THE NORTH AMERICAN DEVELOPMENT BANK: FOR CLEANUP OR PROFIT?

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I. INTRODUCTION

The North American Development Bank (NADBank or the Bank),[1] one of two joint U.S.-Mexico institutions, is credited with calming the fears of public interest organizations[2] that oppose the North American Free Trade Agreement (NAFTA) and with ensuring passage of the trade agreement.[3] Among the groups questioning NAFTA's effects, the environmental lobby claimed that NAFTA would increase health and safety concerns, escalate environmental degradation, and destroy existing infrastructure throughout the U.S.-Mexico border region.[4]

Created primarily to address economic development and environmental contamination, the Bank's structure, guidelines, and focus suggest that border cleanup measures are secondary to profit oriented lending.[5] One thing is

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1. Exec. Order No. 12,916, 59 Fed. Reg. 25,779 (1994).

2. *See* Lucy Conger, *Can NAFTA Reinvent Development Banking?*, Mar. 1994, at 67, 67.

3. *See* Mercedes Olivera, *Some Hispanic Leaders Dissatisfied with Trade Pact,* DALLAS MORNING NEWS, Aug. 15, 1993, at 36A (noting the Southwest Voter Research Institute's conditional support of NAFTA, based on surveys of national Hispanic leaders); Mercedes Olivera, *Undecided on Trade Pact*, DALLAS MORNING NEWS, Sept. 19, 1993, at 36A (finding that 9–12% of Latinos in Texas and California unconditionally supported the trade pact); Dianne Solis, *NAFTA Negotiators Clear a Hurdle on Environmental Side Accord*, WALL ST. J., July 12, 1993, at A9 (observing that Latino groups supported the NADBank proposal).

4. *See generally The Impact of the North American Free Trade Agreement on the Environment: Hearing Before the Subcomm. on Env't and Natural Resources of the House Comm. on Merchant Marine and Fisheries,* 103d Cong. 2 (1993) (testimony of Barbara Dudley, U.S. Executive Director, Greenpeace); Patti Goldman, *NAFTA's Threat to Health, Safety and the Environment,* TEX. LAW., Nov. 29, 1993, at 24.

5. *See* Steven H. Lee, *Conferees Defend NADBank*, DALLAS MORNING NEWS, Aug. 6, 1996, at 1D (quoting Commerce Secretary Mickey Kantor saying that NADBank is "not committed to make grants or below-market interest loans" and labeling it "a financial institution"); *NADBank: NADBank to Seek U.S. Private Loans for Mexican Infrastructure Projects*, Int'l Env't Daily (BNA) (Dec. 22, 1995), *available in* LEXIS, BNA Library, BNAIED File (reporting that U.S. private financing sources and banks may be co-lenders because the Environmental Protection Agency funds approved for water treatment plants cannot be channeled to Mexican projects); *NAFTA: NADBank Meeting Will Seek Public Comment, Provide Update on Evaluation of Projects,* Int'l Env't Daily (BNA) (Feb. 27, 1996), *available in* LEXIS, BNA Library, BNAIED File [hereinafter *NADBank Meeting*] (quoting NADBank official Annie Alvarado saying that NADBank has a "fiduciary responsibility to ensure that all loans will be paid back"); *U.S.-Mexico Border: U.S. May Share Grant Money with Mexico to Spur Border Infrastructure Development*, Int'l Env't Daily (BNA) (May 28, 1996),

certain: the Bank's failure to fulfill the Clinton Administration's promises will indirectly perpetuate environmental degradation and increase the already costly border cleanup, estimated to be in the billions of dollars.[6]

As of August 1996, three years after its inception, the Bank's funding mechanisms had failed to finance any environmental infrastructure projects by the Border Environmental Cooperation Commission (BECC).[7] In a region where public investment lagged and the border population increased over sixty percent in ten years,[8] NADBank project financing guidelines are unclear, impractical,[9] and appear to represent nothing more than political cover for the U.S. and Mexican governments.[10]

This Article's purpose is to provide political subdivisions along the Rio Grande with a framework to: (1) provide a basic understanding of the environmental institutions created by the NAFTA, (2) analyze NADBank's statutory authority, and (3) provide an alternative approach to current Bank financing policies and criteria. Part II of this Article addresses safety and health concerns along the U.S.-Mexico border region and the promises made by both governments to remedy these conditions. Part III describes the institutions created by the "Supplemental Agreements" and their interplay under NAFTA. Part IV outlines the Bank's basic statutory structure, purpose, and limitations. Part V describes and clarifies both

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available in LEXIS, BNA Library, BNAIED File [hereinafter *Grant Money*] (noting that the BECC has pursued financing from U.S. private banks and investors).

6. *See* Conger, *supra* note 2, at 72 (citing a U.S. Army Corps of Engineers study of the US$6.3 billion cost of installing public water supplies and waste disposal facilities); *Grant Money*, *supra* note 5 (noting plans for a US$4.6 billion investment in air contamination control over five years); David LaGesse, *Pact to be Monitored for Effectiveness in Cleaning Up Border,* DALLAS MORNING NEWS, Dec. 26, 1993, at 8P (noting Sierra Club projections that border costs would be between US$20 billion and US$30 billion); Steven H. Lee, *NADBank Will Miss Start Date*, DALLAS MORNING NEWS, Oct. 1, 1994, at 1F (reporting an estimate that wastewater treatment, water supply, and solid waste management projects along the border could cost from US$6.5–8 billion over the next several years).

7. *See* Lee, *supra* note 5; Dan Margolis, *NADBank's First Loans Ok'd for Two Water-Treatment Projects in Mexico*, SAN ANTONIO EXPRESS-NEWS, Sept. 21, 1996, at 1E (reporting criticism of the Bank's sluggishness).

8. *See* Richard Alm, *Free-Trade Success Depends on Cleaning Up Border Problems,* DALLAS MORNING NEWS, July 19, 1993, at 1D.

9. *See* Conger, *supra* note 2, at 68; *cf. NADBank Meeting*, *supra* note 5 (stating that NADBank is focusing on more innovative approaches); Richard G. Opper et al., *On Developing Issues in State and Local Government Law: Report of the Committee on the Environment,* 27 URB. LAW. 733, 746 (1995).

10. *See* Michelle Mittelstadt, *NAFTA-Related Bank Has Loaned Zilch: U.S., Mexico Capitalized It at $224 Million*, ARIZ. REPUBLIC, Aug. 6, 1996, at E2.

the loan and guarantee policies and bank-created operational procedures.

II. HEALTH AND SAFETY CONCERNS ALONG THE U.S.-MEXICO BORDER

The border between the United States and Mexico stretches for approximately 2,000 miles.[11] Desert, semi-arid mountains, valleys, and coastal areas make up the region.[12] The Rio Grande serves as a neatly bisecting artery. At the beginning of the century 36,000 people inhabited the region.[13] Today some estimate the border is one of the fastest growing areas in North America, with a population of over 10.5 million people (approximately split between the United States and Mexico).[14] The population is expected to double in ten years.[15] The majority of the border population lives in the following fourteen pairs of sister cities: Tijuana/San Diego, Mexicali/Calexico, Nogales/ Nogales, Agua Prieta/Douglas, Naco/Naco, Yuma/San Luis Colorado, Ciudad Juárez/El Paso, Ojinaga/Presidio, Las Palomas/ Columbus, Ciudad Acuña/Del Rio, Piedras Negras/Eagle Pass, Nuevo Laredo/Laredo, Reynosa/McAllen and Matamoros/ Brownsville.[16] Poverty is common throughout these border communities. Compared with the U.S. national average of US$19 thousand in 1990–1991, average personal incomes of less than US$10 thousand are prevalent in border counties.[17] Along with a growing population and urbanization, the Mexican government's lack of foresight has caused increased industrialization in the region.[18]

The Mexican government initiated the maquiladora program in 1965 in an effort to generate economic

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11. *See* Buck J. Wynne, *The Impact of NAFTA on the U.S./Mexico Border Environment*, 26 URB. LAW. 11, 12 (1994).

12. *See id.*

13. *See* Sanford E. Gaines, *Bridges to a Better Environment: Building Cross-Border Institutions for Environmental Improvement in the U.S.-Mexico Border Area*, 12 ARIZ. J. INT'L & COMP. L. 429, 429 (1995).

14. *See id.*; EPA, US/MEXICO BORDER XXI PROGRAM: DRAFT FRAMEWORK DOCUMENT III.1 (June 1996) [hereinafter DRAFT BORDER PROGRAM].

15. *See Global Health: United States [sic] Response to Infectious Diseases: Hearings of the Senate Labor and Human Resources Comm. Subcomm. On Pub. Health and Safety*, 105th Cong. 3 (1998) (statement of Joan Baumbach, District Health Officer New Mexico Department of Health).

16. *See* NORTH AMERICAN DEVELOPMENT BANK (North American Development Bank Working Paper, May 1995) [hereinafter NADBank Working Paper] (on file with the *Houston Journal of International Law*).

17. *See* Gaines, *supra* note 13, at 430 n.4.

18. *See id.* at 429–30.

development along the northern border, and to provide employment opportunities for migrant farm workers returning to Mexico at the end of the U.S. Bracero program.[19] Under the maquiladora program, foreign-owned corporations create production facilities engaging in processing or secondary assembly of imported components.[20] The maquiladoras are permitted to import raw materials, capital equipment, and machinery for the production of goods, exclusive of tariffs.[21] When the products are finished they are exported to the United States, and taxed only on the value added in Mexico.[22]

For over thirty years the maquiladora program has attracted large American corporations to the border region.[23] U.S. and foreign industries are afforded economic advantages such as: (1) low-cost labor, (2) reduced transportation costs, (3) ease of access to U.S. markets, (4) favorable tax treatment, (5) preferential treatment by the Mexican government, and (6) relaxed environmental and worker-safety standards.[24]

The number of maquiladora operations has increased because of economic advantages and currency devaluations. In 1982 approximately 500 maquiladoras were located on the border.[25] In 1988 the number jumped to nearly 1,400, and by 1990 there were close to 1,900 maquiladoras on the border.[26] Estimates state that 80% of the maquiladora plants in Mexico are located within the border region, and that 80% of the border maquiladoras are located in six sister cities.[27] Over 400,000 jobs are created by maquiladoras,[28] with almost half of the border-area maquiladora workers employed in Tijuana and Ciudad Juárez.[29] As a direct result of the maquiladora law, border industries have flourished,

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19. *See* Brenda S. Hustis, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 592 (1993).

20. *See* Wynne, *supra* note 11, at 13.

21. *See id.*

22. *See id.*

23. *See* Hustis, *supra* note 19, at 592–93.

24. *See* Kelly L. Reblin, *NAFTA and the Environment: Dealing with Abnormally High Birth Defect Rates Among Children of Texas-Mexico Border Towns*, 27 ST. MARY'S L.J. 929, 935 (1996); *see also* Wynne, *supra* note 11, at 13–14.

25. *See* Hustis, *supra* note 19, at 594.

26. *See id.*

27. *See* Wynne, *supra* note 11, at 13.

28. *See id.*

29. *See* LESLIE SKLAIR, ASSEMBLING FOR DEVELOPMENT: THE MAQUILA INDUSTRY IN MEXICO AND THE UNITED STATES 81, 99 (1989).

including the automotive, electrical, electronic, furniture, ceramics, textile, and chemical industries.[30] These industries use large quantities of toxins, including resins, acids, paints, solvents, oils, plastics, varnishes, pesticides, and heavy metals.[31] The Environmental Protection Agency (EPA) noted in 1989 that 145 manufacturing plants in the region process at least 25 thousand pounds of toxic chemicals per year or use at least 10 thousand pounds of chemical toxins per year.[32]

Maquiladora workers and their families account for a large percentage of the border population.[33] More importantly, rapid industrialization has caused a population explosion with no end in sight.[34] Every day a continuous migration of people arrives in Ciudad Juárez searching for work.[35] Border environmental infrastructure needs are numerous, and deserve immediate attention if the fragile and already stressed ecosystem is to survive.[36]

III. NAFTA'S ENVIRONMENTAL PROMISES

By negotiating on "parallel tracks," Congress approved two independent environmental agreements along with NAFTA: the North American Agreement on Environmental Cooperation (Environmental Side Agreement or ESA),[37] among the United States, Canada, and Mexico, and the agreement creating the Border Environment Cooperation Commission (Border Environment Cooperation Agreement or BECA)[38] between the United States and Mexico. The ESA

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30. *See* Hustis, *supra* note 19, at 593.

31. *See id.*

32. *See* EPA, SUMMARY—ENVIRONMENTAL PLAN FOR THE MEXICAN-U.S. BORDER AREA 7 (1992).

33. *See* Wynne, *supra* note 11, at 13.

34. *See* Elizabeth A. Ellis, Note, *Bordering on Disaster: A New Attempt to Control the Transboundary Effects of Maquiladora Pollution*, 30 VAL. U. L. REV. 621, 630 (1996); *see also* H.R. DOC. NO. 103-160, at 256 (1993).

35. *See* Sonia Nazario, *Boom and Despair: Mexican Border Towns Are a Magnet for Foreign Factories, Workers and Abysmal Living Conditions*, WALL ST. J., Sept. 22, 1989, at R26.

36. *See* H.R. DOC. NO. 103-160, at 256.

37. North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480, 1482 (1993) [hereinafter Environmental Side Agreement].

38. Exec. Order No. 12,916, 59 Fed. Reg. 25,779, 25,779 (1994); Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 16, 18, 1993, 32 I.L.M. 1545 (1993) [hereinafter Border Side

established the Commission for Environmental Cooperation (CEC)[39] and the BECA established the NADBank and the BECC.[40] These agreements played a significant role during the NAFTA negotiation process; they were essential in accomplishing its environmental objectives.[41] The following sections will briefly discuss the ESA and BEC.

A. North American Agreement on Environmental Cooperation

The ESA allows enforcement and monitoring of NAFTA's objectives and effects.[42] Originally, the ESA was promoted by Arkansas Governor Bill Clinton during his 1992 presidential campaign. If elected president, Bill Clinton promised to negotiate a "supplemental" agreement concerning environmental, agricultural, and labor issues.[43]

The ESA was a continuation of previous attempts to address border issues,[44] and created the first comprehensive agreement concerning border environmental issues.[45] In the ESA's Preamble, the governments of the United States, Canada, and Mexico recognize that the interrelation of their environments requires conservation, protection, and enhancement, and enables each nation to achieve sustainable development.[46] Striking a balance between the environment and the NAFTA's terms,[47] the ESA's additional objectives include the avoidance of trade "distortions" or barriers, mutual cooperation, enhanced compliance, the enforcement of environmental regulations, transparency, economic efficiency, and the promotion of pollution prevention policies and practices.[48]

Agreement]; *see also* Barbara Weiss, *NAFTA and Environmental Infrastructure Projects*, 10 GOV'T FIN. REV. 49, 49 (1994).

39. *See* Environmental Side Agreement, *supra* note 37, art. 6(3), 32 I.L.M. at 1485.

40. *See* Weiss, *supra* note 38, at 49.

41. *See* Exec. Order No. 12,915, 59 Fed. Reg. 25,775, 25,775 (1994).

42. *See* Exec. Order No. 12,916, 59 Fed. Reg. at 25,779; *see also* Weiss, *supra* note 38, at 49.

43. *See* Ferrel Guillory, *Clinton Visits Raleigh: Candidate Announces Support for Trade Pact*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 5, 1992, at A1.

44. *Cf.* David L. Hanna, Comment, *Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias*, 27 ST. MARY'S L.J. 871, 894 (1996) (noting criticism of the La Paz Agreement for inadequate funding to clean up border regions).

45. *See* Ellis, *supra* note 34, at 657.

46. *See* Environmental Side Agreement, *supra* note 37, preamble, 32 I.L.M. at 1482.

47. *See id.* art. 1(d), 32 I.L.M. at 1483.

48. *See id.* art. 1(e)–(f), 32 I.L.M. at 1483.

The ESA attempts to achieve its objectives by ensuring that no member nation gains a competitive trade advantage by failing to protect the environment. Measures include requiring that member countries ensure their "laws and regulations provide for high levels of environmental protection."[49] ESA policies are expected to prevent industrial relocation, and subsequently ease the burden on the existing population, environmental conditions, and infrastructure.[50] Additionally, private access to administrative, quasi-judicial, or judicial proceedings,[51] and remedies, such as fines, injunctions, or sanctions, are included in the ESA's framework. [52]

B. The Commission for Environmental Cooperation

CEC objectives include sustainable development, pollution prevention policies, compliance with environmental statutes and regulations, and cooperation among member countries.[53] The CEC is composed of the Council of Ministers (Council), a Secretariat, and a Joint Public Advisory Committee.[54] Annual funding for the CEC in 1995 and 1996 totaled US$9 million.[55]

As the CEC's governing body, the Council's functions are broad,[56] including the ability to develop environmental recommendations.[57] Additionally, to solidify cooperation in developing environmental laws and regulations, the Council may exchange information and methodologies used to establish domestic environmental standards.[58] The Council

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49. *Id.* art. 3, 32 I.L.M. at 1483.

50. *See* Ellis, *supra* note 34, at 659.

51. *See* Environmental Side Agreement, *supra* note 37, art. 7, 32 I.L.M. at 1484.

52. *See id.* art. 6(3), 32 I.L.M. at 1484.

53. *See* GREGG A. COOKE & AMANDA ATKINSON, THE EVOLVING PROTECTION OF STATE LAWS AND THE ENVIRONMENT: NAFTA FROM A TEXAS PERSPECTIVE 27 (Lyndon B. Johnson School of Public Affairs U.S.-Mexican Occasional Paper No. 5, 1994) (on file with the *Houston Journal of International Law*).

54. *See* Environmental Side Agreement, *supra* note 37, art. 8(2), 32 I.L.M. at 1485.

55. *See NAFTA's Broken Promises: The Border Betrayed*, PUB. CITIZEN'S GLOBAL TRADE WATCH (Pub. Citizen, Washington, D.C.), Jan. 1996, at 56 [hereinafter *Border Betrayed*] (on file with the *Houston Journal of International Law*).

56. *See* Thomas J. Schoenbaum, *The North American Free Trade Agreement (NAFTA): Good for Jobs, for the Environment, and for America*, 23 GA. J. INT'L & COMP. L. 461, 493 (1993).

57. *See* Environmental Side Agreement, *supra* note 37, art. 10(2), 32 I.L.M. at 1485–86.

58. *See id.* art. 10(3)(a), 32 I.L.M. at 1486.

may draft recommendations[59] and cooperate with NAFTA's Free Trade Commission to prevent environment-related trade disputes.[60] The Council assesses the environmental impact of new projects,[61] and establishes judicial and administrative procedures.[62]

The Secretariat provides "technical, administrative and operational support to the Council and to committees and groups" created by the Council.[63] The Secretariat may prepare reports concerning the "scope of the annual program."[64] However, there is a thirty-day notification period if the Secretariat wishes to create a report pertaining to "any other environmental matter related to the cooperative functions"[65] of the Agreement.[66] This type of report may be prevented if two-thirds of the Council object to its preparation.[67]

The fifteen-member Joint Public Advisory Committee advises the Secretariat on environmental provisions and issues encompassed by the Agreement.[68] The Advisory Committee's access to information is limited to factual records, if the Council decides to reject those records by a two-thirds vote, and information generated by the Secretariat, such as the proposed annual program, the CEC's budget, the draft annual report, and any Secretariat report prepared for the Council.[69]

C. Border Environment Cooperation Agreement

The United States and Mexico negotiated the Border Environment Cooperation Agreement to address "transboundary environmental issues,"[70] promote

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59. *See id.* art. 10(5), 32 I.L.M. at 1486.
60. *See id.* art. 10(6)(c), 32 I.L.M. at 1486.
61. *See id.* art. 10(7)(a), 32 I.L.M. at 1486.
62. *See id.* art. 10(8), 32 I.L.M. at 1487.
63. *Id.* art. 11(5), 32 I.L.M. at 1487.
64. *Id.* art. 13(1), 32 I.L.M. at 1487–88.
65. *Id.* arts. 13(1), 15(1), 32 I.L.M. at 1487–88. "Report" could be interpreted as a factual record on an outside submission asserting a failure to comply with environmental laws under Article 15(1) or an investigative report pursuant to Article 13(1). *See id.*
66. *See id.* art. 13(1), 32 I.L.M. at 1487–88.
67. *See id.*
68. *See id.* art. 16, 32 I.L.M. at 1489 (requiring the Secretariat to forward information to the Council).
69. *See id.* art. 16(6), 32 I.L.M. at 1489.
70. *Environment Ministers Hammer Out Implementation Issues for Side Accord*, 17 Int'l Env't Rep. (BNA) 303 (Apr. 6, 1994), *available in* LEXIS, BNA Library, INTENV File.

"sustainable development,"[71] encourage "increased investment in the environmental infrastructure in the border region,"[72] and advance "environmental justice, ecosystem protection, and biodiversity preservation."[73] Created by the BECA, the BECC and the NADBank play pivotal roles in attaining the desired objectives.

The BECC provides technical assistance to municipalities, states, public entities, and private investors seeking to develop feasible environmental infrastructure projects within 100 kilometers (60 miles) of the border region.[74] The BECC also assesses the social and economic benefits of projects, and secures public and private project funding.[75]

A more critical role for the BECC involves "certifying" infrastructure projects for financing by the NADBank[76] and other financial institutions.[77] BECC assistance to infrastructure projects pertaining to water pollution, wastewater treatment, municipal solid waste, and other related matters will be given priority.[78] To certify a project outside the 100-kilometer border region, the BECC, with the approval of the EPA and the Mexican Secretaria de Desarollo Social, must determine that the project addresses

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71. *BECC Approves Certification Criteria, Including Public Input, Sustainability Issues*, 18 Int'l Env't Rep. (BNA) 677 (Sept. 6, 1995), *available in* LEXIS, BNA Library, INTENV File.

72. Border Side Agreement, *supra* note 38, 32 I.L.M. at 1547.

73. Exec. Order No. 12,916, 59 Fed. Reg. 25,779, 25,779 (1994).

74. *See* NORTH AMERICAN DEVELOPMENT BANK, LOAN AND GUARANTY POLICIES AND OPERATIONAL PROCEDURES FOR PROJECTS CERTIFIED BY THE BORDER ENVIRONMENT COOPERATION COMMISSION 2 (1996) [hereinafter NADBANK POLICIES].

75. *See* Border Side Agreement, *supra* note 38, ch. 1, art. 1, § 1, 32 I.L.M. at 1548.

76. *See id.* ch. 1, art. 2, § 3(b)–(c), 32 I.L.M. at 1549–50; *see also id.* ch. 2, art. 1, § 1, 32 I.L.M. at 1556. A "certified" project is one meeting "the technical, environmental, financial or other criteria applied, either generally or specifically, by the Commission to that project." *Id.* ch. 1, art. 2, § 3(b), 32 I.L.M. at 1549–50. A certified project having significant transboundary environmental effects must observe the environmental and other laws of the place where it is to be located or executed. *See id.* ch. 1, art. 2, § 3(c), 32 I.L.M. at 1550.

77. *See* Alan Charles Raul, *In NAFTA's Wake, Billions of Dollars Will Go Toward Improving the Environment at the U.S.-Mexico Border*, NAT'L L.J., Mar. 21, 1994, at B7 (explaining how the World Bank has become "more directly involved at the U.S.-Mexico border").

78. *See* Border Side Agreement, *supra* note 38, ch. 1, art. 2, § 2(b), 32 I.L.M. at 1549.

transboundary environmental or health problems.[79] Headquartered in Ciudad Juárez, the BECC's Board of Directors determines if the project provides high levels of environmental protection for the particular area based on an environmental assessment for each project.[80] The BECC must also provide avenues for public comment, including complaints.[81] The Board has ten members, five from each country.[82] The members include the U.S. and Mexican commissioners to the International Boundary and Water Commission, EPA and Secretario de Desarrollo Social (SEDESOL) administrators, and six additional representatives, such as U.S. and Mexican border state representatives, a representative from a border locality from each side, and a U.S. and Mexican border resident.[83]

For 1995 and 1996, BECC appropriations totaled US$1.8 million, with an equal portion of this amount coming from each government.[84] By October 2, 1997, the BECC had certified sixteen border infrastructure projects;[85] however, financing had not been allocated.[86]

IV. THE NORTH AMERICAN DEVELOPMENT BANK: STRUCTURE AND ROLE

A. *History*

The idea behind the Bank was proposed by Raúl Hinojosa-Ojeda, a professor of urban planning at the University of California at Los Angeles.[87] Hinojosa-Ojeda

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79. *See* NADBANK POLICIES, *supra* note 74, at 2; *see also* Border Environment Cooperation Commission Guidelines, 60 Fed. Reg. 48,982, 48,985 (1995).

80. *See* Border Side Agreement, *supra* note 38, ch. 1, art. 2, § 3(c), 32 I.L.M. at 1550.

81. *See id.* ch. 1, art. 4, § 4, 32 I.L.M. at 1550.

82. *See id.* ch. 1, art. 3, § 3(a), 32 I.L.M. at 1551.

83. *See id.*

84. *See Border Betrayed*, *supra* note 55, at 71.

85. *See Water Pollution: $30 Million Waste-Water Treatment Project Approved by BECC for Juárez, Mexico*, Daily Env't Rep. (BNA) A-2 (Oct. 2, 1997).

86. *See id.* The Executive Committee has recommended to the Board the approval of the first four projects, located in Brawley, California; Matamoros, Tamaulipas; Nogales, Sonora; and Naco, Sonora, with a total project cost of approximately US$40 million in the final stages of loan closing. *See id.* Project certification does not guarantee financing by the NADBank or other sources. *See id.*

87. *See Border Betrayed*, *supra* note 55, at 69; Raúl Hinojosa-Ojeda, *The North American Development Bank: Forging New Directions in Regional Integration Policy*, 60 J. AM. PLAN. ASS'N 301, 301, 304 n.1 (1994).

proposed his concept of the Bank to members of Congress to ensure NAFTA's passage.[88] According to Hinojosa-Ojeda, North American integration requires substantial resource investment in the areas of environmental upgrades, infrastructure creation, community development, and the improvement of labor productivity.[89] "[The] NADBank is proposed as a highly cost effective method of financing environmental infrastructure, labor and regional economic development projects . . . [.] NADBank would be organized to specifically invest in the environmental[ ] and social infrastructure that will be needed to bring an upward convergence in environmental and social standards and practices."[90] Representative Esteban Torres sponsored the development fund legislation as part of a group of House members organized by Hinojosa-Ojeda.[91]

B. Organization

The Bank's Board of Directors is comprised of three members from the United States and three from Mexico.[92] A U.S. or a Mexican citizen serves as Chairperson of the Board for a one-year term on an alternating basis.[93] Currently, the U.S.-Bank Board of Directors includes Secretary of the Treasury, Robert Rubin; Secretary of State, Madeleine Albright; and EPA Administrator, Carol Browner.[94] The Mexican Board of Directors includes Secretario de Hacienda y Crédito Público Guillermo Ortiz, Secretario de Comercio Herminio Blanco, and SEDESOL Carlos Rojas.[95] The agreement vests "all the powers of the Bank" in the Board members.[96]

In addition to the Board, the NADBank legislation provides for the position of Manager or Managing Director,

88. *See Border Betrayed*, *supra* note 55, at 69.

89. *See id.*

90. *Id.* (quoting *Proposal For a North American Regional Bank and Adjustment Fund*).

91. *See id.* (stating that the coalition members realized that a "secure funding development fund was vital to any plan to improve health and environmental conditions in the border area").

92. *See* Border Side Agreement, *supra* note 38, ch. 2, art. 6, § 2(a), 32 I.L.M. at 1564.

93. *See id.*

94. *See* Exec. Order No. 12,916, 59 Fed. Reg. 25,779, 25,779 (1994); NADBank Working Paper, *supra* note 16, at 5.

95. *See* NADBank Working Paper, *supra* note 16, at 5.

96. Border Side Agreement, *supra* note 38, ch. 2, art. 6, § 2(a), 32 I.L.M. at 1564.

currently Victor Miramontes.[97] According to the statute, he is to "conduct the business of the Bank and shall be chief of its staff" subject to the Board's instruction.[98] The Bank's senior management also includes a deputy managing director.[99]

Elected to a three-year term, the Bank Manager serves as the Bank's legal representative and holds office until the "Board of the Bank so decides."[100] Unlike the Board of Directors, the Manager, officers, and staff "owe their duty entirely to the Bank and to no other authority."[101] The same provision explicitly directs the U.S. and Mexican governments not to attempt to influence these individuals.[102] A second caveat prohibits Bank personnel from interfering with the "political affairs of either Party" and from being "influenced" by the political character of the Parties.[103] According to the statute, only economic or financial criteria shall be considered in the decision making process.[104] These considerations shall be impartially weighed to satisfy the functions and purposes of the NADBank.[105] The decision making procedures dictate that "[a]ll decisions of the Board of the Bank shall require the assent of at least two representatives, alternates, or temporary alternates" of each country.[106]

C. Purpose

In Executive Order 12,916, issued on May 13, 1994, President Clinton stated that implementation of the BECC and Bank was consistent with the U.S. policy of protecting human, animal, and plant life, public health, and the environment.[107] Unlike President Clinton's vague Executive Order, the Bank's statutory language provides for specific functions and goals. A primary goal of the Bank is to finance

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97. *See NAFTA-Related Bank Promotes No. 2 Official*, DALLAS MORNING NEWS, May 6, 1997, at 4D [hereinafter *Bank Promotes*].
98. Border Side Agreement, *supra* note 38, ch. 2, art. 6, § 4(a), 32 I.L.M. at 1565.
99. *See Bank Promotes*, *supra* note 97, at 4D.
100. Border Side Agreement, *supra* note 38, ch. 2, art. 6, § 4(a), 32 I.L.M. at 1565.
101. *Id.* ch. 2, art. 6, § 4(b), 32 I.L.M. at 1565.
102. *See id.* ("The Parties shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.").
103. *Id.* ch. 2, art. 6, § 4(d), 32 I.L.M. at 1565.
104. *See id.*
105. *See id.*
106. *Id.* ch. 2, art. 6, § 3, 32 I.L.M. at 1564–65.
107. *See* Exec. Order No. 12,916, 59 Fed. Reg. 25,779, 25,779 (1994).

BECC-approved projects and assist the BECC in fulfilling its role.[108] To properly fulfill its role, the Bank may utilize its own capital, funds raised in financial markets, and "other available resources."[109]

In contrast to the BECC's broad purpose,[110] the Bank must promote the investment of public and private monies; encourage private investment in projects and supplement private investment on reasonable terms and conditions when needed; and provide technical, financial, and "other assistance" to BECC plans and projects.[111] Cooperation with domestic and international institutions and private sources is mandatory in carrying out the Bank's role.[112]

As noted by the NADBank materials, the Bank's purpose is to serve as a "financial partner and catalyst"[113] for public and private capital investments (environmental infrastructure projects)[114] certified by the BECC.[115] Although Bank lending can be allocated to public and private sector entities, the Bank strongly encourages private sector lending and risk sharing.[116]

D. Capitalization

The Bank's authorized full capital stock is US$3 billion.[117] This amount is divided between both countries into 300,000 shares, with each share having a US$10,000 par value.[118] Only under "special circumstances" will the Bank

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108. *See* Border Side Agreement, *supra* note 38, ch. 2, art. 1, § 1(a), 32 I.L.M. at 1556.

109. *Id.* ch. 2, art. 1, § 2, 32 I.L.M. at 1557.

110. *See id.* ch. 1, art. 1, § 1(a), 32 I.L.M. at 1548 ("The purpose of the Commission shall be to help preserve, protect and enhance the environment of the border region in order to advance the well-being of the people of the United States and Mexico.").

111. *Id.* ch. 2, art. 1, § 2, 32 I.L.M. at 1557.

112. *See id.*

113. NADBank Working Paper, *supra* note 16, at 2.

114. *See* Border Side Agreement, *supra* note 38, ch. 3, art. 5, 32 I.L.M. at 1570 ("Environmental infrastructure project means a project that will prevent, control or reduce environmental pollutants or contaminants, improve the drinking water supply, or protect flora and fauna so as to improve human health, promote sustainable development, or contribute to a higher quality of life.").

115. *See* Border Side Agreement, *supra* note 38, ch. 1, art. 1, § 2(ii), 32 I.L.M. at 1549.

116. *See* NADBank Working Paper, *supra* note 16, at 6.

117. *See* Border Side Agreement, *supra* note 38, ch. 2, art. 2, § 1(a), 32 I.L.M. at 1557.

118. *See id.*

issue shares on "other terms."[119] The capital stock is divided into paid-in capital and callable capital.[120] As required by statute, each country must subscribe 22,500 paid-in capital shares.[121] Callable share contributions required by each country total 127,500 shares.[122] Thus, each country subscribes 150,000 shares of capital stock.[123] As of March 31, 1996, the Bank had US$225 million in paid-in capital and US$1.275 billion in callable capital.[124]

E. General Statutory Operations

Article III of the NADBank's legislation gives an overview of the Bank's general loan and grant limitations. Under these regulations, the Bank fulfills its role in numerous ways. For example, the Bank can condition grants, make direct loans, and guarantee loans.[125] Subject to some conditions, the Bank may make appropriations to either country,[126] including any government agency or subdivision, or "any entity in the territory" of a Party.[127]

1. Monetary Limitations for all Grants, Direct Loans, and Loan Guarantees

The Bank is held to certain limitations. For example, total outstanding loans and guarantees at any time may not exceed the sum of (1) the Bank's unimpaired plus subscribed capital, (2) surplus included in the Bank's capital resources, and (3) other income of the capital resources assigned by the Board to reserves not available for loans or guarantees.[128] Implicitly, these limitations apply to total border infrastructure lending, "domestic window spending,"[129] and

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119. *Id.* ch. 2, art. 2, § 2(b), 32 I.L.M. at 1557.
120. *See id.* Annex A, 32 I.L.M. at 1571.
121. *See id.*
122. *See id.*
123. *See id.*
124. *See* NORTH AMERICAN DEVELOPMENT BANK: 1995 ANNUAL REPORT 8 (1996).
125. *See* Border Side Agreement, *supra* note 38, ch. 2, art. 3, §§ 2–3, 32 I.L.M. at 1559.
126. *See id.*
127. *Id.* ch. 2, art. 3, § 3, 32 I.L.M. at 1559.
128. *See id.* ch. 2, art. 3, § 4(a), 32 I.L.M. at 1559.
129. Domestic window spending must be devoted to community development projects, including job training and other projects attempting to attract new business to areas adversely affected by NAFTA. *See* David Hendricks, *NADBank OKs 2 Projects in U.S.*, SAN ANTONIO EXPRESS-NEWS, Dec. 3, 1996, at 13A. Unlike NADBank financing decisions, which take place in San Antonio, Texas, domestic window spending is determined in Los Angeles, California by U.S. Treasury officials, representatives from the Small Business Administration, the

investment spending. The domestic window receives ten percent of all Bank capital spending.[130]

Unlike the infrastructure financing component, specific limitations are established within Article III regarding domestic window spending. This spending, according to the Bank, assists individuals and businesses adjusting to the effects of NAFTA on the economies of both countries.[131] The allocation of funds, however, will not be limited to the border area.[132]

The total amount of loans, guarantees, and grants for community adjustment and investment is limited to no more than ten percent of the total sum of capital actually paid by the country requesting a loan and the amount of callable shares for which the country has an unqualified subscription.[133] Grants for domestic window operations must be limited to the total amount of grants provided to a country plus fifteen percent of the combined loans and guarantees made for community adjustment and investment.[134] Thus, grants for domestic window lending may not exceed ten percent of the capital actually paid to the Bank by the requesting country.[135]

2. *Rules and Conditions for Direct Loans and Loan Guarantees*

General rules for all loans or guarantees require that the Bank look at all "pertinent factors."[136] While Article II fails to identify the pertinent factors, it requires the Bank to decide if the borrower will be able to maintain all loan obligations and determine the borrower's ability to obtain a loan from private sources under reasonable terms.[137] Additionally, the Bank must address the appropriateness of the interest rate, charges, and the schedule for the principal repayment.[138] The

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U.S. Department of Housing and Urban Development, and the U.S. Department of Agriculture. *See id.* For example, domestic window investment assists communities in the rehabilitation of abandoned factories, job training, and in incentives for companies to expand or relocate to areas that have suffered job cuts. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See* Border Side Agreement, *supra* note 38, ch. 2, art. 3, § 4(b)–(c), 32 I.L.M. at 1559–60.

134. *See id.*

135. *See id.*

136. *Id.* ch. 2, art. 3, § 6(a)(1), 32 I.L.M. at 1560.

137. *See id.* ch. 2, art. 3, § 6(a)(1), (2), 32 I.L.M. at 1560.

138. *See id.* ch. 2, art. 3, § 6(a)(3), 32 I.L.M. at 1560.

Bank may charge a suitable compensation for guaranteeing a loan made by other investors.[139]

Additional conditions apply to loans and guarantees made pursuant to BECC certification.[140] These added considerations are as follows: (1) a complete application for a loan or guarantee must be submitted with the BECC's written report certifying the proposal;[141] (2) the Bank must find that the proposed project is "economically/financially sound," and that the project will generate revenues by user fees or other means, be self-sustaining, or that funds from other sources will meet debt obligations;[142] and (3) financing by the Bank must be for specific projects.[143] In addition to the above limitations, an endorsement from either the United States or Mexico is needed for loans or loan guarantees focusing on community adjustment and investment.[144]

3. Other Considerations Regarding Loans and Guarantees

The Bank has discretionary power to attach other conditions on loans and loan guarantees as deemed appropriate.[145] No condition may require that proceeds of a loan be spent in either country.[146] Article III provides that the Bank may institute measures to ensure that the proceeds are allocated "only for the purposes for which the loan was granted."[147] The Bank is obligated to charge a guarantee fee, payable periodically, on the amount of the outstanding loan.[148] If a borrower defaults on a loan, the Bank may terminate its liability with respect to interest by purchasing the bonds or other guaranteed obligations at par plus accrued interest.[149] When issuing any guarantee, the Bank may impose any other terms and conditions.[150]

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139. *See id.* ch. 2, art. 3, § 6(a)(4), 32 I.L.M. at 1560.
140. *See id.* ch. 2, art. 3, § 6(b), 32 I.L.M. at 1560.
141. *See id.* ch. 2, art. 3, § 6(b)(1), 32 I.L.M. at 1560.
142. *Id.* ch. 2, art. 3, § 6(b)(2), 32 I.L.M. at 1560.
143. *See id.* ch. 2, art. 3, § 6(b)(3), 32 I.L.M. at 1560.
144. *See id.* ch. 2, art. 3, § 6(c), (d), 32 I.L.M. at 1560–61.
145. *See id.* ch. 2, art. 3, § 7(b), 32 I.L.M. at 1561.
146. *See id.* ch. 2, art. 3, § 8(a), 32 I.L.M. at 1561.
147. *Id.* ch. 2, art. 3, § 8(b), 32 I.L.M. at 1561.
148. *See id.* ch. 2, art. 3, § 10(a), 32 I.L.M. at 1561.
149. *See id.* ch. 2, art. 3, § 10(b), 32 I.L.M. at 1561.
150. *See id.* ch. 2, art. 3, § 10(c), 32 I.L.M. at 1561.

4. *Rules and Conditions for Grants*

To receive a grant for domestic window spending, a party must comply with general monetary grant limitations and receive a U.S. endorsement.[151] Similar to a direct loan, any grant the Bank makes may consist of proceeds in that Party's currency to meet costs and expenses closely linked to the purposes of a grant.[152]

V. CRITIQUE

The goals and operational guidelines created by the Bank Charter or implementation statute materialize in the Bank's actual loan and guarantee policies. The similarities between both sets of guidelines are best explained by the concerns of the drafters, who, in an effort to ensure the legitimacy of infrastructure projects within constrained lending policies, failed to address systematic environmental degradation along the border and its harmful effects on millions of lives. For those that believe the federal government has no role in the development of public infrastructure, even in a successful free-trade global economy, the market-driven approach of the NADBank was a so-called social, political, and economic success. The following sections address deficiencies in the ESA. The correction of these deficiencies will truly effectuate change and assist those living on the U.S.-Mexico border.

A. *Bank Statutory Authority*

Chapter 2 of the Border Side Agreement is solely devoted to the Bank's purpose and organizational structure. Chapter 2 represents a failed attempt to address the concerns of those living along the Rio Grande through policies that place a high value on lending restraints and profitability.

1. *Article I*

Article I, section 1 provides that the purpose of the Bank is to finance BECC-certified projects.[153] Financing for BECC-certified projects is classified under the broad category of "environmental infrastructure projects" as defined by Chapter III of the Agreement. To be classified as an environmental infrastructure project, a plan must be designed to "prevent, control or reduce environmental

151. *See id.* ch. 2, art. 3, § 11(a), 32 I.L.M. at 1561.
152. *See id.* ch. 2, art. 3, § 5, 32 I.L.M. at 1560.
153. *See id.* ch. 2, art. 1, § 1(a), 32 I.L.M. at 1556.

pollutants or contaminants, improve the drinking water supply, or protect flora and fauna so as to improve human health, promote sustainable development, or contribute to a higher quality of life."[154] Limiting financing to BECC-certified projects implies that only the types of projects set by BECC legislation address environmental, health, and safety concerns.

According to Article II, section 2(b), the BECC will favor infrastructure projects "relating to water pollution, wastewater treatment, municipal solid waste and related matters."[155] Thus, BECC and NADBank legislation attempts to solve transboundary pollution primarily by addressing bad water conditions.[156] Neglected border ills include transportation issues and non-water related health problems.[157]

Article I, section 2 of the Bank's statutory authority establishes the Bank's functions.[158] Article I stresses private enterprise's crucial role in cleaning up the border.[159] Section 2(a) includes the promotion of public and private investment as one of the Bank's functions.[160] Section 2(b) states that the Bank should "encourage private investment in projects, enterprises, and activities contributing to its purposes [and] supplement private investment when private capital is not available on reasonable terms and conditions."[161]

Section 2 reflects the Agreement's emphasis on privatization.[162] The statute recognizes expanded private involvement and a limited public sector role in infrastructure development.[163] According to the preamble, both the United States and Mexico recognize that environmental infrastructure development should be left to the private

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154. *Id.* ch. 3, art. 5, 32 I.L.M. at 1570.

155. *Id.* ch. 1, art. 2, § 2(b), 32 I.L.M. at 1549.

156. *See id.* ch. 1, art. 2, §§ 1, 2(b), 32 I.L.M. at 1549.

157. *See NAFTA Nations Establish Commission for Environmental Cooperation,* 4 ENV'T WATCH: LATIN AM., Apr. 1994, at 2 [hereinafter *Cooperation Commission*] (noting that the Bank was to address emissions standards); *see also* DRAFT BORDER PROGRAM, *supra* note 14, ch. 3 (noting areas of concern along the border such as (1) environmental information resources; (2) natural resources; (3) air; (4) hazardous and solid waste; (5) pollution prevention; (6) contingency planning and emergency response; (7) environmental health; and (8) cooperative enforcement).

158. *See* Border Side Agreement, *supra* note 38, ch. 2, art. 1, § 2, 32 I.L.M. at 1557.

159. *See id.* ch. 2, art. 1, § 2(a), (b), 32 I.L.M. at 1557.

160. *See id.* ch. 2, art. 1, § 2(a), 32 I.L.M. at 1557.

161. *Id.* ch. 2, art. 1, § 2(b), 32 I.L.M. at 1557.

162. *See id.* preamble, 32 I.L.M. at 1547.

163. *See id.*

sector, which would operate and maintain facilities by charging user fees to "polluters and those who benefit from the projects."[164]

Under the Border Side Agreement, user fees would ease the financial burdens of infrastructure projects.[165] This proposal would find resistance from business leaders and the general public because user fees would be passed on to the residents of municipalities that benefit from the water sewage and drainage systems.[166] However, it would not ensure that polluters internalize their cost of doing business on the border. The Bank's private enterprise slant would ensure profitability for private businesses operating and maintaining the projects.

2. Article II

Similar to Article I, numerous deficiencies can be found in Article II of the Bank's statute. Article II provides that initial funding for the Bank should total US$3 billion in capital stock in the form of 300 thousand shares, each having a US$10 thousand value.[167] The capital stock will be divided into paid-in shares worth US$450 million and callable shares worth US$2.55 billion.[168] The funding provisions neglect figures showing that a border cleanup would require between US$4 billion and US$30 billion.[169] Also, while US$3 billion is allocated for projects, Article III constrains total lending to 20% of capital, currently US$600 million.[170] Another problem with Article II is its recognition of callable capital—money that can be drawn from financial

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164. *Id.*

165. *See id.* ch. 2, art. 3, § 6(b)(2), 32 I.L.M. at 1560.

166. *See* NADBANK POLICIES, *supra* note 74, at 13. The Bank must require recourse against project sponsors or guarantors if a governmental borrower fails to have a "demonstrable and reasonable assurance of repayment." *Id.* One form of recourse includes general obligation financing, whereby the governmental entity is obliged to "call on tax revenues or general revenue sources to meet debt service requirements. Examples include property, income or sales taxes, or municipal or state budget allocations." *Id.* Another possible alternative is the "[e]stablishment of a utility service district or enterprise fund, which could be designed to allow the project to draw on other sources of revenue in the service area." *Id.*

167. *See* Border Side Agreement, *supra* note 38, ch. 2, art. 2, § 1(a), 32 I.L.M. at 1557.

168. *See id.* ch. 2, art. 2, § 1(b), 32 I.L.M. at 1557.

169. *See* Conger, *supra* note 2, at 72; *Grant Money*, *supra* note 5; LaGesse, *supra* note 6; Lee, *supra* note 5.

170. *See* Border Side Agreement, *supra* note 38, ch. 2, art. 3, § 4, 32 I.L.M. at 1559–60.

markets—as actual funding.[171] Thus, the Bank only has US$450 million in paid-in capital to fund projects, subject to leveraging procedures.[172]

Another potential problem arises from the statute's failure to secure governmental funding for the Bank. Without assessing penalties, a country that fails to fund the Bank due to budgetary legislation is subject to the "Qualified Subscription" clause.[173] This clause permits the country that has paid its installment to petition the Bank to restrict commitments against the unpaid installment.[174] Thus either nations' congress or executive office may eliminate or forestall the Bank's funds.[175] The effects may dissuade private entities from financing environmental projects because of the Bank's recourse provisions.[176] As a daily penalty provision, a clause charging interest on any amount not approved by either legislature would be a valued addition to the operating legislation of the Bank.

Article II, section 4 allows the Bank to invest capital in the same manner as most investment banks.[177] The statute provides that the Bank's resources may include authorized capital, funds raised by borrowing pursuant to Article V, funds from repayments, and income derived from loans.[178] This provision clearly demonstrates the profit oriented activities the Bank may undertake without regard to the rapid infrastructure breakdown currently experienced along the border. This provision allows the Bank to meet the US$2.55 billion callable shares requirement.[179] Without setting any monetary constraints or time limitations, Article V permits the Bank to borrow funds, furnish collateral or other securities, invest funds not needed for operations, guarantee securities in its portfolio, and exercise other powers "as shall be necessary."[180] Reports have circulated

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171. *See id.* ch. 2, art. 2, § 1(b), 32 I.L.M. at 1557.

172. *See id.*

173. *Id.* ch. 2, art. 2, § 3(b), (c), 32 I.L.M. at 1558.

174. *See id.* ch. 2, art. 2, § 3(c), 32 I.L.M. at 1558.

175. *See, e.g.*, David Hendricks, *Senate Erases NADBank Funds*, SAN ANTONIO EXPRESS-NEWS, Sept. 16, 1995, at 1E (noting that the U.S. Senate Appropriations Committee did not provide funding for NADBank operations).

176. *See id.* (interviewing Albert Jacquez, assistant to U.S. Representative Esteban Torres, regarding Congress's failure to fund the NADBank).

177. *See* Border Side Agreement, *supra* note 38, ch. 2, art. 2, § 4, 32 I.L.M. at 1558–59.

178. *See id.*

179. *See id.* ch. 2, art. 2, § 4(2), 32 I.L.M. at 1558.

180. *Id.* ch. 2, art. 5, § 1, 32 I.L.M. at 1563.

that the Bank initially intended to leverage capital for a period of five years.[181]

3. Article III

Article III establishes the conditions and regulations for the use of capital funds.[182] The statute's failure to clearly indicate the Bank's actual capital dedicated to environmental project financing demonstrates an inconsistency within Article III's provisions. However, the financial conditions and limitations for making grants, direct loans, and loan guarantees are clearly established for community adjustment investment purposes.[183] Financing for community adjustment is limited to 10% of a country's total amount of paid-in capital and callable shares.[184] While limitations are placed on community adjustment spending, the reasons for failing to include environmental financing capital limitations are hard to find. As mentioned above and pursuant to Article V, the Bank has the power to invest funds without specific monetary limitations.[185]

Besides questioning the use of Bank capital, many criticize the Bank's treatment of potential borrowers and beneficiaries. NADBank legislation indicates that the Bank "may make or guarantee loans to either Party [the United States or Mexico], or any agency or political subdivision thereof, and to any entity in the territory of a Party."[186] American agencies may have difficulty justifying the need for Bank funds because budgetary measures dictate the availability of funds several months, if not years, in advance.

Requiring a "political subdivision" classification to ensure financing prevents countless unincorporated towns along the U.S.-Mexico border, commonly referred to as colonias,[187] from receiving financial help. Unlike the U.S. and Mexican governments and their agencies, colonias are without the necessary resources to finance water and sewage plants.[188]

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181. *See Cooperation Commission, supra* note 157, at 2.

182. *See* Border Side Agreement, *supra* note 38, ch. 2, art. 3, 32 I.L.M. at 1559–62.

183. *See id.* ch. 2, art. 3, §§ 4–12, 32 I.L.M. at 1559–62.

184. *See id.* ch. 2, art. 3, § 4(b), 32 I.L.M. at 1559.

185. *See id.* ch. 2, art. 5, § 1(b), 32 I.L.M. at 1563.

186. *Id.* ch. 2, art. 3, § 2, 32 I.L.M. at 1559.

187. *See* Hanna, *supra* note 44, at 878–79 (defining colonias as unincorporated communities faced with third world living conditions).

188. *See* U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-96-179, INTERNATIONAL ENVIRONMENT: ENVIRONMENTAL INFRASTRUCTURE NEEDS IN THE U.S.-MEX. BORDER REGION REMAIN UNMET 11 (1996) [hereinafter GAO REPORT].

For individuals living in colonias, health and safety conditions would be significantly helped by water-improvement infrastructure projects financed by the Bank.[189]

In contrast to the inability of colonia residents to secure funds, Bank legislation authorizes lending to "entities."[190] While no statutory definition of entities is included in Chapter 3 of the statute, judging from the Bank's earliest loans, the term "entities" includes private organizations.[191] For example, a private industrial park in Matamoros, Tamaulipas was among the first to receive a financial commitment from the Bank.[192] Undoubtedly this provision, more than any other, causes one to question the governments' concerns about hazardous living conditions in communities, especially in colonias, along the U.S.-Mexico border.

The statute's ambiguities do not end with the entities provision in section 2. Article III, section 6, which addresses the rules and conditions for loans, fails to enumerate important financial criteria required to loan money.[193] First, according to section 6(a)(1), "[I]n considering a request for a loan or a guarantee, the Bank shall take into account the ability of the borrower to obtain the loan from private sources of financing on terms which, in the opinion of the Bank, are *reasonable*."[194] The statute does not explicitly mention what factors should be used to determine the reasonableness of a borrower's ability to find lenders. The language only indicates that "all pertinent factors" will be considered.[195] However, Bank materials indicate that the borrower must submit financial information as a prerequisite.[196] The Bank does not provide any guide as to how the criteria will be weighed.

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189. *See* Hanna, *supra* note 44, at 873–74 & n.12.

190. *See* Border Side Agreement, *supra* note 38, ch. 2, art. 3, § 2, 32 I.L.M. at 1559; *see also* NADBANK POLICIES, *supra* note 74, at 4 (defining an entity as a private borrower in the territory of Mexico or the United States, including corporations, financial institutions, investors, and nongovernmental organizations).

191. *See Rubin Announces First NADBank Financings in United States*, News Release RR-1394 (Dec. 2, 1996), *available in* 1996 WL 698102 (noting that one of the first two projects financed in Mexico was the Fraccionadora Industrial del Norte, S.A., an industrial park in Matamoros, Tamaulipas).

192. *See id.*

193. *See* Border Side Agreement, *supra* note 38, ch. 2, art. 3, § 6, 32 I.L.M. at 1560–61.

194. *Id.* ch. 2, art. 3, § 6(a)(1), 32 I.L.M. at 1560 (emphasis added).

195. *Id.*

196. *See* NADBANK POLICIES, *supra* note 74, at 28–29. The financial information requested includes:

Finally, Article III requires that projects be "economically/financially sound, and pay due regard to the prospects that the project will generate sufficient revenues, by user fees or otherwise, to be self-sustaining, or that funds will be available from other sources to meet debt servicing obligations."[197] This provision makes clear that the borrower must be able to pay its obligations. Although similar to an investment bank, there is no specific time period by which a

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1. A breakdown of anticipated project costs and expenditures from the initial planning phase through start-up, including interest during construction and working capital requirements, by major category.
2. A summary of the anticipated project financing plan and security package, including the proposed source, amount, currency, and terms of [the] debt, equity investments, and grants; the sources of finance in the event of project cost overruns; and a description of contingency reserves and escrow accounts. Information on the terms, security requirements, and status of financing commitments of other lenders to the projects, if applicable, should be provided.
3. Comprehensive audited annual financial reports for the last five fiscal years; draft comprehensive annual financial reports for the current fiscal year; [and the] budget for the following fiscal year.
4. An analysis of unit costs and rates by category for the last five years and projected for the next five years; and a comparative rate analysis with the other cities in the region.
5. Projected annual financial statements covering the period from project development through final maturity of the proposed Bank financing, to include balance sheet, projected collections of user fees, profit and loss, source and application of funds statements, and debt service ratios. Projections should also include a sensitivity analysis.
6. An evaluation of finance sources: equity, debt, grants; debt/bond issuance history; information on outstanding and other proposed loans and liabilities.
7. An assumption for financial projections, including but not limited to the bases for estimates of user fees or other dedicated sources of repayment; operating and administrative costs, depreciation, amortization and tax rates; and local government policy on user fees/rates.
8. Where the currency of the loan or guaranteed loan differs from the currency of project revenues, a description of the measures that will be taken (hedging or recourse arrangements) to protect the borrowers and/or the Bank loan or guaranty from exchange risk.
9. Where the Bank requires recourse to a project sponsor or guarantor, detailed financial information on the capacity of the sponsor or guarantor to meet its financial obligations must be provided, as well as a detailed description of the potential collateral.
10. A description of the principal risks and benefits of the project to the sponsors, lenders, and guarantors.
11. A description of the types of insurance coverage to be purchased for both the pre- and post-completion phases of the project.

Id.

197. Border Side Agreement, *supra* note 38, ch. 2, art. 3, § 6(b)(2), 32 I.L.M. at 1560.

borrower may gauge its ability to pay. Under the BECC's criteria for achieving sustainable development, a borrower may meet its obligations over a lengthy period. To secure financing, it is important for borrowers to have a clear understanding of all borrowing terms and conditions. The broad policies set forth in the statutory language fail in this regard. Nonetheless, this Article will clarify the provisions of the Bank's Loan and Guaranty Policies and Operational Procedures for BECC-certified projects in the following section.

B. Guaranty Policies and Operational Procedures

The Loan and Guarantee Policies and Operational Procedures established by the Bank reiterate many of the Charter provisions previously mentioned. In fact, these policies and procedures "outline the operational procedures that the Bank will use in the analysis and evaluation"[198] of environmental projects. These policies attempt to clarify any ambiguities by "[e]stablishing proper policies and procedures [that] will ensure the Bank's long-term effectiveness through appropriate loan pricing, reserve maintenance, avoidance of unnecessary costs, project transparency, and community advisory activities."[199]

1. General Provisions

The Bank's general provisions track the statutory conditions and rules as set out in the Agreement's Charter. With several exceptions, the majority of the guidelines reiterate the statutory requirements, albeit in a more specific, orderly way. Under the Bank's umbrella of loan and guarantee policies, the general provisions for making or guaranteeing a loan identify eligible borrowers,[200] transactions,[201]

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198. NADBANK POLICIES, *supra* note 74, at 2.
199. *Id.*
200. The general loan provisions for eligible borrowers provide:

> A borrower must be a creditworthy entity that conforms to the standards and criteria established by the Bank . . . . The Bank may make or guarantee loans to Governmental and Private Borrowers. A Governmental Borrower is defined as:
>
> - either Party to the Charter (the United Mexican States "Mexico" or the United States of America "U.S.");
> - any agency of Mexico or the U.S.; or
> - any political subdivision of Mexico or the U.S., including states, localities or other public governmental entities.

and projects;[202]

> A Private Borrower is defined as any other entity in the territory of Mexico or the U.S., including corporations, financial institutions, investors, and non-governmental organizations.

Id. at 3–4.

201. The general loan provisions for eligible transactions provide:

> The Charter requires that loans made or guaranteed by the Bank be for financing specific projects. The Bank is prepared to finance a portion of the capital costs of a project. Eligible capital costs will include the acquisition of land and any buildings thereon, site preparation and development, design, construction, reconstruction, rehabilitation, improvement and the acquisition of such machinery and equipment as may be deemed necessary and may include the following:
>
> a) legal, finance, and development costs;
> b) customs and other duties;
> c) interest during construction and fees;
> d) contingency or reserve funds; and
> e) other incidental costs approved by the Bank.
>
> The Bank may consider limited recourse financing, provided there is a demonstrable and reasonable assurance of repayment. Limited recourse financing refers to a credit and security structure in which the primary source of funds for repayment of a Bank loan is the revenue derived from the operation of the project. The Bank reserves the right to require limited and general guaranties from project sponsors, borrowers, equity investors, contractors, suppliers, operators or other relevant parties to guarantee technical, operational, or financial performance of a project.

Id. at 4.

202. "The Bank will only finance environmental infrastructure projects. The Charter gives preference to projects relating to water pollution, wastewater treatment, municipal solid waste and related matters." *Id.* The general characteristics of these priority sectors for Bank financing are the following:

> *Environmental infrastructure project* means a project that will prevent, control, or reduce environmental pollutants or contaminants; improve the drinking water supply; or protect flora and fauna, so as to improve human health, promote sustainable development, or contribute to a higher quality of life.
>
> *Water Pollution Project* encompasses facilities for the collection, transportation, treatment, storage and distribution of potable water from the sources of supply (groundwater or surface water) to the user. Facilities include, but are not limited to, buildings, structures, equipment and other appurtenances for: the collection of surface water or groundwater supplies, storage facilities such as natural impoundments or reservoirs; transportation of water by aqueducts, whether open channel, pipelines, or tunnels; treatment systems necessary to meet potable water standards; distribution systems to meet the requirements for domestic, commercial, industrial and fire fighting purposes, including pipe systems and networks, pumping stations, storage facilities, fire hydrants, service connections, meters and other appurtenances; storage, handling, treatment, recycling or reclamation systems for solids resulting from the treatment of water.

repayment terms;[203] application fees and expenses;[204]

> *Wastewater* is water carrying wastes from residential, commercial or industrial buildings that is a mixture of water and dissolved or suspended solids, liquids or gases.
>
> *Wastewater treatment project* encompasses facilities for the collection, conveyance, treatment and disposal of wastewater and solids derived from the treatment of such wastewater. Facilities include, but are not limited to, buildings, structures, equipment, and other appurtenances for: sewers (gravity, pressure, or vacuum); interceptors; force mains; pumping and lift stations; treatment systems for primary, secondary or tertiary treatment of wastewater necessary to meet treatment standards; industrial and commercial pretreatment; storage, handling, treatment, recycling or reclamation of solids resulting from the treatment of wastewater; and systems for the disposal of effluent or solids. A unified water system encompasses a project or projects that provide both water supply and wastewater treatment under a single plan. Such a system will include provisions for the use of recycled water.
>
> *Municipal solid waste project* encompasses facilities that are designed to collect or dispose of municipal solid waste (i.e., waste generated by households and commercial establishments, but excluding construction and hazardous wastes). A municipal solid waste project could include facilities for disposing of, recycling or recovering useful material from municipal waste.

Id. at 4–5.

203. The general loan provisions for repayment terms provide:

> Loan maturities generally will range up to 25 years, depending on individual project requirements such as affordability of the annual debt service. Grace periods for principal repayment are negotiable, and may cover the anticipated project construction and start-up phase. Term structure should be appropriate to the type of project financed and generally consistent with market practice for such projects. In no case should the total repayment term exceed the useful life of the project.
>
> Repayment of principal and payment of interest will normally be scheduled to provide level debt service over the amortization period. The Bank may modify this requirement on a case-by-case basis if the Bank determines that a different principal repayment schedule would result in a more effective and efficient use of its capital resources and, combined with other measures, would maintain or improve the prospects for repayment. An example where such a modification may arise would be financing for projects in smaller communities where gradual increases in principal payments may better reflect their long-term capacity to pay user fees.

Id. at 5–6.

204. The application fee and expenses provisions state the following:

> In making or guaranteeing a loan, the Bank shall be reimbursed for its expenses and shall receive suitable compensation for its risk. The Bank expects that allocable Bank administrative costs will be borne by its own administrative budget, while the expenses of the Bank's outside professionals will be borne by the borrowers. The following fees will be applicable to all financing operations of the Bank, including direct loans, guaranties, and co-financing operations.

third-party guarantees;[205] preferred creditor status;[206] project completion risk;[207] and currency issues.[208]

> *Application Fee*: The Bank will charge a nominal application fee, payable upon submission of the detailed proposal by the project sponsor.
>
> *Expenses*: Before the financial and other consultants begin the review of a project, and after a preliminary review by the Bank, the applicant will be required to execute an acceptance agreement with the Bank that shall include provisions for paying the expenses incurred by the Bank. The Bank will incur costs relating to processing the application and analyzing the project. In addition, for most projects, the Bank will require, either in conjunction with other lenders or for its own use, the advice of financial consultants, independent outside legal counsel, independent engineers, and insurance advisors. There may also be other costs associated with conducting proper due diligence. In line with commercial practice, the Bank will generally pass through to the project sponsors these costs. Payment of these and any other costs will be the responsibility of the project sponsors or the applicant.

Id. at 6.

205. The third-party guaranty conditions provide:

> The Bank is not required to obtain a third-party guaranty from the government, federal public institutions, or development banks for its financing operations, unless it determines that the counter-guaranty is necessary to achieve demonstrable and reasonable assurance of repayment . . . . The terms and conditions of any counter-guaranties will be specified in a counter-guaranty agreement between the Bank and the counter-guarantor.

Id.

206. The preferred creditor status provisions state the following:

> Loans by international institutions such as the Bank have been traditionally excluded from sovereign debt rescheduling and have therefore enjoyed preferred creditor status. Banks that participate in loans made by the Bank to private sector borrowers, where the Bank remains the lender of record, may share in the benefit of the preferred creditor status.
>
> The Bank will make use, as appropriate, of negative pledge and prepayment clauses in its loan agreements. Cross-default clauses will be used only in co-financing operations where the Bank has determined that the cross-default clause would encourage private sector entities to assume substantially more risk and will not adversely affect the Bank's own credit standing.

Id. at 7.

207. "The Bank must be protected against project completion risk. Where the Bank does not seek recourse to a sponsor or guarantor, the Bank may seek specific performance and completion guaranties plus other forms of support of the kind that are normal practice in limited-recourse financing." *Id.*

208. The terms relating to possible currency issues state the following:

> The Bank shall establish the currency or currencies in which payment shall be made to the Bank. All loans and guaranties must be repaid and serviced in full in the contracted currency or its equivalent in other currencies.

The provisions discussing borrower eligibility are unclear. The Bank stated that eligible borrowers must be "creditworthy" entities that conform to the Bank's particular standards, criteria, and guidelines.[209] The major problem with this requirement concerns the creditworthiness of an entity. Borrowers must be governmental borrowers or private borrowers, such as corporations, financial institutions, investors, and nongovernmental organizations;[210] however, the guidelines fail to explain a borrower's creditworthiness. A General Accounting Office (GAO) report noted that the colonias along the border will not be able to meet the high creditworthiness criteria.[211] According to the GAO report:

> The environmental infrastructure needs of Mexican communities and U.S. colonias are particularly acute because of insufficient financial and technical resources. Limited access to affordable financing continues to prevent many of these border communities from extending basic environmental infrastructure services to residents. To improve access by border communities to needed infrastructure financing, EPA and the NADBank have begun to formalize their working relationship through meetings and correspondence. Similarly, the International Boundary and Water Commission and the EPA have formally agreed to support the wastewater infrastructure planning efforts of U.S. and Mexican border communities to help them meet the BECC's certification requirements and enhance

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> If project revenues are in a currency different from the loan's contracted currency, adequate provisions shall be made against currency exchange risk. The problem of foreign exchange risk becomes particularly acute in limited recourse project financing where project revenues are in a currency different from the loan's contracted currency. The risk must be covered by some form of hedging arrangement acceptable to the Bank, or alternatively through recourse to a guarantor acceptable to the Bank.
>
> The Bank will promote the establishment of exchange risk hedging mechanisms and encourage potential borrowers to use them in order to increase the possibility of obtaining the Bank's financial support. The Bank will also encourage the development of natural hedges where feasible. Examples of natural hedges include requirements that industrial customers with earnings in the contracted currency pay in the contracted currency.

Id.

209. *See id.* at 3.
210. *See id.* at 3–4.
211. *See* GAO REPORT, *supra* note 188, at 15.

> their eligibility for financing from the NADBank. Despite these efforts, it is not certain that this financing will be affordable to communities on either side of the border.[212]

Furthermore, the report does not contain any standards for creditworthiness and makes no mention of tax receipts, state and federal government funds, or other potential sources of income for political subdivisions. Standards for creditworthy private borrowers, the Bank's preferred customers, are also lacking. Creditworthiness criteria notify a potential borrower of its ability to receive funds without wasting resources, capital, and time.

Repayment terms set out by the Bank are unclear and may harm potential borrowers. The Bank identifies the need for a term structure that is "consistent with market practice for such projects."[213] Interest rates for direct lending will represent a rate of 100–150 basis points above the yield or market rate on U.S. Treasury securities of comparable maturity plus a borrower's particular exposure element.[214] The interest rate, based on the 100–150 margin (1–1.5%), reflects the Bank's own cost of borrowing, the cost of hedging the funds over the period of project disbursements, and basic return on the Bank's capital.[215]

The Bank will also charge commitment fees estimated at three-quarters of one percent on the undisbursed balance of the direct loan.[216] Lenders will be charged for commitment fees where the Bank is making a loan guarantee.[217] A commitment fee of one-eighth of one percent will be assessed on undisbursed balances guaranteed by the Bank.[218] The actual guarantee fee of fifty basis points per year on the present value of the full amount of the guarantee will also be charged.[219] It appears that these provisions may hurt those communities that are not able to afford market-based interest rates.[220] Like the vague creditworthiness requirement, these terms may prevent communities from attempting to secure financing.

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212. *Id.* at 21.
213. NADBANK POLICIES, *supra* note 74, at 5.
214. *See* 1995 ANNUAL REPORT, *supra* note 124, at 50.
215. *See id.* at 39–40.
216. *See id.* at 50.
217. *See id.* at 41.
218. *See id.* at 51.
219. *See id.* at 50.
220. *See* GAO REPORT, *supra* note 188, at 15.

An additional problem with the Bank's general policies concerns the application fee and related expenses that must be borne by potential borrowers. The Bank's policies authorize application fees[221] ranging from US$250 when required financing totals US$1 million or less to US$2.5 thousand for projects over US$5 million and for private commercial or industrial purposes.[222] Compared to other charges, these application fees do not raise a serious burden.[223]

Among other project related costs, Bank regulations state that borrowers must bear any bank-incurred expenses for outside professionals.[224] The possible expenses for most projects will include outside financial consultants, outside legal counsel, independent engineers, and insurance advisors sought by the Bank.[225] The need for outside consultants is questionable. As stated in Bank literature, the Bank will only lend to BECC-approved projects.[226] There is no need for outside engineers when BECC engineers have already approved the project. Similarly, expenses for financial consultants—although more relevant than engineers for Bank lending purposes—should not be incurred when the Bank has already promulgated policies addressing financing. Insurance and legal expenses, on the other hand, should be grouped under the Bank's administrative costs. Other costs pertaining to "due diligence" are borne by the applicant as well. These policies exemplify the Bank's unwillingness to make community lending inexpensive, effective, and less burdensome. These outside expenses could be better used for meeting other community needs.

Finally, unlike the statutory scheme, which explicitly provides grants for community adjustment programs, the general provisions also eliminate the Bank's power to provide grants. According to the policies, "The Bank is not empowered to make grants to a project nor can it have any equity participation in a project."[227]

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221. *See* NADBANK POLICIES, *supra* note 74, at 6.
222. *See* 1995 ANNUAL REPORT, *supra* note 124, at 49.
223. *See* NADBANK POLICIES, *supra* note 74, at 6.
224. *See id.* ("Before the financial and other consultants begin the review of a project, and after a preliminary review by the Bank, the applicant will be required to execute an acceptance agreement with the Bank that shall include provisions for paying the expenses incurred by the Bank.").
225. *See id.*
226. *See id.* at 3.
227. *Id.*

C. Other Concerns

Structurally, the Bank Charter and Loan Policies do not adequately assist border communities in achieving sustainable development, a goal articulated by the Side Agreement's preamble.[228] In fact, it would be difficult to reconcile and accept the purported sustainable development-oriented Bank policies with the U.N. definition of sustainable development. Sustainable development was defined by a U.N. report as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[229] The report concluded that poverty is a major cause and effect of global environmental problems and explained that environmental degradation undermines economic growth.[230]

In addition to addressing sustainable development for the border region in NAFTA's side agreement charter, President Clinton responded to the U.N. report by creating the President's Council on Sustainable Development in June 1993.[231] In a report to the President, the Council articulated its vision: "Prosperity, fairness, and a healthy environment are interrelated elements of the human dream of a better future."[232]

Judging from the U.N. report and the current political emphasis on reducing reliance on the federal government,[233] the Bank's task of cleaning up the border and ensuring its residents long term sustainable growth will undoubtedly fail. At least with regard to the poverty stricken U.S.-Mexico border, the Clinton Administration's Bank policies stressing both market-oriented, high-interest lending, as well as the slowing of border environmental degradation and unsafe living conditions, are at odds.[234]

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228. *See* Border Side Agreement, *supra* note 38, preamble, 32 I.L.M. at 1547. The two governments acknowledged that "the border region of the United States and Mexico is experiencing environmental problems which must be addressed in order to promote sustainable development." *Id.*

229. WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE 8 (1987).

230. *See id.* at 6–7.

231. *See* Exec. Order No. 12,852, 3 C.F.R. 611 (1994).

232. PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, SUSTAINABLE AMERICA: A NEW CONSENSUS FOR PROSPERITY, OPPORTUNITY, AND A HEALTHY ENVIRONMENT FOR THE FUTURE 6 (1996).

233. *See* David A. Gantz, *The North American Development Bank and the Border Environment Cooperation Commission: A New Approach to Pollution Abatement Along the United States-Mexican Border*, 27 LAW & POL'Y INT'L BUS. 1027, 1050 (1996).

234. *See id.* at 1038.

For example, a primary concern is the Bank's interest rate. According to Bank policies, the interest rate for loans and guarantees will be between 1%–2.25% above Treasury rates.[235] Perhaps, to sophisticated investment banks, the mere 1%–2.25% interest rate would not be taken seriously if a project were financed at that cost. Reluctantly, Bank officials have come to realize that for poor border communities along the Rio Grande, the rate is too high and prevents communities from seeking Bank assistance.[236] Until recently, Managing Director Alfredo Phillips Olmedo, in response to criticism of the Bank's failure to make loans or guarantees, explained that the Bank is constrained by statutes preventing lending below market rates.[237] Although the statute prohibiting low interest rate lending can be faulted, the Bank's underlying premise of relying on private investment to finance projects is clearly flawed.[238]

With the Mexican government's spotty record of enforcing environmental statutes, it is unlikely that any investor would consider the border region an attractive investment opportunity. Based on current political trends, it is ironic and misguided that the United States and Mexican governments would have to step in and attempt to convince private investors that environmental projects along the border could be profitable. Can one assume that this purported lucrative market existed even before NAFTA?

Market-oriented theory dictates that the market for environmental projects would be found by investors rather than reliance on government courtship. To the dismay of Clinton Administration officials, the government must, at least initially, step in to attempt to remedy the current problems along the border. At one point, the original Bank plan authorized the issuance of bonds and low interest loans to border communities. The market-oriented strategy dissuaded many communities, including El Paso, which determined it could finance an infrastructure project at

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235. *See id.* at 1037–38.

236. *See NAFTA Round-Up: GAO Says Mexican Border Cleanup Lags*, N. AM. FREE TRADE & INV. REP., Aug. 15, 1996, *available in* 1996 WL 10175590 (noting that officials in El Paso have decided that cheaper funds can be attained from other sources and that officials in Brawly, California, where a water treatment plant will be funded by the Bank, are debating the amount of loans to accept).

237. *See Still a Lot of Unresolved Problems: Failure to Sort Out Lorry Issue*, LATIN AM. NEWSLS., Sept. 26, 1996, *available in* LEXIS, News Library, Lan File.

238. *See* Border Side Agreement, *supra* note 38, ch. 1, art. 1, § 1(b), 32 I.L.M. at 1548.

better rates elsewhere.[239] Cities are turning to the state public sector to finance projects. For example, a water treatment plant expansion project in Mercedes, Texas recently approved by the NADBank sought funds solely from the Bank for its initial financing. The note would then be sold to the Texas Water Development Board, which would finance the larger portion.[240]

Another major criticism of the Bank is its inability to lend directly to Mexican communities. The Mexican Constitution bars any governmental entity, including states and municipalities, with the exception of federal agencies, from transacting directly with foreigners.[241] The failure to lend directly ensures a larger bureaucracy when attempting to issue loans to Mexican communities.[242] While the Bank Charter and policies indicate that loans or guarantees will be made to any "political subdivision" of either the United States or Mexico,[243] the constitutional and political realities confirm that Mexico's National Bank of Public Works and Services will have its hand in any loans or dealings, thereby complicating financing.[244] The complications of bureaucracy, along with the Mexican communities' inexperience in planning and developing public works projects, have caused financing delays.[245] Bureaucratic infighting and BECC decisions are credited with many of the financing delays.[246] In addition, many poor communities along the border will not be willing to accept debt associated with environmental infrastructure during harsh economic times.[247]

Even NADBank financing within the United States is burdened by bureaucracy.[248] With the Mercedes, Texas project, the municipality has received engineering approval from the BECC[249] and lending approval from the Bank.[250]

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239. *Cf.* GAO REPORT, *supra* note 188, at 15 (noting officials stated that cheaper funds could be obtained from other sources).

240. Telephone Interview with Araceli Felix, Acting City Manager for Mercedes, Texas (Jan. 6, 1997).

241. *See* MEX. CONST. art. 117, § VIII.

242. *See* GAO REPORT, *supra* note 188, at 13–14.

243. *See* NADBANK POLICIES, *supra* note 74, at 3.

244. *See* GAO REPORT, *supra* note 188, at 13–14.

245. *See id.* at 13.

246. *See* Gantz, *supra* note 233, at 1044–45 (noting the reasons why the implementation process has been slow).

247. *See BECC Debates Border Cleanup Criteria, Dismisses Fears over Funding Commitments*, 18 Int'l Env't Rep. (BNA) 329 (May 3, 1995).

248. *See* Gantz, *supra* note 233, at 1045.

249. *See id.* at 1046–47 (listing the Mercedes project as one of eleven that the BECC had certified as of September 1995).

However, the Bank is unable to finance the entire project.[251] Mercedes, appearing pressured by the Bank to accept the limited lending, after a year or two, must sell the note, finance the remaining costs with the Texas Water Development Board, and undertake numerous administrative procedures.[252]

Recent criticisms have centered on Bank (and BECC) officials' departures.[253] The Bank's CEO and managing director,[254] Phillips Olmedo, resigned in February 1997,[255] and two high ranking BECC officials departed from the institution in January 1997.[256] This calls into question the ability of both institutions to fully clean up the border region.[257] Replacements for these positions were not named until May 1997.[258]

Finally, those defending the NADBank's failure to actually finance a project claim that no projects have been financed because the institution must protect itself from any nonprofit activities.[259] This argument assumes that the NADBank is a private enterprise that must assure increased annual revenues. Thus, NAFTA, rather than creating a truly environmentally friendly lending institution that provides returns to the citizens its designed to benefit, created an

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250. *See* Mark Mensheha, *Border Towns Will Benefit from $10 Million EPA Grant,* SAN ANTONIO BUS. J., Dec. 6, 1996, at 7 (reporting that the NADBank approved Mercedes' application for US$4.1 million to improve the community's water supply and waste system).

251. *See NADBank Clears $1.9 Million Loan to Mercedes*, SAN ANTONIO EXPRESS-NEWS, May 30, 1997, at 2E (stating that the NADBank finalized a US$1.9 million loan for the Mercedes project and that the loan will be combined with other sources to fund the project).

252. S*ee id.*; *see also* Joe Millman, *No Sovereignty: Along the U.S.-Mexico Border, Cities Desperately Need to Accommodate Growth,* WALL ST. J., Sept. 18, 1997, at R5 (indicating that the Mercedes project is being "funded through grants cobbled together by the NADBank and a range of U.S. agencies").

253. *See, e.g.*, Diane Lindquist, *Building Good Will: Two NAFTA Agencies Are Giving Brawley a New Water Plant*, SAN DIEGO UNION-TRIB., Feb. 16, 1997, at I1.

254. *See* 1995 ANNUAL REPORT, *supra* note 124, at 12 (identifying the managing director as the chief executive officer and legal representative of the Bank).

255. *See* Lindquist, *supra* note 253, at I1.

256. *See id.* (noting that BECC general manager and deputy general manager were forced to resign amid allegations of mismanagement).

257. *See id.*

258. *See id.*

259. *See, e.g.*, Lee, *supra* note 5 (reporting that Commerce Secretary Mickey Kantor responded to criticisms that the NADBank had failed to fund any projects by stating that the NADBank is a financial institution and is not in the business of making grants or charging reduced interest rates, and that the NADBank must be convinced that border projects can support themselves).

institution whose sole motivation is self-preservation without providing returns to the citizens it is supposed to benefit.[260]

The NADBank was created pursuant to federal authority.[261] Its main purpose was to assist poor local governments in alleviating the environmental ills[262] resulting from years of neglect and increased industrialization.[263] As Raúl Hinojosa-Ojeda had planned, the Bank was to invest originally in areas where the market-driven institutions had found no profit,[264] including environmental upgrading, infrastructure creation, community development, and improved labor productivity.[265] Hinojosa-Ojeda did not pursue the creation of the NADBank alone. In 1989 and 1990, California Assemblyman Richard Polanco introduced bills for the creation of a California-Mexico infrastructure bond authority that would finance public improvements along the border.[266] While NAFTA was debated, a proposal was discussed that would have established an environmental fund within the InterAmerican Development Bank.[267] Under this scheme, a financial institution, such as the NADBank, would borrow capital from the international markets at

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260. *Compare* Border Side Agreement, *supra* note 38, preamble, 32 I.L.M. at 1547–48 (citing that the reason for the creation of the NADBank is to provide capital for BECC efforts to "preserve, protect and enhance the environment" along the border), *and* NADBANK POLICIES, *supra* note 74, at 2 (explaining that one of the Bank's functions is to "ensure that solutions to border environmental infrastructure problems are not impeded due to a lack of access to capital"), *with* Border Side Agreement, *supra* note 38, ch. 2, art. 3, § 6, 32 I.L.M. at 1560 (requiring the Bank to take into account the ability of the borrower to obtain private funding).

261. *See supra* Part IV.

262. *See* NADBANK POLICIES, *supra* note 74, at 2.

263. *See* Hustis, *supra* note 19, at 594–95 (noting that rapid population growth in the border region has complicated environmental problems as hundreds of thousands of poor, unemployed Mexicans move to the border and establish rural communities without sewers, roads, wastewater treatment facilities, or other necessary infrastructure).

264. *See* Hinojosa-Ojeda, *supra* note 87, at 302 (noting the failure of private and governmental entities to direct investments in these areas toward sustainable development).

265. *See Border Betrayed*, *supra* note 55, at 69.

266. *See* Brad Altman, *California Legislation Seeks $150 Million Bond Financing for U.S.-Mexico Cleanup,* BOND BUYER, Apr. 14, 1993, *available in* 1993 WL 7136527; *see also* Ralph Frammolino, *Sponsor Tables Border Bonding Authority Bill; Legislature: Move Comes in Face of Opposition from San Diego Representatives Who Fear the Plan to Deal with the Border Infrastructure Could Lead to a Kind of 'Junk Bond' Crisis,* L.A. TIMES, May 31, 1990, at B1 (discussing Polanco's 1990 bill).

267. *See Bank Trust Fund Seen as One NAFTA Solution,* AM. METAL MARKET, May 26, 1993, at 5.

relatively low interest rates.[268] Finally, a Treasury report submitted to Congress, on the eve of Congressional approval of NAFTA, indicated that the Clinton Administration proposed funding for environmental projects in the form of federal, state, and local government grants, loans, and guarantees.[269] Both supporters and critics can agree that the NADBank's sole purpose, to assist communities along the border, has failed.

VI. CONCLUSION

To solve the U.S.-Mexico border region's problems of environmental degradation and lack of sustainable development, the Environmental Side Agreement's institutions must recognize that a market-oriented response furnishes only a small part of the solution. Initially, both governments must recognize that overnight solutions will not improve a region devastated for over thirty years. As originally drafted, the Bank prototype would have assisted more of the 10.5 million border residents by lending at low interest rates and issuing bonds.[270] Focus should be placed on lower lending rates, access to funds by unincorporated entities, border health problems, fewer financing requirements, and governmental grants. The Bank is premised on the market's acceptance of cleaning up the border, making a profit, and reducing government involvement. However, the capital markets have indicated that financing border infrastructure projects is unlikely to yield profits. Thus, the governments of Mexico and the United States should understand that they must initially assist border communities and corporations willing to provide environmental technology for infrastructure projects.

Achieving a true market-oriented plan, with the initial assistance of the United States and Mexico, would permit environmental corporations to take advantage of border markets. With a government subsidy, the environmental industries of both countries could maximize their resources through economies of scale, bringing prices down and eventually allowing global competition and the creation of new jobs. This was a goal of the original Bank draft.

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268. *See id.*

269. *See* Joan Pryde, *NAFTA Cleanup Plan as Filed by Treasury Makes No Provision to Ease Muni Curbs,* BOND BUYER, Nov. 5, 1993, *available in* 1993 WL 7141451 (providing language from the report).

270. *See House Panel Examines Trilateral Bank as Mechanism to Fund Infrastructure Costs*, 16 Int'l Envtl. Rep. (BNA) 558 (July 28, 1993).

Incentives to reach the Latin American infrastructure market, estimated at US$26 billion in 1994, should be implemented. Furthermore, the economic rewards achieved under the NAFTA should be recognized. According to the U.S. Department of Commerce, Texas and California stand to earn approximately US$30 billion and gain over 600 thousand jobs. Unlike the promises of cleaning the border environment, NAFTA delivered economic gains in only two years. The governments are obligated to respond by providing more money and more institutions willing to help. The EPA's US$10 million grant to assist border communities seeking funding from the NADBank[271] is one small, yet symbolic, step towards a wider recognition of current border ailments. A clean environment can be reconciled with economic growth, provided environmental industries are allowed to take advantage of emerging environmental markets. To do this, Mexico and the United States, through tax incentives or grants, must liberally finance a larger number of environmental projects at a more rapid pace.

271. *See* Mark Mensheha, *supra* note 250, at 7.