settlement procedures under NAFTA. We should first recognize that these panels are not like federal courts. They do not now have the power to overturn or preempt domestic standards. Instead the panels are mechanisms for trying to resolve diplomatic disputes when negotiations fail. Nonetheless, a finding that a health or environmental measure is an unfair trade barrier could have significant legal and political impacts in national fora.

We do not favor turning the NAFTA panels into trinational courts.¹ Instead, we should sharply limit the scope of their review with respect to health and environmental standards. As suggested above, the panels should consider only whether the decision-making process and basis underlying a contested measure were rational with some factual basis and not arbitrary and capricious, and, of course, whether the measure discriminates unjustifiably against international trade.

The Parties should also adopt provisions to assure the opportunity for meaningful participation in trade disputes by concerned citizens, non-governmental organizations, and state and local government bodies. This would include public access to submissions, decisions, and proceedings of panels, and rights to make written and oral submissions to dispute panels.

¹ As discussed above in our recommendations on the NACE, we support moving toward new disciplines that would treat unmitigated environmental enforcement lapses as actionable trade violations. Such violations could be addressed within the NAFTA dispute regime with environmental expertise furnished by NACE.

We have proposed to USTR the following specific clarifications to the NAFTA disciplines governing S & P measures:

Clarifications of Article 712

The Parties recognize that the adoption, maintenance, and application of sanitary and phytosanitary measures may involve actions by regulatory agencies, legislatures, courts, electoral referenda, and private standard-setting bodies at both the national and subnational levels. The Parties further recognize that these actions may take place in circumstances where risk assessments, as required in Article 712.3 (c) and prescribed in Article 715, may not be appropriate or feasible.

Additional language for Article 712.3

(d) is not arbitrary or capricious, but based upon a fair and open process in which there is consideration of scientific evidence and opinion, and policy options and preferences.

This subsection would be added to an Article establishing the conditions under which a Party may adopt, maintain, or apply S & P standards. This language much more accurately reflects the reality of S & P standards decision-making than the current formulation in NAFTA. It would insulate from NAFTA challenge U.S. measures, which by law must be established and carried out with due process. At the same time, this formulation would protect the interests of American exporters against "midnight" or "off-the-wall" regulations. Where there are significant procedural failures or lapses, Parties would be able to question the validity of resulting standards.

Additions to Article 724 Definitions

"necessary" means reasonably required

Articles 712.1 and 712.5 use the term "necessary" in regard to S & P measures, which Parties are free to adopt and apply. There is concern based upon earlier GATT practice that the term "necessary" might be construed to mean "least trade restrictive."² (To the negotiators' credit, Chapter 9 of NAFTA governing "Technical Barriers to Trade" omits the troubling "necessary/least trade restrictive" test.) NAFTA trade panels should not be empowered to second guess the judgment made by domestic authorities as to the

² Testimony of David A. Wirth, Assistant Professor of Law, Washington and Lee University, before the House Committee on Science, Space and Technology, September 30, 1992; S. Charnovitz, "NAFTA: An Analysis of its Environmental Provisions," 23 Environmental Law Reporter, p. 10068 (February 1993).

best means to protect life and health. With the proposed clarification, a Party challenging such a measure under NAFTA would have to prove that there was no reasonable nexus between the measure and the accomplishment of its specific objective to protect life and health. A measure could not be viewed in violation of NAFTA just because there was theoretically an equally effective, but less trade restrictive, alternative.

"Scientific" refers to the systematic pursuit of acquiring knowledge through study or practice

"Basis" refers to any factual support, theory or opinion that is neither irrational nor arbitrary or capricious.

Article 712.3(a) states that Parties must establish S & P measures based upon "scientific principles." Article 712.3(b) obligates the Parties not to maintain S & P measures where there is no longer a "scientific basis," defined in Article 724 as "a reason based on data or information derived using scientific methods." However, the term "scientific" or "science" is never defined.

Our proposal is to adopt the "dictionary" definition for the term, which refers to the reasoned process by which knowledge is gained through observation or experimentation. Under this definition, NAFTA panels would not be able to substitute their own judgment for those of national authorities as to whether the "science" underlying the measure were "good" or "adequate." Instead, such measures could be successfully challenged only if it could be shown that there were no supporting analyses.

Addition to Article 105

The Parties agree that measures taken to secure observance by state, provincial and local governments of provisions of this Agreement shall not diminish nor impair the constitutional and legal rights of state, provincial and local governments to adopt, maintain, or apply measures to protect public health and the environment.

This language would recognize the rights of states (granted in the U.S. Constitution and by federal statute) to adopt more exacting health and environmental standards than those of the federal government. It is critical that the NAFTA side agreements and implementing legislation make clear that the U.S. Federal Government will not be required or expected to preempt state or local requirements in any manner that is inconsistent with existing law.

Clarification of Article 2012

The Parties agree in advance that in any dispute involving environmental or health issues, the rules of procedure must require the prior publication of written submissions to the panel, permit sub-federal governmental bodies and nongovernmental organizations to present written and oral submissions to the panel, and assure public access to panel proceedings and initial and final panel reports.

It is critical that the public have an opportunity to participate meaningfully in disputes that go beyond purely commercial matters to raise health and environmental concerns. Our proposed language would not upset the general assumption that dispute panel deliberations would be confidential. Instead, the Parties would agree, as permitted by Article 2012.2, to treat health and environmental disputes more openly.

BORDER FUNDING

Facimile Cover Sheet

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

**Executive Office of the President
Washington, DC 20506**

To: dan blank

From: Bryan Samuel

Date: Friday, Aug 13, 1993 3:05 a.m

Pages: (including cover page)

MESSAGE

If there are any problems receiving this fax, please call (202) 395-3419.

THE FUNDING OF ENVIRONMENTAL INFRASTRUCTURE PROJECTS IN THE U.S.-MEXICO BORDER REGION

Mexican Secretary of Trade and Industrial Development Jaime Serra and United States Trade Representative Mickey Kantor met to discuss the funding of border environmental infrastructure projects in their border region as an important component of the ongoing discussions regarding the Agreement on Environmental Cooperation. They agreed that there is a serious need to achieve effective coordination and fund environmental infrastructure projects designed to address wastewater treatment, water pollution, municipal solid waste and related matters in the U.S.-Mexico border region. They recognized that many environmental problems in the border region are not confined to either jurisdiction but must be addressed jointly by the United States and Mexico. They emphasized the importance of collaborating with the affected state, local communities and governments, and non-governmental organizations in developing solutions to environmental problems in the border region. Finally, they noted that substantial financial resources must be marshalled over the next decade from all sources, both public and private, to solve the environmental problems of the border region.

Secretary Serra and Ambassador Kantor suggested that negotiations on an agreement to establish coordinating and financing mechanisms for environmental infrastructure projects in the border region be governed by the following principles:

- o The functions of a border environment institution would be, for environmental infrastructure projects for which it provides technical and/or financial assistance:
 - to coordinate environmental infrastructure projects in the region;
 - to review and approve environmental infrastructure projects;
 - to assess the technical and financial feasibility of environmental infrastructure projects;
 - to oversee the financing, construction and operation of environmental infrastructure projects; and
 - to ensure a transparent process which incorporates the views of affected states, local communities, and non-government organizations.

- o This institution could mobilize sources of financing for environmental infrastructure projects:
 - a border environment financing facility;
 - direct government support, such as grants, loans, and guarantees from federal, state and local governments;
 - the private sector; and
 - subject to future agreement by the United States and Mexico, capital raised directly by the institution.
- o The principles governing the provision of financial support mobilized by this institution should be to:
 - provide secure sources of financing for environmental infrastructure projects;
 - leverage government financing;
 - encourage maximum participation of private capital; and
 - encourage maximum reliance on fees paid by those causing pollution and those benefitting from the improved environment in order to ensure payment of debt service.
- o A border environmental financing facility would be established, capitalized, and governed by the United States and Mexico. The possibility of a link with the Inter-American Development Bank should be explored. The financing facility would serve the border environment institution as one source of direct loans and partial guarantees for environmental infrastructure projects approved by the institution. The agreement establishing the facility could contain provisions for amendment that would enable the role of the facility to be expanded in the future, if the two governments agreed.

Secretary Serra and Ambassador Kantor agreed that officials would pursue further discussions on these issues in coming weeks.

FACT SHEET:

NOT FINAL

**FUNDING ENVIRONMENTAL INFRASTRUCTURE
PROJECTS IN THE U.S.-MEXICO BORDER REGION**

New Institutional Arrangements Although negotiators have not yet begun work on the language of a text, basic agreement was reached on a new institutional structure to promote effective coordination of infrastructure projects.

- o A hallmark of the institution will be a transparent process which incorporates the views of local residents and non-government organizations.
- o Initially, the institution will focus on projects addressing serious wastewater treatment and water pollution problems.
- o The institution will provide assistance on both the technical and financial aspects of the projects.

Financing Options Though the institution will not itself offer bonds initially, it will work to mobilize multiple sources of financing, depending on the nature of the individual project.

- o As appropriate, it will turn to the private sector, direct government support (loans, grants or guarantees at the federal, state and local level), and a *border environmental financing facility*.
- o Subject to future agreement, the institution could raise capital directly.

Border Environmental Financing Facility The United States and Mexico are exploring capitalization of a new financing mechanism to serve the border institution as one source of direct loans and partial guarantees.

U.S. and Mexican officials will hold further discussion in coming weeks, including discussions on the important question of the required levels of funding.

ROADMAP FOR NGO REACTIONS TO NAFTA ENV AGREEMENTS

o What looks good in this agreement?

1. **Obligations** on Parties include:

- a. access to national courts
- b. transparent judicial and administrative procedures
- c. high levels of env protection
- d. effective enforcement
- e. reports on state of env
- f. taking "all reasonable steps" to provide Secretariat with information it requests (including visits to individual facilities as appropriate)

NACE
Council 3 min
Secret Dir + staff
Joint Advis Com
(citizens)

Commission includes an **independent Secretariat** (which has broad information-gathering authority and can receive submissions from the public) and a **Joint Advisory Committee**
****but there are decision-points for broad direction from Parties****

3. Transparency, public participation and "teeth" (fines, courts and sanctions--plus ongoing enforcement) in **dispute settlement** ****but no trade sanctions for Canada****

4. Commission has significant **role in** prevention and resolution of **environment-related trade disputes**

5. Commission's **agenda** includes:

- a. PPMs-plus ("environmental implications of products throughout their lifecycles")
****but doesn't mention PPMs by name**** *in a way, even broader.*

b. Community right-to-know

6. Protection of **IEAs**

Montreal, Basel + CITES

a. in preamble and operative article

b. Mexico and Canada have agreed to expand list of IEAs in NAFTA itself

o What looks just OK?

1. States/provinces not bound by agreement, but there are strong incentives for opt-in

(Good for Can.)
No way we could have - Can would have had to be const.

- if not ban domestically*
2. Trade in toxic substances not banned, but agreement includes obligations for notification and "work toward" limiting trade in toxic substances
 3. Scope of agreement itself is broad, but dispute settlement limited to "effective enforcement of environmental laws" and includes a "trade test"
 4. Parties don't need to have "exhausted alternatives" before Secretariat proceeds with respect to a submission, but one "guiding" (non-mandatory) criteria is whether "alternative remedies...have been pursued"

o What looks not so good?

1. **NACE funding** not explicitly dealt with (to be decided along with size and location), except that it will be equally divided among the Parties *(good)*
2. **Definition of "effective enforcement"** (for deciding whether to set up a dispute resolution panel and the panel finding) provides for "reasonable" exercise of discretion and "bona fide" resource allocation decision.

o What else have NGOs been concerned about?

1. **Border project funding**

- good*
- a. not part of side agreement, but will be developed as a separate bilateral with Mexico
 - b. Mexican Secretary of Trade and Industrial Development Jaime Serra and USTR Mickey Kantor **have agreed on principles** for negotiating an agreement to establish coordinating and financing mechanisms for environmental infrastructure projects in the border region
 - + new institutional framework with **transparent processes**
 - + initial focus on wastewater and water pollution
 - + financing through mobilizing private sector, direct government support and a **border environmental financing facility**

2. **Standards**

- a. Nothing in NAFTA precludes states from having **more stringent standards** than federal, or one country applying an SPS measure that is more stringent than an international standard
- b. Agreed summary of obligations states "protects the rights of states and provinces to set high levels of protection, consistent with the NAFTA" (e.g., won't pre-empt California standards like prop 65)
- c. The word "necessary" in the NAFTA S&P text does not mean "least trade restrictive" and does not give precedence to GATT standards code over NAFTA.

THE FUNDING OF ENVIRONMENTAL INFRASTRUCTURE PROJECTS IN THE U.S.-MEXICO BORDER REGION

Mexican Secretary of Trade and Industrial Development Jaime Serra and United States Trade Representative Mickey Kantor met to discuss the funding of border environmental infrastructure projects in their border region as an important component of the ongoing discussions regarding the Agreement on Environmental Cooperation. They agreed that there is a serious need to achieve effective coordination and fund environmental infrastructure projects designed to address wastewater treatment, water pollution, municipal solid waste and related matters in the U.S.-Mexico border region. They recognized that many environmental problems in the border region are not confined to either jurisdiction but must be addressed jointly by the United States and Mexico. They emphasized the importance of collaborating with the affected state, local communities and governments, and non-governmental organizations in developing solutions to environmental problems in the border region. Finally, they noted that substantial financial resources must be marshalled over the next decade from all sources, both public and private, to solve the environmental problems of the border region.

Secretary Serra and Ambassador Kantor suggested that negotiations on an agreement to establish coordinating and financing mechanisms for environmental infrastructure projects in the border region be governed by the following principles:

- o The functions of a border environment institution would be, for environmental infrastructure projects for which it provides technical and/or financial assistance:
 - to coordinate environmental infrastructure projects in the region;
 - to review and approve environmental infrastructure projects;
 - to assess the technical and financial feasibility of environmental infrastructure projects;
 - to oversee the financing, construction and operation of environmental infrastructure projects; and
 - to ensure a transparent process which incorporates the views of affected states, local communities, and non-government organizations.

- o This institution could mobilize sources of financing for environmental infrastructure projects:
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7/24 Beth
VPs Offici ASAP

Pope
Adams
Berke

Kathie conf

When can we begin the
TPts