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NAFTA: A Catalyst for Environmental Change in Mexico

Michael D. Madnick

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COMMENT

NAFTA: A Catalyst for Environmental
Change in Mexico

MICHAEL D. MADNICK

The North American Free Trade Agreement (NAFTA) is first and foremost an economic treaty designed to foster economic expansion. NAFTA has been drafted with the intent of maximizing economic growth while retaining a "green character." NAFTA is the catalyst for a sounder Mexican environmental program. Its signing into law on December 8, 1993, will ensure the substantive commitments made by the United States and Mexico for a better environment.

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I. Introduction

Economic survival for a nation in today's global economy is not an easy task. Increased competition and protective trade barriers mandate that nations carefully guard their industries. To this end, nations have long entered into bilateral or multilateral economic agreements of one sort or another. In recent times, these agreements have taken the form of free trade blocs favorable to its members and restrictive to the rest of the world. The clearest example of this has been the European Economic Community, which, if fully implemented, will effectively eliminate most trade barriers currently existing among its members. To sustain economic development, the United States, Canada and Mexico have created the world's largest trading bloc, better known as the North American Free Trade Agreement.

The North American Free Trade Agreement (NAFTA),¹ signed into law by President Clinton on December 8, 1993, is first and foremost an economic treaty designed to foster economic expansion. Its objectives are to eliminate trade barriers, promote fair competition and further investment opportunity.²

The past, however, has shown that economic growth absent consideration of environmental consequences cannot only harm our environment, but slow down the very economic progress sought.³ As a result, recent years have been marked by a gradual admission that global trade and the environment are unavoidably linked.⁴

1. North American Free Trade Agreement, Sept. 15, 1992, U.S.-Mex.-Can. 1992 [hereinafter NAFTA].

2. OFFICE OF U.S. TRADE REPRESENTATIVE, DESCRIPTION OF THE PROPOSED NORTH AMERICAN FREE TRADE AGREEMENT, U.S.-MEX.-CAN. 1 (Aug. 12, 1992).

3. Environmental degradation on the Mexican side of the border, resulting from rapid expansion absent environmental considerations over the last decade, provides the clearest example of the consequences of fast economic growth without an environmental plan.

4. WORLD WILDLIFE FUND, STATEMENT OF KATHRYN S. FULLER, PRESIDENT WORLD WILDLIFE FUND TO THE SUBCOMM. ON INTERNATIONAL TRADE, COMM. ON FINANCE, U.S. SENATE, 102d CONG., 2d SESS. 2 (Sept. 16, 1992) [hereinafter STATEMENT OF KATHRYN S. FULLER].

In keeping with the momentum of harmonizing economic and environmental development, NAFTA has been drafted with the intent of maximizing economic growth while retaining a "green character." The agreement recognizes that United States and Mexican environmental standards have not been equivalent in the past. The United States has made it clear that an environmentally soft Mexico is not in its economic interest and in recognition of this reality, NAFTA's economic provisions are sensitive to environmental issues.

Further, the Mexican government, as will be discussed, has already made enormous strides in its environmental controls in anticipation of NAFTA's approval. Because the economic growth which NAFTA promises to bring is the best way to improve the Mexican economy and standard of living, NAFTA provides essential mechanisms for continued improvement of Mexico's environmental condition.

Detractors of NAFTA live in fear of consequences they feel are inevitable. Yet, the consequences they envision exist today. The U.S.- Mexican border is already in dire environmental condition and American manufacturing jobs are being lost as companies move south of the border. Up to now, both of these trends have gone unchecked. NAFTA negotiations have, and its implementation will, serve as a catalyst to improve environmental conditions of the border region. NAFTA is the catalyst for a sounder Mexican environmental program. Preserving the status quo would have been the sole achievement had NAFTA's detractors prevented its passage.

As this comment will illustrate, in NAFTA lies the most realistic hope for two groups usually at opposite ends of a spectrum. For the environmentalist, decades of environmental inaction in Mexico will cease, and the border region will benefit as a result. For the business sector, decades of closed markets and trade imbalances will cease, with the potential for unparalleled growth.

In this comment, Part II provides a brief sketch of what NAFTA is. Part III will address pertinent environmental issues presently confronting the United States-Mexican Border. Part IV will address relevant environmental provisions of NAFTA. Part V will examine the implementation program

of the Integrated Environmental Plan For The Mexican-U.S. Border Area. Part VI will outline the key provisions of the Environmental Side Agreement passed in September of 1993. A discussion follows in Part VII regarding the viability of NAFTA provisions, of implementation programs of the Integrated Environmental Plan and of the Environmental Side Agreements, as well as the substantive manner in which they all address environmental concerns created by a possible North American Free Trade Agreement.

II. What is NAFTA? What Will it Do?

To better understand why environmental issues are so tied to NAFTA's success, a general understanding of the scope and aims of NAFTA is useful. First, the sheer mass of a NAFTA: the U.S./Canada/Mexico bloc is the largest free trade zone on Earth, with 360 million people and an estimated combined gross national product (GNP) of over \$6 trillion dollars.⁵

For years, Mexico has been a major trading partner of the United States. Today, Mexico is our third largest trading partner.⁶ Trade barriers established by the Mexicans have, however, limited America's ability to reach the Mexican market. Through NAFTA, in the next ten to fifteen years, most U.S.-Mexican tariffs will be phased out.⁷ The treaty also ensures that goods from all three member nations be given treatment equal to that treatment afforded equivalent domestic goods of other member nations.⁸ NAFTA establishes five trade assurances that will greatly enhance the fluidity and ease of trade in North America: 1) nondiscriminatory treatment; 2) freedom from performance requirements; 3) free transference of investment funds; 4) expropriation only in conformity with international law; and 5) the ability to

5. GENERAL ACCOUNTING OFFICE, NORTH AMERICAN FREE TRADE AGREEMENT: ASSESSMENT OF MAJOR ISSUES, GENERAL ACCOUNTING OFFICE 2 (Sept. 1993) [hereinafter ASSESSMENT].

6. HOUSE REPUBLICAN CONFERENCE, ISSUE BRIEF, NAFTA: SUMMARY AND ANALYSIS 2 (Sept. 13, 1993) [hereinafter SUMMARY AND ANALYSIS].

7. *Id.*

8. *Id.* at 3.

seek international arbitration for any violation of the agreement.⁹

The result of such principles is enormous. NAFTA will enable U.S. businesses, for the first time in decades, to own majority interests in corporations and investment services such as banks and insurance providers that are located in Mexico.¹⁰ This will give U.S. entrepreneurs an opportunity to create footholds in Mexico and to more efficiently serve a new consumer region.

Many fear that U.S. companies will move their operations from the U.S. to Mexico to take advantage of cheaper costs and lax environmental standards. However, as the provisions that follow indicate, this is not the likely consequence of NAFTA. The more likely consequence of NAFTA is that U.S. investors will expand their businesses: keeping their American operations to service the northern region of North America, and opening new operations to service the southern region of North America.

Already, the expectations of NAFTA have caused enormous growth in U.S.-Mexican trade. 1991 marked the first year in several in which the U.S. had a trade surplus with Mexico. Since 1986, U.S. exports to Mexico have risen from \$11.9 billion to \$40.6 billion in 1992; a 350% increase.¹¹

Because of NAFTA's potential for tremendous growth, assessing existing environmental problems and formulating a plan to manage future growth is essential. As the following sections will show, member states have squarely met this challenge and have incorporated specific measures to prepare for, and grow with NAFTA.

III. Environmental Issues of the Border Area

The border area of the United States and Mexico consists of heavily populated "sister city" areas, separated by sparsely

9. ASSESSMENT, *supra* note 5, at 5.

10. SUMMARY AND ANALYSIS, *supra* note 6, at 3.

11. *Id.* at 2.

populated and under-developed land.¹² Sister cities are parallel cities on opposite sides of the United States-Mexican border.¹³ Seventy-two percent of the border area's population consists of fourteen pairs of sister cities.¹⁴ Sixty percent of this population growth has occurred within the last ten years, and the population of this region now stands at nine million.¹⁵ The largest of the sister cities include: San Diego/Tijuana; Calexico/Mexicali; Nogales/Nogales; and El Paso/

12. SECRETARIA DE DESARROLLO URBANO Y ECOLOGIA (SEDUE), U.S. ENVIRONMENTAL PROTECTION AGENCY, (EPA), INTEGRATED ENVIRONMENTAL PLAN FOR THE MEXICAN-U.S. BORDER AREA (FIRST STAGE 1992-94) II-6 [hereinafter BORDER PLAN].

13.



14. BORDER PLAN, *supra* note 12, at II-6.

15. *Id.*

Ciudad Juarez.¹⁶ It is in the sister cities that rapid population growth coupled with inadequate environmental policies have created the greatest environmental concern.¹⁷ The environ-

16. *Id.* at II-7. The following table provides a complete list of the "sister cities," as well as their respective populations.

1990 Populations of Border Sister Cities		
	Metropolitan Area	City
Tijuana, Baja California	742,686	688,690
San Diego, California	2,498,016	1,110,549
Mexicali, Baja California	602,390	438,303
Calexico, California	109,303	18,633
San Luis Rio Colorado, Sonora	111,508	105,933
Yuma, Arizona	106,895	54,923
Nogales, Sonora	107,119	102,124
Nogales, Arizona	29,676	19,489
Agua Prieta, Sonora	39,045	32,778
Douglas, Arizona	97,624	17,324
Naco, Sonora	4,636	3,906
Naco, Arizona	97,624	675
Las Palomas, Chihuahua	16,565	2,500
Columbus, New Mexico	18,110	641
Ciudad Juarez, Chihuahua	797,679	787,788
El Paso, Texas	591,610	515,342
Ojinaga, Chihuahua	23,947	6,637
Presidio, Texas	20,972	3,072
Ciudad Acuna, Coahuila	56,750	52,983
Del Rio, Texas	138,721	30,705
Piedras Negras, Coahuila	98,177	20,651
Eagle Pass, Texas	36,378	96,178
Nuevo Laredo, Tamaulipas	219,468	218,413
Laredo, Texas	133,239	122,899
Reynosa, Tamaulipas	376,676	332,755
McAllen, Texas	383,545	84,021
Matamoros, Tamaulipas	303,392	266,055
Brownsville, Texas	260,120	98,962
Mexican Total	3,500,038	3,149,378
U.S. Total	5,722,694	2,070,886
TOTAL	9,222,732	5,220,264

Source: UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EPA SUMMARY, ENVIRONMENTAL PLAN FOR THE MEXICAN-U.S. BORDER AREA, 7 (February 1992).

17. While much of this comment will focus on the urban border area, a brief comment on the plight of the "colonias" is warranted. The term "colonias" refers to the sparsely populated regions between the sister cities where a small population exists. These areas lack much infrastructure, including proper sew-

mental issues confronting the border area can be explained best individually of one another.¹⁸

A. The Maquiladoras

The term "maquiladora" applies to what has rapidly become over 2,000 industrial processing and assembly plants employing over 400,000 persons south of the U.S.-Mexican border.¹⁹ Through Mexico's Maquiladora program, first established in 1965, stringent Mexican trade barriers between Mexico and the rest of the world were relaxed to permit the importation into Mexico of component parts to the foreign owned plants. At these plants, finished products are assembled at low wages²⁰ and then exported back to the country of origin.²¹ The goods, with limited exception, may not be sold in Mexico, and any hazardous waste created by the assembly of these goods is to be sent back to the respective company's country of origin.²²

The goal of the Maquiladora program was to provide desperately needed jobs to Mexicans in the region. Companies taking part in the program enjoy economic advantages offered by cheaper labor and tax benefits.²³ Examples of industries currently taking advantage of the Maquiladora program include automotive, textile, ceramic, chemical, electrical and

age and water treatment. The Border Plan *does* address this concern, and earmarks manpower and financial resources accordingly. *Id.* at V-14.

18. For a more complete discussion of the environmental problems confronting the border region, see James P. Duffy III, *The Environmental Implications of a North American Free Trade Agreement*, 10 HOFSTRA LAB. L.J. 561 (1993).

19. Justin Ward and Glenn T. Prickett, *Prospects for a Green Trade Agreement*, 34 ENV'T 2 (1992).

20. "In 1991, the average hourly compensation for American manufacturing workers was \$15.45, while for Mexican manufacturing workers, it was \$2.17. In the maquiladoras, it was even less than that—just \$1.25." *Id.*

21. Justin Ward and Glenn T. Prickett, *Prospects for a Green Trade Agreement*, 34 ENV'T 1 (1992).

22. BORDER PLAN, *supra* note 12, at II-9.

23. Patrick J. McDonnell, *Foreign-Owned Companies Add to Mexico's Pollution*, L.A. TIMES, Nov. 18, 1991, at A1, A14.

furniture.²⁴ Notable American corporations participating in the Maquiladora program include the "Big Three" automakers (Ford, Chrysler and General Motors) and electronics producer Zenith.²⁵

The Maquiladora program may well be the best argument of those who fear American jobs being lost as a result of NAFTA. Cheap labor and lax environmental standards have meant lost American jobs. For this reason NAFTA and the Border Plan must address the environmental disparity between the two nations.

B. Water

Mexico and the United States have followed a water policy pursuant to a 1944 treaty on the Utilization of Waters of the Colorado and the Tijuana Rivers and of the Rio Grande ("the Water Treaty" of 1944).²⁶ This treaty alone, unfortunately, does not adequately address the current situation in the border region. Rapid industrial, and in turn, residential development have placed tremendous strain on water availability from the border rivers such as the Rio Grande and Colorado.²⁷

The primary cause of water pollution and of the lack of clean water in Mexico is due to insufficient sewer systems and insufficient wastewater treatment facilities.²⁸ Only about sixteen percent of Mexico's municipal and industrial wastewater is treated before being released into water supplies.²⁹ Many of the poor residents of the border region are

24. TEXAS CENTER FOR POLICY STUDIES, OVERVIEW OF ENVIRONMENTAL ISSUES ASSOCIATED WITH MAQUILADORA DEVELOPMENT ALONG THE TEXAS-MEXICAN BORDER, 1 (1990).

25. WILLIAM MCGAUGHEY, JR., A U.S.-MEXICO-CANADA FREE TRADE AGREEMENT: DO WE JUST SAY NO?, 59 (1992).

26. BORDER PLAN, *supra* note 12, at III-1; Treaty Between the United States of America and Mexico Relating to the Utilization of the Waters of the Colorado and the Tijuana Rivers, and of the Rio Grande from Fort Quitman, Texas to the Gulf of Mexico, Nov. 14, 1944, U.S.-Mex., 59 Stat. 1219 (1944).

27. BORDER PLAN, *supra* note 12, at III-3.

28. Brenda S. Hustis, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 597 (1993).

29. *Id.*

forced to use the large border rivers for drinking, washing and irrigation despite the heavy presence of sewage and contaminants. For example, the Rio Grande forms the boundary between Texas and Mexico and is the primary source of water for drinking, irrigation and recreation on both sides of the border.³⁰ Millions of gallons of raw sewage and industrial contaminants are discharged into the river daily.³¹ According to a former EPA Regional Administrator, other border region problems, "pale by comparison," to the problems associated with water pollution.³²

Existing treatment facilities are also inadequate and are unable to handle the heightened presence of sewage. In many of the sister cities, particularly Tijuana/San Diego, wastewater discharges and raw sewage overflow have been unavoidable consequences of rapid regional development.³³ Furthermore, the Gulf of Mexico, one of the richest regions of fish, wildlife and countless fauna, has also been endangered by overpopulation and development.³⁴

C. Air

The sister cities along the border suffer severe consequences from severe air pollution problems. The surrounding noxious air, due to rapid development absent parallel environmental policy, threatens the health and safety of all people living there. Mobile (automobiles and trucks) and stationary (manufacturing plants) sources account for the problems, which may be exacerbated by the geographic setting of the sister cities.³⁵

30. *Id.*

31. *Id.*

32. "Water Pollution Biggest Problem for Border Region," *Former Official Says*, INT'L ENVTL. DAILY, (BNA) 1 (Oct. 4, 1993) (interview with Buck Wynne, former Bush Administration EPA Regional Administrator).

33. BORDER PLAN, *supra* note 12, at III-9.

34. *Id.* at III-10, 11.

35. INTERAGENCY TASK FORCE, OFFICE OF THE U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEX. ENVIRONMENTAL ISSUES 87 (1992). Many sister cities are located in valleys. Valleys tend to retain large quantities of mobile and stationary pollution, resulting in "smog" conditions. *Id.* Specific types of stationary sources of air pollution include the vast number of respiratory problem producing copper smelters along areas of the Arizona-Sonora border region. Brenda S.

The largest obstacle to sounder air policy is the lack of current data to determine the best means to proceed.³⁶ While each nation has its own federal laws regarding air quality, compliance with these standards in the border region has not occurred, and lack of available data pertaining to the border region may have been a contributing factor.³⁷ Additionally, related environmental policies to control air pollution have been limited. For example, only in 1991 did Mexico require catalytic converters³⁸ in its automobiles.³⁹ Clearly, there is enough evidence available to support the argument of a serious air pollution problem. For example, the air quality over several sister cities exceeds United States ambient air quality standards.⁴⁰

Other policy shortcomings exacerbating mobile sources of air pollution include a lack of adequate infrastructure. This is most clearly demonstrated by the lack of paved roadways to disperse traffic, as well as the lack of public transportation (buses and trains) to help diminish the volume of that same traffic.⁴¹ Such conditions add to current air pollution problems. Additional stationary pollution problems result from inadequate compliance by the manufacturing base to current requirements.⁴²

Hustis, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 596 (1993).

36. BORDER PLAN, *supra* note 12, at III-12.

37. *Id.*

38. A Catalytic Converter is defined as a reaction chamber into which exhaust gases from an automotive engine are passed together with excess air so that carbon monoxide and hydrocarbon pollutants are oxidized to carbon dioxide and water. AMERICAN HERITAGE DICTIONARY 247 (2d ed. 1982). In lay terms, a catalytic converter "purifies" environmentally hazardous car exhaust into harmless properties.

39. INTERAGENCY TASK FORCE, OFFICE OF THE U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEX. ENVIRONMENTAL ISSUES 87 (1992).

40. J. Michael Kennedy, *On Texas Border, Outlook for Air Quality is Murky*, L.A. TIMES, Nov. 20, 1991, at A1, A20.

41. BORDER PLAN, *supra* note 12, at III-14.

42. *Id.*

D. Hazardous Waste

Proper management of hazardous waste is essential to the preserving the quality of United States and Mexican lands, and ensuring the safety of their respective citizens. Management of hazardous waste requires treatment, recycling and disposal.⁴³ These issues have not been adequately addressed in the past. For example, the EPA has determined that there has been minimal compliance by Maquiladora industries regarding proper disposal of hazardous waste.⁴⁴ Only a small percentage of the total amount of hazardous waste required by Mexican law to have been exported from the Maquiladora region has actually been accounted for. It is likely that much of the waste generated by the region is in unlawful dumping grounds.⁴⁵

For these reasons, as will be later expanded upon, the Border Plan's primary emphasis in the area of hazardous waste is on the transboundary movement of such waste. In particular, Border Plan policies apply to either American Maquiladora or Maquiladora companies who contract with United States hazardous waste disposers to remove the hazardous waste from Mexico.⁴⁶ The Border Plan also contains an initiative to promote the use of non-toxic substitute materials.⁴⁷

In addition, as alluded to above, Mexican intrastate, and transboundary tracking of hazardous waste, has been a serious problem. Statistics on current hazardous waste produc-

43. *Id.* at III-18. Note that the lack of adequate air pollution data is not limited to the Border Region. Greenpeace, an international organization devoted to environmental concerns, has reported that, "[w]hile Mexico City's government gives daily reports on ozone levels, the city's monitoring and reporting of suspended microscopic particles, which pose a greater long-term health threat, is inadequate at best." *Greenpeace Faults Reports on Particulates in Mexico City*, INT'L ENVTL. DAILY, (BNA) 1 (Oct. 10, 1993).

44. U.S. GEN. ACCOUNTING OFFICE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT, 1 (1991).

45. *Id.*

46. BORDER PLAN, *supra* note 12. It is also interesting to note that Mexican law prohibits the importation of hazardous waste for disposal within Mexico's boundaries. Mexico General Law on Ecological Equilibrium and Environmental Protection, Article 153, III (1988).

47. BORDER PLAN, *supra* note 12, at III-19.

tion by the Maquiladoras are not fully known, and are believed to be much higher than recorded values.⁴⁸ There are Mexican procedures presently in place to track transboundary and Mexican intrastate waste, but they have had only limited success.⁴⁹ The United States' flow of hazardous waste is governed by the Uniform Hazardous Waste Manifest.⁵⁰ It tracks hazardous waste from its generation, transportation and final disposal, including quantities and characteristics.⁵¹

Unless a stronger joint United States-Mexican approach to dealing with hazardous waste and its tracking is established, illegal waste flow will increase, leading to various environmental and public health problems. These problems include: exposure of toxic chemicals to the environment and general population, contamination of surface and ground water, and air pollution due to evaporation and/or incineration.⁵²

E. Pesticides

The need for adequate joint regulation of pesticides is enormous. From an environmental perspective, safe pesticides for both the applier and consumer are essential. According to the Border Plan, the pesticides used on both sides are generally equivalent.⁵³ The United States federal pesticide law⁵⁴ and the 1988 Mexican environmental statute⁵⁵ both provide comprehensive regulation on the use of pesti-

48. *Id.* at III-20. A recent GAO study cites the opinion of the United States embassy in Mexico that approximately 13,000 tons of hazardous waste is created in Mexico per day. U.S. GEN. ACCOUNTING OFFICE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT (1991).

49. BORDER PLAN, *supra* note 12, at III-20. Such procedures include Mexico's Ecological Guide, an import/export document that bases its information on data found in corporate semi-annual reports. Reliance on a company's semi-annual report is a dangerous mechanism to assure that all hazardous waste is being accounted for. *Id.*

50. *Id.* at III-21.

51. *Id.*

52. *Id.* at III-20.

53. BORDER PLAN, *supra* note 12, at III-25.

54. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (1988)[hereinafter FIFRA].

cides.⁵⁶ However, the plans diverge in that some pesticides in Mexico have different registered uses than in the United States. This could have major repercussions if not addressed because, as will be seen within the NAFTA text, one nation will not accept another nation's goods treated with an unauthorized pesticide.⁵⁷

55. The General Law on Ecological Equilibrium and Environmental Protection (Published in the Federal *Diario Oficial* on Jan. 28, 1988; effective Mar. 1, 1988) [hereinafter 1988 Mexican Environmental Law].

56. See Federal, Insecticide, Fungicide, and Rodenticide Act (FIFRA), at 7 U.S.C. § 136v (a) ("a state may regulate the sale or use of any federally registered pesticide or device in the state, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter."); 1988 Mexico Environmental Law, Chapter III, Art. 134(IV) ("Use of pesticides, fertilizers and toxic substances should be compatible with the equilibrium of the ecosystems.")

In addition, the Mexican environmental law provides for the disposal, importation and exportation of pesticides. Article 143 of the same chapter addresses the issue of standards and the disposal of pesticides, fertilizers and toxic substances:

Pesticides, fertilizers and toxic substances shall remain subject to the official Mexican standards and to the technical standards issued jointly by the Ministry and the Ministries of Agriculture and Hydraulic Resources, of Health and of Trade and Industrial Promotion, so as to avoid causing ecological imbalances. The regulation to this Law shall establish, in the same manner, the rules that must be complied with by activities relating to said substances or products, including the final disposal of their wastes, empty packaging and containers; measures for avoiding adverse effects on the ecosystems, and the procedures for granting the pertinent authorizations.

Id. at Art. 143. Article 144 of the Mexican Environmental Law covers the importation and exportation of pesticides, fertilizers and toxic substances:

In keeping with the provisions of this Law, the Law on Animal and Plant Health of the United Mexican States, and any other applicable legal and regulatory provisions, the Ministry, together with the Ministries of Health, of Agriculture and Hydraulic Resources, and of Trade and Industrial Promotion, shall participate in reviewing customs duties relative to importation or exportation of pesticides, fertilizers and toxic substances. No authorizations shall be granted for importation of pesticides, fertilizers and toxic substances when their use is banned in the country in which they have been prepared or manufactured. The Ministry shall promote, before the component authorities, the establishment of special requirements for manufacture in the country of said substances and products, when their use may cause ecological imbalances.

Id. at Art. 144.

57. BORDER PLAN, *supra* note 12, at III-25.

F. Contingency Planning/Emergency Response

To adequately prepare for an environmental emergency in the border area, the U.S. and Mexico have already, beyond their individual commitments,⁵⁸ created a Joint Response Team (JRT).⁵⁹ JRT has held conferences, formed contingency planning and simulation exercises, and held joint training exercises to prepare for an emergency.⁶⁰ The Border Plan calls for more detailed JRT initiatives and directives to prepare for the increasingly mutual risks that NAFTA may produce.⁶¹

To date, joint pollution prevention efforts have been illusory at best. According to the Border Plan, activity in this area has not gone beyond statement of the problem, with amorphous proposals for solutions.⁶²

As shown, the environmental concerns of the border area are significant. They demonstrate a need on the part of any economic relationship between the United States and Mexico to be cognizant of current environmental problems. Thus they demonstrate the necessity that NAFTA provide mechanisms to foster environmental protection without eliminating the economic advancement that could pay for such environmental improvements.

It has also been the responsibility of United States NAFTA negotiators to both ensure the maintenance of America's strict environmental standards, and protect American consumers from goods and agriculture falling below such standards. As the following description of environmentally relevant NAFTA provisions indicate, U.S. citizen interests will be protected. Moreover, these provisions demand of Mex-

58. U.S. commitment required under CERCLA and SARA Amendments; Mexico has adhered to polices created under the United Nations Environment Program APELL (Awareness and Preparedness for Emergencies at the Local Level). *Id.* at III-26.

59. *Id.*

60. BORDER PLAN, *supra* note 12, at III-26.

61. *Id.*

62. BORDER PLAN, *supra* note 12, at III-28. Past illusory efforts have included statements such as: "1) Products can be reformulated to use less hazardous material; 2) Processes can be modified to use less input material; 3) Equipment and processes can be redesigned to use less energy; 4) Waste materials can be recovered for recycling or reuse." *Id.*

ico no alternative but stricter environmental standards if they are to benefit from NAFTA.

IV. NAFTA: Relevant Environmental Provisions

A. The Preamble and Chapter 1 — The Environmental Groundwork Is Laid

NAFTA's commitment to the environment is first seen in its preamble. There, the governments of Canada, Mexico and the United States resolve to, "STRENGTHEN the development and enforcement of environmental laws."⁶³ NAFTA next provides, under Article 104, that when there is any inconsistency between NAFTA and trade obligations under other environmental treaties,⁶⁴ the latter shall take priority, except that where there are similar means to comply with alternate obligations, the "least inconsistent" with NAFTA shall apply.⁶⁵

B. Chapter 9 — Each Nation May Pass Environmental Laws Independently

Among the most important environmental provisions within this economic trade agreement is Article 904(2). It provides, in relevant part, that each state, in order to pursue its own objectives relating to the environment and protection of human, plant and animal life, may establish levels of protection it deems appropriate.⁶⁶ This provision may be viewed in different ways.

First, it may be considered a triumph for all involved. The United States' environmental policies will stand, and thus guarantee the American public that America's strict standards of environmental control will not be compromised.

63. NAFTA, *supra* note 1, at preamble (emphasis in original).

64. The applicable treaties are the Convention on the International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973; the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature Mar. 22, 1989, 28 I.L.M. 649 (1989).

65. NAFTA, *supra* note 1, at 1-2.

66. *Id.* at 9-2.

Numerous environmental groups have applauded this provision as a substantive step towards protecting America's environment.⁶⁷ Even in the absence of trade barriers, Mexican goods not meeting U.S. standards will not be permitted entry, and visa versa. The incentive for either country to improve standards is obvious: raise your standards, or gain nothing from NAFTA.

An alternate view of the provision is not one of optimism. Critics fear that, by not forcing Mexico, through NAFTA, to improve their own environmental standards, Mexico will make their goods, and grow their agricultural stuffs in a manner that will minimally meet American or Canadian standards, while sacrificing a "greener" methodology in agriculture and manufacturing.⁶⁸ Further, critics fear that permitting each nation to set its own standards may result in a mass migration of American business due to Mexico's less rigorous and cheaper standards, resulting in heavy job loss in the U.S.⁶⁹

Article 906(1) of NAFTA recognizes the importance of standards-related measures among the three member states, and calls on them to work together to further the protection of the environment and related concerns.⁷⁰ This will occur pursuant to Article 913, which establishes a Committee on Standards-Related Measure, comprising representatives of each nation.⁷¹ Within the Committee, ANNEX 913-C pro-

67. NATIONAL WILDLIFE FEDERATION, SYNOPSIS OF NATIONAL WILDLIFE FEDERATION TESTIMONY REGARDING ENVIRONMENTAL CONCERNS RELATED TO THE NAFTA BEFORE THE SUBCOMM. ON INTERNATIONAL TRADE OF THE SENATE COMM. ON FINANCE, 102d CONG., 2d SESS. 1 (Sept. 16, 1992) (Statement of Stewart J. Hudson, National Wildlife Federation); Statement of Kathryn S. Fuller, *supra* note 4, at 4.

68. See *supra* note 57 and accompanying text.

69. *Hearings on the North American Free Trade Agreement Before the Senate Finance Comm.*, 102d Cong., 1st Sess. 1 (1992) (Statement of Thomas R. Donahue, Secretary-Treasurer, American Federation of Labor And Congress of Industrial Organizations).

70. NAFTA, *supra* note 1, at 9-3; Related concerns include human, animal and plant life.

71. *Id.* at 9-11.

vides for subcommittees to deal with standardizing specific areas, such as automobile emissions.⁷²

C. Chapter 7 — Sanitary Measures and Scientific Principles

Chapter 7, subchapter (b) of NAFTA deals solely with the issue of sanitary and phytosanitary⁷³ measures. The scope of the provisions cover any measure affecting trade between the states.⁷⁴ Like article 906(1), article 754(1) permits each country to make its own sanitary or phytosanitary standards for protection of human, animal or plant life.⁷⁵

Another controversial provision arises at this point. Article 754(3) states that whatever standards each country makes are acceptable so long as they are based on "scientific principles."⁷⁶ Many have questioned what that exactly means. Whose principles? Who determines their validity? This is seen as a potentially dangerous loophole absent further clarification.⁷⁷ Safeguarding against such potential untrustworthy "scientific principles" is attempted through Article 755, which calls for relevant international standards to serve as the scientific base from which each state may create stricter provisions.⁷⁸

Article 758 utilizes the "scientific principles" approach in a different manner. It provides that each member state may adapt specific sanitary and phytosanitary standards to *specific regions* of their state as needed.⁷⁹ NAFTA imposes an additional obstacle on those seeking to export goods to re-

72. *Id.* at 9-18.

73. Phytosanitary is the branch of ecology that deals with the characteristics, relationships and distribution of associated plants. AMERICAN HERITAGE DICTIONARY 936 (2d ed. 1982).

74. NAFTA, *supra* note 1 at 7-35.

75. *Id.*

76. *Id.* at 7-36.

77. NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL SAFEGUARDS FOR THE NORTH AMERICAN FREE TRADE AGREEMENT 5 (June 1992).

78. NAFTA, *supra* note 1, at 7-36; Article 754(4) checks this power only to the extent that resulting policies may not discriminate. Article 754(5) allows states to adopt policies "only to the extent necessary to achieve its appropriate level of protection, taking into account technical and economic feasibility." *Id.*

79. *Id.* at 7-39.

gions where specific standards have been adapted. Such exporters have the burden of proving to the importer, by means of "scientific principles," the safety of his goods pursuant to importer state standards.⁸⁰

Article 760 promotes awareness of environmental controls by requiring notice whenever a new standard is created, or an old one is modified or struck.⁸¹ Article 762 promotes technical advice, assistance and overall cooperation among the three parties.⁸²

D. Chapter 11 — No Investment at the Expense of the Environment

Chapter 11 deals with investment, services and related matters.⁸³ Its scope pertains to investors of one nation, with investments in another nation.⁸⁴ Article 1114 is a particularly sensitive environmental provision that states, in relevant part, "nothing in Chapter 11 shall be construed to prevent a Party [nation] from adopting, maintaining, or enforcing any measure, to ensure that *investment activity in its territory is undertaken in a manner sensitive to environmental concerns*."⁸⁵ This is an environmental provision restricting economic development, in an economic treaty.

Subsection two of Article 1114 furthers the commitment to joint economic and environmentally-sound policy by stating that a nation should not relax environmental standards to encourage investment.⁸⁶

E. Chapter 20 — Dispute Settlement Based on International Environmental Treaties

Chapter 20 deals with institutional arrangements and dispute settlement procedures. One of the strongest criticisms of environmental policies in general is their inability to

80. *Id.* at 7-40.

81. *Id.* at 7-43.

82. *Id.* at 7-45.

83. NAFTA, *supra* note 1, at 11-1.

84. *Id.*

85. *Id.* at 11-10 (emphasis added).

86. *Id.*

be adequately enforced.⁸⁷ In Article 2005(3) and (4), NAFTA provides varying mechanisms for environmental disputes to be addressed. These provisions permit settlement pursuant to either NAFTA provisions or applicable international treaties.⁸⁸ Furthermore, disputes regarding specific environmental, health or safety requirements are to be addressed under a NAFTA-provided scientific review board.⁸⁹

F. Chapter 21 — NAFTA Exception to the Environment's Benefit

Chapter 21 deals with exceptions to the entire NAFTA text. Significant here is Article 2101(3), which provides that nothing in Article 1106 (investment performance requirements) shall be interpreted to preclude a state from passing or retaining environmental measures needed to protect human, animal or plant life.⁹⁰

Given the economic nature of this treaty, there are abundant environmental provisions. The environmental provisions have been implemented in a complementary fashion unlike any prior treaty. As Stewart J. Hudson of the National Wildlife Foundation stated, "The NAFTA is, most assuredly, the 'greenest' trade agreement that has yet been negotiated, and it represents a positive step towards unifying economic and environmental concerns in the pursuit of sustainable development throughout North America."⁹¹

87. Enforcement capacity is an integral part of the Border Plan, as will be seen below. *See infra* Section V.

88. NAFTA, *supra* note 1, at 20-4; *See supra* note 65. Some of these treaties would include: the Convention on International Trade in Endangered Species, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, The La Paz Agreements for Environmental Protection, the Montreal Protocol, and the Agreement between Canada and the United States Concerning the Transboundary Movement of Hazardous Waste.

89. *Id.* at 20-11, Article 2015.

90. *Id.* at 21-2. Note the similarity to Article 1113 as it limits economic growth to protect the environment.

91. NATIONAL WILDLIFE FEDERATION, SYNOPSIS OF NATIONAL WILDLIFE FEDERATION, TESTIMONY REGARDING ENVIRONMENTAL CONCERNS RELATED TO THE NAFTA BEFORE THE SUBCOMM. ON INTERNATIONAL TRADE OF THE SENATE COMM. ON FINANCE 102d CONG., 2d SESS. 10 (Sept. 16, 1992).

In this spirit, the governments of Mexico and the United States have created a working relationship between their respective environmental agencies, the Environmental Protection Agency of the United States (EPA), and the Mexican Social Development Secretariat (SEDESOL).⁹² Together, these agencies have created an environmental agreement (the Border Plan) independent of NAFTA to address the present environmental issues confronting the border area. Additionally, this agreement seeks to prepare the border region so that economic growth resulting from NAFTA may coexist with an increasingly stable and healthy environment.

V. The Border Plan and its Initiatives

A. Introduction

On November 27, 1990, Presidents Carlos Salinas de Gortari of Mexico and George Bush of the United States met. The result, among others, was a commitment to solving the current environmental problems of the border area,⁹³ and to prepare an agreement between the two states that would address the potential environmental impacts that a free trade agreement would cause.⁹⁴ The Border Plan, in turn, will be revised and expanded in stages as new data is collected, prior implementation measures are completed, and new ones are formulated.⁹⁵ This is a "living" document that Mexico and the United States have committed to in the hope of fostering economic growth in conjunction with sustaining the environment.⁹⁶

The Border Plan was purposefully designed to supplement NAFTA. The Border Plan notes that both states intended for "two tracks" to be taken to avoid negative

92. SEDESOL was created in May of 1992, replacing the Mexican Ministry for Urban Development and Ecology (SEDUE).

93. The border area stretches for 2,000 miles, from San Diego, California, to the Gulf of Mexico, and has a 100 kilometer depth on each side of the international boundary. *BORDER PLAN*, *supra* note 12, at II-1,2.

94. *Id.* at I-2.

95. *Id.* at I-4.

96. *BORDER PLAN*, *supra* note 12, at I-4.

environmental impacts of NAFTA.⁹⁷ The first track consists of the above environmental provisions within NAFTA itself.⁹⁸ The second track is comprised of agreements similar to and including the Border Plan, that are designed to foster economic development in an environmentally friendly manner.⁹⁹

B. Priorities of the Border Plan

The drafters of the Border Plan asserted two aspirations when they embarked on this agreement: the critical need for action and long term objectives of the Border Plan to prepare for present and future environmental and economic growth under NAFTA. In preparation for the implementation of Border Plan initiatives, the drafters, from EPA and SEDUE, knew that though committed, each state was, is, and will be limited in the amount of financial resources available to address the issues. Prioritizing their initiatives was done under a risk-based approach to address the most critical needs first.¹⁰⁰ The order devised for implementation of Border Plan initiatives is as follows:

1. *Media specific issues* including municipal wastewater, water supply sources, and air (e.g., ozone and particulate matter);
2. *Source control issues* including industrial wastewater, hazardous waste, air toxins, and accidental releases;
3. *Hazardous and municipal waste issues* including import/export of hazardous waste, abandoned or illegal hazardous waste sites, and municipal waste sites, municipal solid waste sites along with the collection and transportation of municipal solid waste; and
4. *Emergency response/contingency planning* including the development and coordination of all affected agencies to prepare, train, and respond to potential/actual accidental releases.¹⁰¹

97. *Id.* at I-5.

98. *Id.*

99. *Id.*

100. BORDER PLAN, *supra* note 12, at IV-1.

101. *Id.* at IV-3.

These priorities will start with the sister cities, as opposed to the colonias,¹⁰² as the need is more pressing there.¹⁰³ As a final general priority, the Maquiladora situation will be reevaluated in light of all implementation initiatives.¹⁰⁴

C. Implementation of the Border Plan (First Stage 1992-1994)

After addressing all relevant issues and the priorities with which they will be considered, this comment now focuses on the actual implementation provisions provided by the Border Plan.

In order to implement Border Plan initiatives, Mexico has committed \$460 million over a three-year period.¹⁰⁵ The United States, for Fiscal Year 1992 had committed \$143 million.¹⁰⁶ Since then, future Congressional appropriations for border area activity have steadily increased.¹⁰⁷

1. Enforcement

In order to assure that implemented initiatives are adhered to, and to promote the welfare of America's citizens and its environment, strong border enforcement, particularly in the area of hazardous waste is essential. To this end, SEDESOL will spend \$6.3 million U.S. dollars to monitor the border crossings of raw materials and hazardous wastes, and conduct thorough inspections of the maquiladoras.¹⁰⁸ This is a 450% increase in Mexican border enforcement spending.¹⁰⁹

Already, SEDESOL has been successful in improving enforcement. Between 1982 and 1984, there were only 1,209 inspections of Mexican industry.¹¹⁰ Between 1988 and 1990,

102. *See supra* note 17.

103. BORDER PLAN, *supra* note 12, IV-4.

104. *Id.* at IV-5.

105. *Id.* at V-1.

106. *Id.*

107. *Id.* at V-52.

108. BORDER PLAN, *supra* note 12, at V-4.

109. *Id.* at V-50. Note that recent commitments of the United States, Mexico and the World Bank may result in a substantial increase of that amount.

110. INTERAGENCY TASK FORCE, OFFICE OF THE U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEX. ENVIRONMENTAL ISSUES 41 (1992).

after Mexico implemented its 1988 environmental law, 5,404 inspections took place.¹¹¹ Moreover, between 1982 and 1984, information was not even available to determine how many (or few) enforcement actions there were. Between 1988 and 1990, there were three permanent closings (including a state owned oil refinery), 980 partial or temporary closings, 29 relocations, 1,032 agreements for compliance scheduling, and 679 voluntary compliance agreements.¹¹² Finally, the Border Plan has resulted in an increase in Mexico's inspection team from 19 in 1991,¹¹³ to more than 300 today, 200 of which are specifically targeted for the border region.¹¹⁴

The Border Plan enforcement strategy also calls for targeting violations to priority targets, such as recidivist non-compliers of environmental laws on both sides of the border, and sensitive geographic regions of mutual concern.¹¹⁵ Further, enforcement will be made as media-friendly as possible, so that the public will be aware of manufacturers that are not complying.¹¹⁶ Lastly, the Border Plan creates the Cooperative Enforcement Strategy Work Group to, among other things: exchange information regarding priority enforcement issues relevant to both states; develop compatible hazardous-waste tracking systems (including a shared computer system in 1992¹¹⁷) to ease the exchange of data on moving waste; exchange relevant statistical information; and hold joint-training exercises.¹¹⁸

2. Industrial Multimedia Source Controls

a. Water

The Border Plan provided for initiation of a program to monitor groundwater sources and trouble-spots, and for

111. *Id.*

112. *Id.*

113. CRS REPORT FOR CONGRESS, NORTH AMERICAN FREE TRADE AGREEMENT: ISSUES FOR CONGRESS 48 (Mar. 25, 1991).

114. STATEMENT OF WILLIAM K. REILY, *supra* note 107, at 9.

115. BORDER PLAN, *supra* note 12, at V-4.

116. *Id.* at V-5.

117. *Id.* at V-10.

118. *Id.* at V-6.

SEDESOL, EPA, and the International Boundary Water Commission to develop an inventory of source, quality and treatment processes for existing water facilities in the sister cities during 1992.¹¹⁹ This program will also assess future infrastructure needs for collection, treatment and disposal of water.¹²⁰ This will prepare later stages of the Border Plan to act aggressively in order to deal with further growth associated with NAFTA.

The First Stage of the Border Plan calls for the completion of an international water treatment works for Tijuana/San Diego that will include: completion of an international treatment plant by 1995; construction of the land portion of the ocean outfall component in 1993 (the ocean portion to immediately follow); and construction of a 25 million gallon-per-day secondary treatment plant in San Diego County near the international boundary.¹²¹

For Ciudad Juarez/El Paso, the First Stage calls for, by the end of 1994: construction of the Riverside Collector and extension; expansion of the sewage system; construction of a pumping plant to convey sewage from Riverside to a treatment plant; and the construction of a secondary treatment plant with a 31 million gallon-per-day capacity located downstream from the Ciudad Juarez/Lincoln International Bridge.¹²²

In addition to the above examples for actual construction, the Border Plan outlines numerous proposals for studies to be conducted that will enable future development as needed.¹²³

b. Air

As noted earlier, due to the lack of current data regarding air quality, it is necessary that much of the implementing procedures regarding air be in the form of studies, task forces

119. BORDER PLAN, *supra* note 12, at V-12.

120. *Id.*

121. *Id.* at V-15.

122. *Id.* at V-20.

123. *Id.* at V. Note that actual construction called for by the Border Plan is not limited to the examples mentioned above.

and work groups to provide a data base for future programs. Examples of these programs include the identification and implementation of approaches to review vehicular emissions at border crossings (1992); the development, promotion and implementation of a phased-approach vehicle inspection and maintenance program (1992); and improvement of public transportation (1994).¹²⁴

c. Hazardous Waste and Materials

The Border Plan initiatives designed to deal with hazardous waste and materials focus upon the goals of waste tracking, surveillance/enforcement, education and improved and safer transport methods.¹²⁵ These types of initiatives include: a joint U.S.-Mexican data base to monitor trans-boundary waste movement; increased joint training; exchange of all relevant information; inspections by SEDESOL and EPA to establish the amount and form of hazardous waste produced by both sides; joint efforts to locate illegal dump sites; and the development of a cooperative hazardous waste transportation enforcement strategy.¹²⁶

d. Pesticides

Joint effort is the key to the Border Plan's stage one initiatives regarding pesticides. The Border Plan calls for a joint record-keeping system to be instituted by border states on both sides to identify the types and quantities of pesticides in use.¹²⁷ This will be useful in monitoring programs that keep track of appropriate pesticides.¹²⁸ Further, SEDESOL and EPA will develop a joint program combatting pesticide misuse, and provide farmer applicator training.¹²⁹

124. BORDER PLAN, *supra* note 12, at V-27.

125. *Id.* at V-29.

126. *Id.* at V-30-33.

127. *Id.* at V-35.

128. Note that the economic significance of this initiative will provide a secondary safeguard against a grower using a pesticide unacceptable to a member nation.

129. BORDER PLAN, *supra* note 12, at V-35.

e. Contingency Planning/Emergency Response

Stage One of the Border Plan calls for improvement and testing of current emergency plans in Tijuana/San Diego, Mexicali/Imperial County, and Matamoros/Brownsville.¹³⁰ Moreover, contingency plans will be developed, reviewed and tested for all remaining sister cities by the end of 1994.¹³¹ Upon completion, these plans will provide for data sharing with regard to many hazardous wastes. This will promote knowledge on both sides of the border, thereby aiding a quick response and success to any emergency.¹³²

VI. The Environmental Side Agreement

In response to mounting political pressure from numerous environmental groups and the national press, the Clinton Administration took an additional step towards appeasing environmental critics of NAFTA by signing the NAFTA Supplemental Agreements on Trade and the Environment on September 15, 1993.

The North American Agreement on Environmental Cooperation¹³³ is designed to complement the already existing, comprehensive provisions within NAFTA.¹³⁴ In many ways, the agreement reinforces provisions already implemented in NAFTA. For example, Article three of the Side Agreement recognizes the right of each nation to establish its own levels of environmental protection.¹³⁵ NAFTA includes this in Article 904(2).¹³⁶ Also, Article 40 of the Side Agreement maintains that nothing in the Side Agreement will affect the existing rights of the nations under presently existing inter-

130. *Id.* at V-37.

131. *Id.*

132. *Id.* at V-38-39.

133. North American Agreement on Environmental Cooperation, September 15, 1993, U.S.-Mex.-Can. [hereinafter Side Agreement].

134. Side Agreement, *supra* note 133, at 2.

135. *Id.* at 3.

136. *See supra* note 66 and accompanying text.

national environmental agreements.¹³⁷ NAFTA states this in Article 104.¹³⁸

The Side Agreement creates a Commission For Environmental Cooperation, comprised of a Council and a Secretariat.¹³⁹ The Council will be made of cabinet level representatives from the three NAFTA members.¹⁴⁰ Article 10 provides that the Council will oversee the Secretariat (described below) and make various recommendations regarding NAFTA environmental issues.¹⁴¹ Such issues will range from transboundary waste management to assessing the environmental impact of proposed projects of member states.¹⁴² As will also be described below, the Council also contends with enforcement and dispute resolution issues.¹⁴³

The Secretariat will be headed by an Executive Director chosen by the parties.¹⁴⁴ This Executive Director will oversee the Secretariat staff, whose actions and instructions will be independent of the three member states.¹⁴⁵ The primary function of the Secretariat will be to provide technical, administrative and operational support to the Council.¹⁴⁶

The Side Agreement was intended by the Clinton administration to respond to the NAFTA critics' charges that it lacked adequate enforcement mechanisms. To that end, relevant provisions of the agreement include Articles 5 through 7 and Article 37.¹⁴⁷ Article 5 calls for each country to "effectively enforce" their environmental laws through "appropriate government[al] action."¹⁴⁸ The provision calls for appointing inspectors, monitoring compliance with respective laws, publication of corporate non-compliers (the "black list"),

137. Side Agreement, *supra* note 133, at 30.

138. See *supra* note 64 and accompanying text.

139. Side Agreement, *supra* note 133, at 7.

140. *Id.*

141. Side Agreement, *supra* note 133, at 9.

142. *Id.*

143. Side Agreement, *supra* note 133, at 4.

144. *Id.* at 12.

145. *Id.*

146. *Id.*

147. Side Agreement, *supra* note 133, at 4-6, 29.

148. *Id.* at 4.

and providing for mediation and arbitration services.¹⁴⁹ Articles 5 and 6 ensure that the judicial remedies available in each state will be strictly applied to environmental criminals.¹⁵⁰ Article 7 provides for procedural guarantees of due process and public judicial proceedings, as well as a statement prohibiting unconscionable court awarded damages.¹⁵¹ Article 37 places parameters on the Commission's inter-sovereign power. It provides that nothing in the Side Agreement should be interpreted to "empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party."¹⁵²

The Secretariat and the Council of the Commission have mechanisms independent of the member state's respective judiciaries to deal with alleged violations of the agreement by the governments of each member. Article 23 of the Side Agreement permits Parties to seek assistance and guidance from the Council if they have been unable to come to an understanding regarding the dispute.¹⁵³ Once at this level, the Council will attempt to resolve the dispute. To do so, it may seek the advice of relevant advisers and experts and make recommendations to the Parties.¹⁵⁴ Recommendations will be made public only at the discretion of the Council, which must pass such a measure by a two-thirds vote.¹⁵⁵ After 60 days, if the dispute has not been resolved, the Council may convene an arbitral panel at the written request of the complaining nation.¹⁵⁶ Within 180 days after arguments by all sides are made, the panel will provide an initial report that includes findings of fact, findings whether the alleged offending nation has failed to enforce its environmental law, and in the case of such a finding, a recommendations for the resolu-

149. *Id.*

150. *Id.* at 5-6.

151. Side Agreement, *supra* note 133, at 6-7.

152. *Id.* at 29.

153. *Id.* at 20.

154. *Id.*

155. *Id.*

156. Side Agreement, *supra* note 133, at 21. Note that article 24(2) also permits a third Party (nation) to join as a complainant.

tion of the dispute.¹⁵⁷ Written comments may be made within 30 days by Parties disputing the finding, and within 60 days after that, the final report shall be issued.¹⁵⁸

Article 34 enables the arbitral panel to be reconvened should it become clear that none of the recommendations have been achieved, or if no settlement of any kind has come to pass.¹⁵⁹ The reconvened panel would then have the power to establish a plan to solve the dispute, or impose a "monetary enforcement assessment" or fine, pursuant to Annex 34.¹⁶⁰ Currently, the fine cannot exceed \$20 million U.S. dollars.¹⁶¹ Beyond that, any further fines cannot exceed .007% of total trade in goods.¹⁶² Part 3 of the Annex provides that all fines collected will be placed in a Commission controlled fund to improve or enhance the environment or environmental law of the offending nation.¹⁶³

Moreover, should the Party not pay the fine assessed it, the complaining party, pursuant to Article 36 and Annex 36B, may impose a tariff against the fined Party not to exceed the rate applicable to the affected goods on the day prior to NAFTA coming to force and the present Most-Favored-Nation-rate on the date the Party suspends such benefits.¹⁶⁴ The tariff will last only until the equivalent amount of the assessed fine is paid.¹⁶⁵

The above discussion explains the various options the member-nations have in dispute resolution. For individuals

157. *Id.* at 25.

158. *Id.* at 25.

159. *Id.* at 26.

160. *Id.* at 27.

161. Side Agreement, *supra* note 133, at 35.

162. *Id.*

163. *Id.*

164. *Id.* at 38.

165. Note that Annex 36A provides for a separate mechanism in the collection and enforcement of fines for Canada. In brief, the Canadians are entitled to submit the panel determination to a court of competent jurisdiction. A panel determination against Canada cannot be enforced until it has been first filed. At this point, the Commission may seek enforcement of a panel determination that, by being filed, now becomes an order of the court. Further, Annex 41(6) permits Canada to, within a specified period, state whether the fine is to go against the federal government of Canada or a specific province.

and non-governmental organizations, Article 14 of the agreement permits them to give "submissions" to the Secretariat asserting that a Party (nation) is failing to "effectively enforce its environmental law."¹⁶⁶ The Secretariat will then determine if the "submission" merits making a request for a response from a Party.¹⁶⁷ If the Secretariat decides to make a response request to a Party, the Party must advise the Secretariat on the matter. Advising may consist of addressing the matter directly, referring the submitter to relevant judicial proceedings, or advising that private remedies are available to the submitter.¹⁶⁸ The final step in this process is the discretionary choice of the Secretariat to create a factual record consisting of the submission and of the offending Party's response.¹⁶⁹

Other measures of the Side Agreement include Article 16, which establishes the Joint Public Advisory Committee (Committee).¹⁷⁰ The Committee shall have 15 members and will convene at least once a year during the regular sessions of the Council. The Committee's role will be to advise the Council on NAFTA related matters.¹⁷¹ In addition, the Committee may provide technical, scientific or other information to the Secretariat.¹⁷² Beyond the Committee, Articles 17 and 18 enable each Party to convene both a National Advisory Committee and a Governmental Committee. Each of these organizations will be comprised of citizens from each respective nation, and will serve to advise on, "implementation and further elaboration of this Agreement."¹⁷³

Further, Article 30 permits, on request of disputing Parties who have been assigned an arbitral panel, that the panel may hear from any expert person or organization on relevant matters.¹⁷⁴ Also, funding of the Commission is covered by Ar-

166. Side Agreement, *supra* note 133, at 15.

167. *Id.* at 15.

168. *Id.* at 16.

169. *Id.* at 16.

170. *Id.* at 17.

171. Side Agreement, *supra* note 133, at 17.

172. *Id.*

173. *Id.* at 18.

174. *Id.* at 24.

ticle 43, and provides for an equal contribution to be made by all members. This is subject to appropriated funds consistent with an individual Party's legal procedures.¹⁷⁵ Finally, to enable the Executive Director and the staff of the Secretariat to exercise their functions, they are all granted the privileges and immunities of each state as are needed to perform their duties.¹⁷⁶

VII. Analysis

A. NAFTA

The North American Free Trade Agreement provides recognition of environmental concerns. NAFTA's recognition of environmental concerns has led to several articles among its provisions that are sensitive to environmental issues. It protects the United State's right to enforce existing U.S environmental standards, permits each state to enforce tougher standards than the international-environmental treaty based standards that NAFTA recognizes, and permits stringent environmental requirements on new investment, as long as they are not discriminatory.¹⁷⁷ Further, the NAFTA provisions require that adequate notice be given to all parties whenever a new environmental standard is created, or when an old standard is modified or struck.¹⁷⁸ The NAFTA provisions entitle each member nation to pass whatever measures are necessary to ensure that future investment is undertaken in an environmentally sensitive manner.¹⁷⁹ Finally, NAFTA contains enforcement and dispute resolution provisions to deal with environmental conflicts relevant to the treaty.

If one did not know the above was a synopsis of environmental provisions within the North American *Free Trade Agreement*, it would not be unreasonable to believe they were part of a wholly environmental treaty. The Bush administra-

175. *Id.* at 31.

176. Side Agreement, *supra* note 133, at 31.

177. *Hearing on the North American Free Trade Agreement Before the Senate Finance Committee*, 102d Cong., 2d Sess. 8-9 (Sept. 8, 1992) (statement of Carla A. Hills, United States Trade Representative).

178. See *supra* note 81 and accompanying text.

179. See *supra* note 85 and accompanying text.

tion made an important step forward by incorporating such provisions in an economic setting. Moreover, that administration purposefully supplemented their efforts by directing the EPA to construct a Border Plan to improve current environmental provisions, and prepare for future growth associated with NAFTA.

Article 1114 of NAFTA deserves specific mention. This provision within an economic treaty essentially instructs states that investment may, and by implication, should come second to environmental concern.¹⁸⁰ An illustration of Mexico's commitment to protect the environment at the expense of investment and short-term economic development is best expressed by a recent act of President Salinas. In the last year, Salinas closed down two of Mexico's largest state owned oil refineries (one outside Mexico City) because of the refineries' contributions to air pollution.¹⁸¹ Not only will NAFTA *not* result in ignoring environmental issues; if anything, it has forced Mexico to address such issues.¹⁸²

Another example of a NAFTA provision that, arguably, inhibits trade in order that the environment be protected is article 758.¹⁸³ By requiring an exporter to prove the safety of goods by means of "scientific principles" pursuant to importer state standards, NAFTA places the burden on the exporter. Not only must the exporter, as always, prove to a customs department the safety of the goods, but now also directly to the importer as well.

As a whole, NAFTA takes a solid step towards successful integration of economic growth and environmental stability.¹⁸⁴ To those, who because of environmental concerns,

180. *Id.*

181. *Hearing on the North American Free Trade Agreement Before the Senate Finance Committee*, 102d Cong., 2d Sess. 5 (Sept. 30, 1992) (testimony of Bill Greehey, Chairman and CEO of Valero Energy Corp.).

182. *See* Mexico's 1988 Environmental Law and its \$460 million commitment to the Border Plan, its 200 new border inspectors, and its heightened pressure on the Maquiladoras to report hazardous waste. Border Plan, *supra* note 12, at V-1.

183. *See supra* note 80 and accompanying text.

184. As stated by the National Audubon Society, "We believe that the achievements of the NAFTA and the Side Agreements are only a beginning and

would prefer no NAFTA, perhaps they should look at the situation from a broader perspective.

Were it not for the anticipation of NAFTA, the more stringent Mexican environmental practices currently in place would likely not be there. The reason for NAFTA's environmental sensitivity is most likely not altruistic, but economic. A successful trade agreement will not promote further economic growth without adequate public infrastructure to back it up. If infrastructure remained stagnant, at some point NAFTA, and Mexico's benefit from it, would be held back by inadequate resources. Therefore, both governments stand to gain from increasing public works, that at the same time will sustain *and* improve the environment.

While criticisms of NAFTA are stated below, a recognition of the aforementioned environmental consequences of NAFTA cannot be forgotten. Absent the anticipation of NAFTA, it is quite likely that the effort to promote environmental stability in the border area through the Border Plan would not be nearly as strong as it is now.

A controversial provision in NAFTA is Article 754(3), which states that whatever environmental standards each country makes are acceptable so long as they are based on "scientific principles."¹⁸⁵ This provision may leave open a loophole for environmental regulations subject to approval on scientific principles determined at the discretion of the state involved.

The other side of this issue is that scientific principles may be challenged based on the international treaties NAFTA gives priority.¹⁸⁶ Moreover, any goods not meeting the United States import standards will still be refused.¹⁸⁷ It is therefore in the economic interest of each state to not pass environmental provisions which have no practical effect. As a final note, the commitment made by Mexico to enhance

that the business of negotiating trade agreements will never be the same." Letter from Kathleen Rogers, National Audubon Society (Oct. 20, 1993).

185. See *supra* note 76 and accompanying text.

186. *Id.*

187. See *supra* notes 64-65 and accompanying text.

their laws as shown by the 1988 statute and the Border Plan diffuses such fears tremendously.¹⁸⁸

188. SEDUE Environmental Protection Workload 1989 - 1991			
SEDUE DEPARTMENTS	1989	1990	1991
Norms & Regulations Branch			
Environmental impact appraisals reviewed	180	528	829
Risk studies reviewed	86	102	89
Technical Norms issued	7	3	20
Pollution Control Branch			
Air operating licenses issued	298	215	554
Water permits issued	638	952	1,321
Inspections	1,380	2,056	3,119
Facility Closures	160	357	1,228
Complete permanent	0	0	2
Complete temporary	1	2	325
Partial temporary	159	355	901
Compliance Agreements	225	500	1,323

Source: UNITED STATES GENERAL ACCOUNTING OFFICE, GENERAL GOVERNMENT DIVISION, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, U.S. SENATE, U.S.-MEXICO TRADE, ASSESSMENT OF MEXICO'S ENVIRONMENTAL CONTROLS FOR NEW COMPANIES, 18-21 (August 1992).

SEDUE DEPARTMENT	SEDUE FUNDING		SEDUE STAFF (total staffing)	
	(U.S. dollars in thousands)			
	1989	1992	1989	1992
Norms and Regulations Branch*	256.6	4,546.5	73	280
Pollution Control Branch*	2,933.6	20,482.1	354	600
Border Plan Activities**	—	30,565.4		

* 1989 figures are actual expenditures. 1992 figures are budget data and include World Bank loan and Global Environmental Trust grant funds. Natural resources conservation expenditures/budget data are not included in the above figures.

** Funds committed by Mexico for Border Plan Expenditures. Source: *Id.*

See also OFFICE OF GENERAL COUNSEL, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EVALUATION OF MEXICO'S ENVIRONMENTAL LAWS, REGULATIONS AND STANDARDS (Preliminary Version of Final Report, 1993). This report concludes that:

[W]ith certain important exceptions, the Mexican laws and many of the regulations and standards promulgated thereunder in the principal media areas of air, water, waste, and pesticides are broadly compatible to their counterparts in the United States. The Mexican and U.S. environmental protection regimes as a whole are designed to achieve, when implemented and enforced, comparable levels of environmental protection.

Id. at 101.

Some have criticized NAFTA for not including more enforcement provisions.¹⁸⁹ The argument is that if NAFTA addresses environmental issues, it should enforce them as well.¹⁹⁰ Such international enforcement of matters that, with the exception of cross-border movement, are wholly within one state, could pose sovereignty problems. Further, such enforcement mechanisms conflict with NAFTA provisions that permit each party to maintain its own laws on the environment (including enforcement). Moreover, it is important to note that both NAFTA itself, as well as the Environmental Side Agreement include dispute resolution provisions.¹⁹¹ The policing of the environment should be left to the individual states.

B. The Border Plan

The Border Plan provides an organized, prioritized, long term program to improve the current infrastructure shortfalls affecting the environment along the U.S.-Mexican border. It also includes substantive mechanisms to deal with consequences NAFTA may hold for the border region. With limited resources on both sides and marginal support for infrastructure improvement by the U.S. Congress, the Border Plan strives as best it can to meet the needs of the area.

The Border Plan (Stage One 1992-1994) calls for immediate substantive improvement of existing water treatment facilities, as well as the construction of new facilities to meet current and future needs.¹⁹² The Plan has resulted in a 450% increase in Mexican border inspectors to bolster enforcement efforts.¹⁹³ It has also established a targeting program to initiate heightened enforcement against priority targets.¹⁹⁴ In

189. NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL ENFORCEMENT: UNFINISHED BUSINESS IN NORTH AMERICAN TRADE, TESTIMONY OF THE NATURAL RESOURCES DEFENSE COUNCIL BEFORE THE SUBCOMM. ON INTERNATIONAL TRADE COMM. ON FINANCE, 102d CONG., 2d SESS. 3 (1992) (statement of Justin Ward).

190. *Id.*

191. See *supra* notes 87-89 and accompanying text.

192. See *supra* notes 119-23 and accompanying text.

193. See *supra* notes 113-14 and accompanying text.

194. See *supra* note 115-18 and accompanying text.

the wake of limited current data regarding air quality in the region, Stage One calls for measures to initiate studies, and immediately implement any necessary responses.¹⁹⁵ Hazardous waste movement and pesticide control are two areas where the Border Plan initiates joint efforts to more effectively handle these issues.¹⁹⁶ Finally, Stage One also mandates contingency planning/emergency response procedures to be in place in all sister cities by the end of 1994.¹⁹⁷

Some criticize the Border Plan for having too many studies and work groups and too few substantive programs.¹⁹⁸ First, if it was so easy to make the environment stable and maintain continued growth in the border region, it would have already been achieved. The fact is, however, that limited resources have resulted in a lack of specific data indicating which measured responses are most needed. The water, hazardous waste and enforcement provisions of the Border Plan implementation program *are* substantive at this first stage.¹⁹⁹ Perhaps more support from Congress in the way of appropriating what former President Bush had asked for would quicken implementation measures in the border area.²⁰⁰ Second, the Border Plan was designed to be a multi-stage process. Studies conducted in Stage One would logically be used to implement programs in later stages, based on available funds and priorities.

The success of the Border Plan will be measured by its actual achievement. Already, in the area of enforcement, Mexico has made proven strides in this area.²⁰¹ Furthermore, an understanding that the Border Plan is a long-term

195. See *supra* note 124 and accompanying text.

196. See *supra* notes 125-29 and accompanying text.

197. See *supra* note 131 and accompanying text.

198. NATURAL RESOURCES DEFENSE COUNCIL, COMMENTS OF THE NATURAL RESOURCES DEFENSE COUNCIL ON THE INTEGRATED ENVIRONMENTAL PLAN FOR THE MEX.-U.S. BORDER AREA (FIRST STAGE, 1992-1994) 4 (Sept. 30, 1991) (statement by Justin Ward, Natural Resources Defense Council) [hereinafter STATEMENT BY JUSTIN WARD].

199. See *supra* notes 108-23, 125-26 and accompanying text.

200. See *supra* note 107 and accompanying text.

201. See *supra* notes 110-14 and accompanying text; note 188.

program with limited funds²⁰² gives additional cause to applaud needed measures it is now implementing based on its priority/limited fund base, and to look forward to future initiatives.

C. The Environmental Side Agreement

As this comment has developed during the last 15 months, NAFTA has faced setbacks, leading to expansion of environmental provisions. During this period, there has been much opposition to the creation of any form of an outside Commission on environmental issues. The rationale was a lack of belief that an environmental Commission would have access to useful enforcement mechanisms.²⁰³

Importantly, the Environmental Side Agreement signed this fall is stronger than what the proponents of a Commission called for in their draft commission proposal of 1992. The Side Agreement is designed to complement the already existing, comprehensive provisions within NAFTA. In many ways, in fact, the agreement reinforces provisions already implemented by NAFTA.²⁰⁴ The Side Agreement was intended by the Clinton Administration to respond to the criticism of

202. The National Wildlife Federation has recently reported that \$674 million (U.S.) is the latest amount committed to the Border Plan. Specifically, the funds are to be directed to: river pollution reduction, wastewater treatment facilities, the construction of landfills and the purchase of equipment to treat hazardous waste. NATIONAL WILDLIFE FEDERATION, NEWS 2 (Sept. 14, 1993).

203. In line with this enforcement criticism, many environmental organizations have proposed the creation of an international enforcement commission as part of NAFTA. The role of the commission would be to have an international panel comprised of governmental and leading non-governmental environmental experts to coordinate and enforce harmonized environmental regulations for the United States, Mexico and Canada. Proponents of such a commission argue that without it, NAFTA inadequately addresses the impact this treaty will have on the environment.

The largest problem with the Draft Proposal for a Commission on Trade and the Environment is that it is devoid of any legitimate enforcement measures anyway. The strongest measures it can take beyond the inspections mentioned earlier is publishing in its report those who did not comply with the commission-inspection findings. Thus, what the Commission concept really comes down to is one more group giving recommendations to the already existing governmental agencies who do have, and do use the enforcement mechanisms available to them.

204. See *supra* note 134-38 and accompanying text.

NAFTA that it lacked adequate enforcement.²⁰⁵ To this end, among other things, the Secretariat and the Council of the Commission have mechanisms independent of the respective judiciaries to deal with alleged violations of the agreement by the governments of each member.²⁰⁶ These mechanisms include panels that have the power to impose fines and establish tariffs.²⁰⁷ Additionally, the Side Agreement ensures public involvement by establishing the Joint Public Advisory Committee.²⁰⁸

There are however, two surviving criticisms to a Commission or Side Agreement. The first is unavoidable with the Side Agreement's existence: the added bureaucracy that it will create. The second is that the substantive enforcement framework created to address environmental violations is one of tariffs: the antithesis of what NAFTA was supposed to be. The only source of appeasement is that the process is so lengthy that it arguably will encourage settlement rather than reliance on tariffs.

D. NAFTA, The Side Agreement and the Border Plan: Will They Work Together?

A frequent criticism of the Border Plan is that it does not adequately confront one of its key purposes: protecting the border region from the expansion NAFTA will bring.²⁰⁹ In his comment to EPA in September of 1991, Mr. Justin Ward wrote that, ". . . the draft border plan is silent on the prospect of major trade liberalization under NAFTA."²¹⁰ This is true, to the extent that the Border Plan does state that it is to be independent of NAFTA so that its programs would have proceeded even had NAFTA not come to fruition.²¹¹ The real

205. See *supra* note 147 and accompanying text.

206. See *supra* note 153-58 and accompanying text.

207. See *supra* note 159-63 and accompanying text.

208. See *supra* note 170-72 and accompanying text.

209. STATEMENT OF JUSTINE WARD, *supra* note 198, at 3.

210. *Id.*

211. See BORDER PLAN, *supra* note 12, at I-5.

problem is that no one is really sure what the effects of NAFTA will be.²¹²

A joint effort of EPA and the U.S. Trade Representative's Office has formed two possible economic scenarios that may result from NAFTA.²¹³ These scenarios both hold varying effects on the environment. The first of these scenarios predicts rapid economic growth in the border area because of minimal economic risk to U.S. investors.²¹⁴ The second scenario suggests a desire for firms, with the new free trade status, to locate increasingly further in the interior of Mexico to be nearer to Mexican domestic markets.²¹⁵ Under the first scenario, NAFTA economic growth to the border region is projected at 6-17% per year over the next 10 years.²¹⁶ Under the second scenario, NAFTA impact on economic growth in the border region is projected at 4-13% per year over the next 10 years.²¹⁷

Under either scenario, there is going to be marked economic growth to the border region. This article takes the positions that first, because of NAFTA, environmental cooperation between the U.S. and Mexico has increased dramatically.²¹⁸ Case in point of this are the joint efforts, financial commitments and substantive improvement plans created by the Border Plan. Whether such plans and joint cooperation would have been initiated at all had no NAFTA been anticipated is a valid question.

Second, this article takes the position, that NAFTA economic growth will generate more funds, which in turn will allow for more money to be earmarked to stabilize the environment and continue construction of necessary infrastruc-

212. Mark Alan Stamaty, *Washington*, THE VILLAGE VOICE, Sept. 14, 1993, at 22.

213. INTERAGENCY TASK FORCE, OFFICE OF THE U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 66-68 (1992).

214. *Id.* at 66.

215. *Id.* at 68.

216. *Id.* at 67.

217. INTERAGENCY TASK FORCE, OFFICE OF THE U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 68 (1992).

218. *Id.* at 70.

ture.²¹⁹ Considering Congressional unwillingness to spend more at this time on necessary improvements, NAFTA could inject the system with more funds that Congress may allocate as it sees fit.

Moreover, due to the fact that the Side Agreement was signed in September of 1993, after the completion of this article, a full analysis of its potential impact was not considered when the Review was written. Should reality conform to the text of the Agreement, a fund for environmental improvement and protection is to be created. Already, it has been reported that the U.S. will contribute \$4 billion to the fund.²²⁰

Appropriate to discuss at this point is whether or how NAFTA and the Border Plan will effect the interior regions of the three member states. Although NAFTA does provide sensitive environmental provisions applicable to all parts of each member state, if Mexico, the United States and Canada desire to have a comprehensive environmental treaty with one another, NAFTA is not the appropriate forum for it because again, NAFTA is first and *foremost* an economic treaty. Moreover, it is unlikely that such an environmental treaty would ever happen because each state appropriately relies on its own government to protect its own lands and population. Moreover, the Environmental Side Agreement, in small measure, establishes a minor interrelationship between the environmental policies of each member nation.

Multinational agreements like the Border Plan make the clearest sense. This is because of the strong likelihood that acts within one nation can impact a neighboring nation, particularly at the borders. For border regions, therefore, it is in the nations' best interests to work together. Thus, the environmental provisions of NAFTA, the Environmental Side Agreement, and the Border Plan, short of an expansive environmental treaty between the United States, Mexico and

219. *Id.* at 69.

220. Keith Schneider, *Environmental Groups Are Split on Support for Free-Trade Pact*, THE N.Y. TIMES, Sept. 15, 1993, at A1.

Canada, are as invasive into another's country's law and regulations as is appropriate.

Some have argued for a direct "green tax" on trade associated with NAFTA to directly apply money generated from the agreement to applicable environmental concerns. The problems with this are clear. First, NAFTA is a *free* trade agreement, and is designed to eliminate tariffs and trade barriers. A "green tax" defeats NAFTA's very intent. Second, taxation of this trade for a pre-determined specific purpose seems contrary to the general U.S. policy of all tax dollars generated going into a pool and allocated with respect to the various programs needing funding. An equal protection problem could be found with such a "green tax".

Whether NAFTA, the Border Plan and the Environmental Side Agreement will adequately address the environmental consequences of NAFTA, whatever they are, will in large part be based on the commitment of the U.S. and Mexican governments. As stated earlier, a major criticism of the entire Border Plan and Environmental Side Agreement process is the lack of a definitive guarantee of the necessary funds to ensure adequate environmental protection at the border. This criticism is of course diminished with the recent \$1.8 billion (U.S.) loan commitments of the World Bank, and recent Border Plan funding of \$674 million (U.S.) from Mexico and the United States.²²¹ NAFTA addresses environmental concerns that result from economic activity. The Border Plan provides the structure for environmental protection, and by constantly being updated in stages, will be able to effectively plan responses to economic growth associated with NAFTA. The Environmental Side Agreement ensures public participation and strong enforcement to bolster existing NAFTA dispute provisions.

The three agreements, together, provide a cohesive, organized and substantive plan to protecting the environment. If the end hoped for is ecological preservation and responsible

221. *World Bank, Mexico Sign Accord for Program; Border Loan Planned*, INT'L ENVTL. DAILY, (BNA) 1 (Sept. 29, 1993); NATIONAL WILDLIFE FEDERATION, NEWS 2 (Sept. 14, 1993).

economic growth, NAFTA, the Environmental Side Agreement and the Border Plan represent the furthest effort yet to join these two past enemies. They provide for sustainable economic growth that is not at the expense of our environment.²²²

VI. Conclusion

A clear picture of a post-NAFTA environment is difficult to ascertain. The Mexican Government has taken monumental measures in order to take part in this treaty. They have, as their President recently said in an interview, "literally taken food from the mouths of their children," in order to improve their environmental standards. The 1988 Mexican Environmental Law is a comprehensive one. Mexico's billion-dollar commitment to Mexico proper and the Border Plan over the next three years is an example of their sincerity in achieving sustainable economic growth while being sensitive to environmental issues.²²³

NAFTA is *very* sensitive to the environmental implications of free trade. The reason for NAFTA's environmental sensitivity is not altruistic, but economic. A successful trade agreement will not promote further economic growth unless adequate public infrastructure is in place. If infrastructure remained stagnant, at some point NAFTA-driven economic growth would be held back by inadequate resources. Therefore, *both* the U.S. and Mexico will benefit economically from protecting the environment.

Those who are against NAFTA because of possible environmental flaws in the agreement will probably never be fully satisfied with any government proposal seeking to cre-

222. Environmental groups endorsing NAFTA include: Conservation International, the National Audubon Society, the Environmental Defense Fund, the National Wildlife Federation, the Natural Resources Defense Council and the World Wildlife Fund. CONSERVATION INTERNATIONAL, NEWS RELEASE 2 (Sept. 14, 1993); NATIONAL WILDLIFE FEDERATION, NEWS 1 (Sept. 14, 1993).

223. This figure includes the World Bank commitment of \$1.8 billion (U.S.) in bank loans, and Mexico's three year, \$1.2 billion (U.S.) commitment over the next three years. *World Bank, Mexico Sign Accord For Program; Border Loan Planned*, INT'L ENVTL. DAILY, (BNA) 1 (Sept. 29, 1993).

ate free trade throughout North America. Absent NAFTA, it is quite likely that the effort to promote environmental stability in the border area through the Border Plan would not be nearly as strong as it is now. With the creation of the Environmental Side Agreement, those who oppose NAFTA on environmental grounds cannot deny the effort and substantive results that have been achieved. As Mayor Susan Golding of San Diego, California, a densely populated border region city guaranteed to be economically and environmentally affected by NAFTA, has stated, "This [NAFTA] is the greenest treaty in the history of the world."²²⁴ These results include input through the vocal role the agreement creates for non-governmental persons or agencies, and a legitimate enforcement mechanism. For the United States to go further would be irresponsible. Already, a valid argument can be made that the United States has, to a degree, relinquished control over its environmental policy.²²⁵

Opponents of NAFTA who foresee the risk of American businesses moving south where the environmental standards are lower and the wages are cheaper, should consider looking at the big picture. Were it not for the hope of NAFTA, the more stringent Mexican environmental practices currently in place likely would never have been implemented. Moreover, absent NAFTA, given the incredible growth of the Maquiladora industry, this practice would probably grow at a faster rate because, absent NAFTA and the Border Plan, there would be even *more* reason to move south.²²⁶

Until we raise the Mexican standard of living, both economically and environmentally, United States workers will always be at risk to the "temptation" of companies to move south. Thus, it is in the United State's long term benefit to help the Mexicans develop, and in turn promote joint economic development.

224. Mayor Susan Golding, San Diego, California, This Week With David Brinkley, ABC News, Transcript #625, 4 (Oct. 17, 1993).

225. Caspar W. Weinberger, *NAFTA . . . Free Trade or Demagoguery?*, *FORBES MAG.* 37 (Oct. 18, 1993).

226. Many companies will never move south because rebuilding their infrastructure would be too costly, no matter what the savings in labor.

In October of 1993, I had a discussion with an employee of the Texas Natural Resource Conservation Commission. This person was confident that if a pollster went to Juarez, the Mexican sister-city to El Paso, Texas, and asked the population whether they would prefer clean air or a new manufacturing plant, that the latter would be the overwhelming choice.²²⁷ The reason is simple. Clearly, the choice they would be making in choosing the plant is bad for themselves and the environment they live in. Many Mexicans, particularly those in the industrial blue collar sector who will be most affected by NAFTA, do not have the economic stability necessary to ensure that their children are fed, let alone breathe clean air and drink clean water.

Right now the Mexican government is performing a balancing act of great difficulty. While the Mexican economy has greatly improved over recent years, the government has sacrificed even greater immediate economic growth for its people to improve the environmental conditions required by NAFTA. They have done this because they know that NAFTA will ultimately promote not only significant economic growth for its people, but environmental stability as well. Not until the Mexicans develop an improved standard of living can the average Mexican citizen truly afford to choose the environment before their immediate survival. NAFTA is the mechanism to create the economic stability Mexico needs. NAFTA is the mechanism that will rid the United States of the ever-present fear of jobs going south. It is to the United States' long term benefit to help the Mexicans develop, and in turn promote joint-economic development.

NAFTA has set an environmental standard in conjunction with the Border Plan that no future United States trade agreement will ever be without. It may not save the planet, but it is certainly and substantively moving in the right direction.²²⁸

227. Interview of Anonymous, Texas Natural Resource Conservation Commission (Oct. 9, 1993).

228. Work on this comment was concluded in December of 1993, after NAFTA's successful signing into law.