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Collection/Record Group: Clinton Presidential Records
Subgroup/Office of Origin: Council on Environmental Quality
Series/Staff Member: Kathleen (Katie) McGinty
Subseries:

OA/ID Number: 4299
FolderID:

Folder Title:
North American Free Trade Agreement (NAFTA)

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To: Governor Clinton
Fr: Katie McGinty
Re: Environmental Issues relevant to NAFTA

12-31-92

BOTTOM LINE:

In addition to other critical factors (such as enhanced labor protections and safeguards against unexpected surges in imports), strong supplemental measures with regard to environmental protection will have to be negotiated with the Mexicans and Canadians if the NAFTA is to pass Congressional muster and if you are to be able to fulfill your campaign statements with regard to NAFTA. In short, you will need to negotiate an agreement(s) that: (1) will effectively address the failure of the NAFTA to provide for meaningful recourse against a Party's failure to enforce environmental laws and regulations, and (2) will ensure the availability of adequate resources to clean up the border area and prevent further deterioration as trade is expanded.

Environmental Enforcement: Strong resistance can be expected on this front from the Mexicans (and to a somewhat lesser extent, the Canadians). In particular, Mexico will insist that respect for national sovereignty must be a cornerstone of any agreement and that any body with authority relating to the enforcement of environmental laws is an unacceptable infringement of sovereignty. You should maintain your position that effective environmental safeguards must be negotiated and that a mechanism will have to be put in place (including citizen access to the courts to enforce domestic environmental laws) that can better ensure that environmental safeguards will be enforced. You can agree with Mr. Salinas, however, that the negotiated mechanism should not be vested with supra-national enforcement powers, and that trade sanctions for failure to enforce environmental regulations should not be put in place immediately.

Clean up: Mr. Salinas has called for a creation of a special bank in order to fund border clean up. (See separate memo on this issue prepared by Barry Carter.) While agreeing to the need to ensure that adequate funds are in place, you should be non-committal at this time with regard to modalities. Several proposals have been made on this front by key members of Congress (in particular, Senator Baucus and Congressman Gephardt have called for maintaining and earmarking some portion of the border transaction fee to fund environmental restoration) and by the private sector (technology partnerships; government-backed bond issues, etc.). All of these proposals need carefully to be considered before a final decision is made on the precise

contours of the funding mechanism.

The following discussion details the status of current negotiations on supplementary environmental agreements to the NAFTA; reviews your campaign statements on this issue, and suggests the contours of an environmental commission that could effectively ensure greater environmental protections. While these issues are discussed in some detail, it is NOT RECOMMENDED that you get drawn into a detailed substantive discussion at this time. Rather, the discussion should simply be useful to you in coming to an understanding of the divergence of views you may have with the Mexicans (and, to a lesser extent the Canadians) in negotiating these issues.

I. BACKGROUND/NEED FOR THE SUPPLEMENTAL ENVIRONMENTAL MEASURES

The NAFTA does take several significant steps forward in ensuring protection of the environment. For example, while the agreement encourages harmonization of product standards, it expressly provides that parties may set standards that are more protective than an internationally recognized norm. In addition, the agreement stipulates that NAFTA will not preempt federal, state or local environmental standards. Moreover, the NAFTA specifies that, where an international environmental agreement and the NAFTA are in conflict, the environmental agreement will take precedence. And finally, the agreement breaks new ground by shifting the burden of proof to the challenger of a stringent product standard to prove that the standard does not have a scientific basis. This reverses current GATT practice and, since it puts the challenger in the position of proving a negative, it could prove to be a significant shield against successful attack.

However, the NAFTA falls short in one very significant respect. Unlike disputes arising under the commercial provisions of the agreement, for which full dispute resolution mechanisms and trade sanction remedies are available, disputes with regard to the failure to enforce environmental regulations give rise only to consultation among the Parties.

This shortcoming fuels concerns -- voiced strongly by both environmental groups and key members of Congress -- that border pollution problems will only be exacerbated by the NAFTA and that new pollution havens will be created throughout Mexico as trade is increased and expanded. In addition, it is feared that this could also lead to a weakening of US laws (1) as they are challenged as impermissible barriers to trade and (2) as US firms relocate -- or threaten to do so -- because of the stringency of state and/or federal standards.

You identified several supplemental environmental measures in your October speech on NAFTA as a means of addressing this

shortcoming. (See below for a full discussion of these measures). In particular, you called for provision to be made in the domestic environmental legislation of each of the countries party to the agreement for citizen access to the courts, and you called for the creation of a trilateral commission on the environment.

(Note that, in addition to ensuring better enforcement of environmental regulations, in our discussions prior to the October speech, we conceived of the commission as a body that could effectively monitor and assess environmental conditions in each of the countries in order to ensure that the increased trade among them would foster sustainable economic development -- i.e. that it would foster environmental protections and improvements as well as economic growth and lead to more effective efforts to manage and protect critical natural resources. If conceived of in this way, the commission could become a very important means of building on the North-South, environment-development dialogue that was begun at the Earth Summit in Rio).

The creation of an environment commission also figured into President Bush's strategy to meet the concerns of Congress and non-governmental groups. In addition to a series of bilateral agreements with the Mexicans focusing primarily on clean up of the border area, the Administration in September, 1992 reached an agreement in principal to negotiate a North American Commission on the Environment (NACE). As presently conceived by the Parties, the NACE is unlikely to satisfy Congressional concerns. (See below for further detail). In short, while members of Congress are looking for an agreement that will effectively close the loophole in NAFTA relating to the failure of a Party to enforce environmental laws, the NACE as currently conceived by the Bush Administration will -- at best -- serve only to facilitate cooperation among the Parties on environmental matters.

III. CURRENT STATUS OF ADMINISTRATION NACE NEGOTIATIONS

The Bush Administration negotiating position on the NACE is detailed in a classified Circular 175 (10-29-92). According to this document, the purpose of the NACE is merely to provide a forum for trilateral discussion on environmental issues. In particular, the NACE would seek to facilitate implementation of NAFTA environmental provisions and enhance trilateral environmental cooperation among the Parties. While quite modest in its aims, some of the details of the Administration's proposal have met with resistance by Mexico and Canada.

In the second negotiating meeting on the NACE, held near Mexico City on December 15-16, several key concerns were raised:

- o Scope: While all Parties understand that trilateral

environmental cooperation has two principal components: NAFTA-related issues and non-NAFTA related issues, Mexico expressed particular concern that NAFTA-related issues should be a minor part of the Commission's agenda. This is very troubling because it evinces an intent on the part of the Mexicans to resist any mechanism that would seek to bolster that part of the agreement that is the weakest link in ensuring that increased trade will be met with enhanced and adequate environmental safeguards:

Specifically, the provision in question is in the investment chapter of the agreement. While it states that "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures," it provides only for consultation in the event that "a Party considers that a Party has offered such an encouragement."

It is this provision that must be bolstered by the Commission (and other supplemental environmental measures) if NAFTA is to be acceptable to the Congress and if you are to fulfill your campaign statements with regard to NAFTA.

The Mexicans will argue (1) that any enhancements of this provision amounts to a renegotiation of the text and (2) that significant sovereignty concerns are raised if a more effective mechanism is called for.

With regard to the first concern, two responses are appropriate: First, without a strengthening of this provision, NAFTA will face strong resistance in the Congress. Second, whether a supplemental agreement on this point amounts to a renegotiation of the text depends on the details of what is called for in that supplemental agreement. Specifically, if authorities other than an immediate ability to suspend trade benefits to a Party found in violation of the provision are vested in the Commission, then it can be argued that the "core" of the agreement has not been re-opened.

A question is immediately raised here, however, as to whether the Commission should enjoy the authority to impose trade sanctions immediately. I believe that it should not. At this stage, it is difficult to use trade sanctions to ensure the enforcement of environmental standards because -- unlike the case of the protection of intellectual property rights, for example -- there is not an internationally agreed standard from which to judge performance. In addition, in the absence of agreed standards, it is potentially dangerous to allow such sanctions because it invites the use of environmental measures as disguised barriers to trade.

These considerations serve to highlight, however, the critical importance of charging the Commission with undertaking an effort to begin to determine appropriate minimum standards. Once these are in place, the Commission's ability to use trade

sanctions to enforce their observance should be called for. (Note that Canada appears to have called for such a function in the December meeting; US and Mexico expressed caution but took no final position).

o Enforcement: Mexico will also resist vesting the Commission with any hint of an enforcement-related authority. In the December negotiations, Mexico objected even to a suggestion that, in an annual report, the Commission should comment on the Parties' progress in strengthening the development and enforcement of environmental laws.

Again, the response to these concerns lies in the details of what is proposed. While the Commission needs muscle if the NAFTA is to survive (and the environment and human health are not to be victims of the agreement), it is not necessary or advisable to argue for the Commission to be a type of supra-national body with authority to undertake to enforce the Parties' domestic environmental laws.

The Commission can be vested with other authorities that, together with unilateral US measures and citizen access to the courts (see discussion in sections IV and V below), can effectively bolster the environmental provisions that have been incorporated into the NAFTA. One possible authority is worth mentioning here, however, because it is my understanding that the Mexicans believe you will call for it, and they are prepared strongly to resist it. Namely, an issue is raised as to whether the Commission will have inspection authority. It is my view that it will be essential for the Commission to undertake independent fact-finding and investigations. Otherwise, it will function merely as a repository for reports submitted by the Parties with no ability critically to review them. The Commission's credibility and potential effectiveness will be marginalized if not completely undermined.

Having said that, however, there is significant room for compromise with regard to the degree of intrusiveness of the inspection authority. There is precedent in the NAFTA itself for inspections (a Party must yield to inspection if it requests that a particular sanitary or phytosanitary standard it observes be considered equivalent to that of another Party). And, it could be envisioned that inspections would only be had with regard to particular types of facilities, or only after significant public complaint had been received with respect to a particular practice, only with regard to pre-agreed private or publicly run facilities, etc. Also, building on the modalities provided in some of the arms control agreements, provision could be made for overhead surveillance, using aircraft equip with cameras and sensors and obviating in part the need for on-the-ground intrusions.

NOTE THAT WITH REGARD TO ANY AND ALL FUNCTIONS OF THE

COMMISSION, MEXICO WILL ALSO ARGUE THAT FINANCIAL CONSTRAINTS LIMIT ITS PARTICIPATION.

NOTE ALSO THAT THE NACE DISCUSSIONS ARE AT A VERY PRELIMINARY STAGE. VIRTUALLY NOTHING HAS FINALLY BEEN AGREED. INDEED, DISCUSSIONS HAVE BEEN EFFECTIVELY SUSPENDED PENDING NEW ADMINISTRATION. IT IS NOT NECESSARY, THEREFORE, FOR YOU TO ARGUE AT THIS POINT THAT THE NACE SHOULD BE SCRAPPED IN FAVOR OF A NEW COMMISSION.

IV. CAMPAIGN POSITION

In your statement on NAFTA of October 4, 1992, (and in an accompanying document released at that time), you expressed support for the agreement, but noted that additional measures (some of which could be pursued unilaterally by the United States; others of which would require multilateral negotiations) were required to ensure protection of workers and the environment and to address unexpected surges in imports. You stated that, while negotiation of these measures would not necessitate a renegotiation of the agreement, the measures would have to be in place before would he would sign legislation to implement NAFTA in the United States. Specifically with regard to the environment, the following measures were called for:

- * ensure adequate funding for environmental cleanup and for infrastructure necessary to handle increased development and traffic

- * establish an environmental commission with substantial power and resources to:

- o clean up and prevent border pollution
 - o encourage the enforcement of each country's domestic environmental laws
 - o educate and train
 - o undertake construction projects
 - o develop minimum environmental standards
 - o provide remedies -- such as money damages and injunctions
 - o prevent pollution

- * secure agreement that each Party will ensure citizen access to the courts to enhance enforcement of domestic environmental statutes

- * ensure that citizens enjoy strong procedural safeguards

(such as easy access to the courts, public hearings and the right to present evidence, streamlined procedures, and effective remedies) in exercising their right to suit

- * pass domestic legislation to provide for public participation in defending challenges to U.S. laws

- * pass domestic legislation providing US citizens opportunity to bring challenges to the practices of other parties.

In addition, the documentation accompanying your speech asserted that once NAFTA is in full force and effect, you would further ensure protection of the environment (and US jobs and farmers) by:

- * vigorously using section 301 of the 1974 Trade Act and -- to the extent the agreement allows it -- the use of section 201

- * use the President's discretion to deny trade benefits under the General System of Preferences.

Finally, you noted that you would charge the Vice-President elect with ensuring that an effective commission is put into action before the implementing legislation is signed.

V. FURTHER ELABORATION OF STRUCTURE/FUNCTION OF ENVIRONMENT COMMISSION:

Should Mr. Salinas want to engage you in a more detailed discussion of the structure/function of the commission, the following might be considered as possible features of a commission that could prove effective in protecting the environment. Some of these features were specifically noted in your campaign statements. Many of them have been raised in the context of the NACE discussions, and I have noted the positions of the parties as known to date.

Structure:

- * The Commission should be composed of ministers from each of the respective countries.

Note that a question arises here as to whether environment ministers only should participate or if both environment and trade ministers should participate. Because there is already provision in the NAFTA for a Trade Commission, it can be argued that membership here should be limited to environment ministers. However, if the commission is to prove effective in accurately assessing trade and environment inter-relations, inclusion of trade ministers is essential. Current discussions on the NACE envision that the Commission will be composed of environment ministers supported by staff from other appropriate agencies.

* The Commission should be supported by a full-time Secretariat.

NACE would not be so supported. Bush Administration strictly follows a principle resisting the creation of any new international bodies and cites concerns with regard to the financial resources needed to support a new body. If the Commission is to do more than merely rubber-stamp reports submitted by the Parties, it is essential that some full-time support mechanism be put in place.

* Independent, objective, non-governmental representatives should also be full parties to the Commission's proceedings -- either as members of the commission itself, or as members of a free-standing public advisory body. These persons should have full access to all proceedings and documentation.

While all Parties currently agree that the public should be able to provide information/raise issues to the Commission, the question of whether a public advisory body should be created has been left to the discretion of each Party -- and then such bodies would only advise their respective ministers. It is not contemplated that they would -- together -- form a free-standing group, or that they would have access to the internal information of the Commission.

* The Commission's proceedings should be open to the public -- except where necessary to protect national security or confidential business information.

Parties currently agree that at least some part of the Commission's proceedings should be open to the public.

Functions:

* The Commission should assess the state of the environment (i.e. the health of the natural resource base) and the rate and efficacy of environmental enforcement efforts in each of the member countries.

A question arises as to whether the Commission should originate the report, or simply comment on reports submitted by each of the member countries. In either case, if there is to be some assurance that the assessment is credible, the Commission will need to have some degree of fact-finding and investigatory authority. Current NACE negotiations contemplate only that the Commission will undertake to prepare a regular report. Its contents, however, remain in question. And it is not contemplated that there would be any verification mechanism (other than that the report would be publicly available).

* The Commission should recommend measures that should be undertaken by the member countries, jointly or individually, to

improve the health of the natural resource base.

To build on the progress made at the Earth Summit in Rio, the Commission could serve as an important focal point for understanding the elements of Agenda 21 that can best be dealt with on a regional basis and could advance our understanding of how resources can better be managed on an ecosystem-basis rather than according to other arbitrary jurisdictional lines. Current NACE negotiations do not contemplate any role for the Commission in making recommendations for improved environmental performance to the Parties.

* The Commission should undertake an effort to prescribe minimum environmental standards and to set a schedule for each country to meet those standards.

Note that this is essential if at some point, as discussed above, penalties and/or trade sanctions will be available for failure to enforce environmental standards. Canada has suggested this type of role for the Commission. Mexico and US expressed caution; but have taken no final official position.

Note that a question also arises here as to whether the Commission should have authority to penalize a Party's failure to enforce environmental laws in any case -- or only where there has been demonstrated a trade impact of the failure to enforce. Significant sovereignty concerns are raised by the former approach because, again as discussed above, it could allow the Commission to act as a supra-national regulatory body. Moreover, to the extent that the Commission is primarily being proposed in order to shore-up weaknesses in this trade agreement, the latter would appear to be the more appropriate role.

* The Commission should oversee implementation of the environmental provisions that have been incorporated in the NAFTA.

Note the concerns raised by the Mexicans on this front discussed above.

* The Commission should provide a forum for Parties and concerned citizens to register a complaint concerning the failure of a Party to enforce environmental regulations.

Current NACE discussions do not contemplate the Commission as a forum for Parties to air grievances (let alone having established procedures to air those grievances), but they do anticipate that the Commission would be able to receive citizen complaints. It is only suggested, however, that the Commission "may" pass those complaints along to the Trade Commission that is set up under NAFTA to monitor compliance with the commercial provisions of the agreement.

* The Commission should have the authority to investigate complaints, engage in fact-finding efforts and issue a public

report documenting its conclusions.

See discussion of enforcement/inspection authorities above.

* Once internationally agreed minimum standards are in place, the Commission should be able to prescribe damages/sanctions. Prior to that time, the Commission should be able to recommend remedial actions.

It should be noted here that chronic failure of a Party to improve its performance could give rise to unilateral measures -- in particular -- to the use by the President of section 301 sanctions. This would likely require a provision in the implementing legislation that amends section 301 to identify failure to enforce environmental standards as an actionable infraction -- as is already provided in the law for failure to enforce labor standards. This is what was contemplated in campaign statement regarding use of section 301.

* If an agreement is reached, as you called for in your October 4th address, to ensure effective citizen access to the courts to enforce domestic environmental statutes, the Commission should be able to hear complaints that such access has not been provided.

No provision for this in current NACE discussions.

* The Commission should promote and facilitate cooperative efforts, including the provision of technical assistance, to protect the environment.

Note here that there are already numerous bilateral environmental agreements in existence and the proper function of the Commission on this front may be to coordinate and enhance -- rather than to duplicate -- those efforts. Note also that there is agreement among the Parties that this should be a role of the NACE. The Mexicans, in particular, are keen on technical cooperation and they will seek to define it broadly in order to include financial assistance as well.

CAMPAIGN POSITION

ENVIRONMENT

Domestic

- Ensure adequate funding for environmental cleanup and for infrastructure necessary to handle increased development and traffic
- Pass domestic legislation that allows individuals and groups to participate in crafting the U.S. Government's position in NAFTA disputes, especially those with environmental implications
- Introduce legislation that gives private citizens the right to petition the U.S. Government to challenge under NAFTA objectionable environmental practices by Mexican or Canadians
- Strictly apply U.S. pesticide requirements to imported food

Multilateral

- Establish an environmental commission with substantial power and resources to:
 - Encourage the enforcement of each country's domestic environmental laws
 - Provide remedies such as money damages and injunctions
 - Develop minimum environmental standards
 - Educate and train
 - Prevent pollution
 - Clean up and prevent border pollution
 - Undertake construction projects
- Secure agreement that each Party will ensure citizen access to the courts to enhance enforcement of domestic environmental statutes
- Ensure that citizens enjoy strong procedural safeguards (such as easy access to the courts, public hearings and the right to present evidence, streamlined procedures, and effective remedies) in exercising their right to suit

LABOR

Domestic

- Introduce a comprehensive worker assistance program
- Make growers eligible for worker adjustment assistance
- Identify alternative, competitive crop opportunities for affected growers
- Ensure that "professional workers," such as nurses, are not brought in as strikebreakers
- Require that Mexican truck drivers operating in the U.S. are subject to more vigorous inspections

Multilateral

- Establish an worker standards and safety commission with substantial power and resources to:
 - Encourage the enforcement of each country's domestic worker standards and safety laws
 - Provide remedies such as money damages and injunctions
 - Develop minimum worker standards
 - Educate and train
- Secure agreement that each Party will ensure citizen access to the courts to enhance enforcement of domestic worker standards and safety statutes
- Ensure that citizens enjoy strong procedural safeguards (such as easy access to the courts, public hearings and the right to present evidence, streamlined procedures, and effective remedies) in exercising their right to suit

Environmental Issues Surrounding the NAFTA:
Options Paper

In order to address key concerns that:

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

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

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

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

I. Border and other bilateral measures with Mexico

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

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

II. The Commission and other trilateral measures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- o a secretariat that rotates among the three countries
 - Considerations: this approach has been supported by Mexico and Canada; it is the least costly option; it is unlikely to be adequate to perform the desired functions; there would be a lack of continuity; some are concerned that Mexico would not perform adequately during its rotation;
- o each country has its own standing section of the secretariat for which it pays the costs
 - Considerations: this approach would ensure greater continuity than option #1 and the ability to perform more functions; it resembles the CFTA and NAFTA models; and
- o a bilateral body housed in one of the countries and paid for collectively
 - Considerations: this option is favored by environmental NGOs as the strongest; it would be the most expensive; it would also have the ability to perform more functions than option #1; it might require giving Commission international legal personality).

III. Other:

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

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

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

Attachment AAssumptions/Considerations

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

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

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

Border and Other Bilateral Measures with Mexico

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

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

Attachment CThe Commission and Other Trilateral MeasuresThe Commission

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

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

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

NAFTA-Related Commission Functions

-- In terms of facilitating implementation of NAFTA's environmental provisions, the Commission:

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

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

Enforcement-Related Commission Functions

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

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

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

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

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

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

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

General Environmental Commission Functions

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

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

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

Other Aspects of the Commission

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

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

Other Trilateral Measures

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

Attachment D"Minimum" Standards

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

June 1, 1993

INFORMATION

MEMORANDUM FOR ANTHONY LAKE
ROBERT RUBIN

FROM: EILEEN CLAUSSEN
BOB KYLE

SUBJECT: Trade and Environment

We would like to let you know where things stand on this issue and suggest a strategy for how we should proceed. A meeting to discuss these points would also be useful.

There are both short and longer term issues here. The immediate issues that must be resolved over the next month or two, include (1) certification under the Pelly amendment and possible trade sanctions against China and Taiwan over trade in tiger bones and rhinoceros horns; (2) certification under the Pelly amendment and possible trade sanctions against Norway over commercial whaling; (3) the GATT dispute over the tuna/dolphin issue, and (4) the position we take on environment at the next GATT meeting in July. The slightly longer term issue concerns the PRD-12 trade and environment review, where the process is in need of repair.

Short Term Issues

- Tigers, Rhinos and Whales
 - The Pelly Amendment to the Fishermen's Protective Act requires that if the Secretary of Commerce or the Secretary of the Interior finds that "nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species," he must certify such facts to the President. The President then has 60 days to notify the Congress of any action he takes pursuant to the certification, which could include trade sanctions. Despite this discretion, sanctions have never been imposed under the Pelly Amendment.
 - It is likely that Interior will certify tigers and rhinos this summer, and that Commerce will have no choice but to certify Norwegian Whaling soon thereafter. We have been having a series of meetings with the relevant agencies to discuss strategies in both of these cases. Secretary Babbitt will send letters to China and Taiwan indicating that if no corrective actions are

taken, he will certify under the Pelly Amendment in 30 days. The Norwegian whaling case is clearer, since Norway has indicated that it will proceed with commercial whaling very soon. In the case of whales, the pressure for sanctions from both the Congress and the NGO community will be particularly strong. Given that our initial position to continue the whaling moratorium was formulated based on domestic politics rather than science, we will be revisiting the same issue again over the sanctions issue.

- The Tuna/Dolphin Case

- The EC brought a GATT case against us because of our actions under the Marine Mammal Protection Act to protect dolphins during tuna catches. The thrust of the argument of the EC is that unilateral measures to protect a species outside the territorial jurisdiction of the U.S. are not permitted under the GATT. A panel report is likely to be issued this summer in support of the EC position, which will force us to either (1) not accept the report and block its adoption, or (b) pay compensation and agree to change our law. This is a terrible choice on an issue where the environmental argument is weak -- dolphins are not endangered -- but public and Congressional sentiment is strong.

- The July GATT Session

- The subject of environment will certainly come up in the next GATT session in July. The EC has taken the position that trade measures required by international environmental agreements should be specifically permitted under the GATT. I think that no one in the U.S. would disagree with that point, but many would argue that a broader view (going beyond international agreements) would be more desirable. We will have to resolve this issue soon as well, or we will be unable to appropriately respond in July.

We need a process to raise these issues formally, and reach an agreement on how to proceed.

Longer Term Issues

PRD-12 requested a policy review on trade and environment issues. USTR was designated as the chair of the review process. Initially, 12 issues were raised, although the group soon decided to concentrate on 3 items: (1) what kinds of environmental assessments should be undertaken for trade agreements, (2) what process should the government use, both internally and with outside interests, in dealing with trade and environment issues, and (3) what should our policy be for using trade measures to protect the environment. The subgroup is close to agreement on

• the assessment and process issues, but has not even been able to put forward a paper that succinctly raises the key points on the one substantive issue, the use of trade measures to protect the environment. Of course, this issue relates to all of the short term items raised earlier in this memorandum.

In discussions with the relevant Assistant Secretaries, it is clear that all agencies view the process as broken. We hope to set up a meeting early in June at that level to agree on a plan of action to revitalize the process with higher level direction from us.

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

DRAFT

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.

EPK
SEP 21 1993

DRAFT

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.

DRAFT

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.

DRAFT**NAFTA: SANITARY AND PHYTOSANITARY MEASURES** 9/16/93 Draft

- 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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DRAFT

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.