

An Innovative Twist on Free Trade and International Environmental Treaty Enforcements: Checking in on NAFTA's Seven-Year Supervision of the U.S.-Mexico Border Pollution Problems

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*We're building things now to take care of problems that have accumulated for years . . . but the growth on the border continues.*¹

A series of treaties throughout history has addressed the environmental problems along the United States-Mexico international border and has put forth differing approaches to handling cross border pollution. While each successive attempt has been a step away from the finger pointing that once occurred between Mexico and the United States, none of the past agreements have been particularly helpful in

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1. Susan Ferriss, *NAFTA Side Accord Disappoints Environmentalists: Case of Endangered Reef Off Cozumel Highlight Lack of Enforcement Power*, AUSTIN AMERICAN-STATESMAN, Aug. 2, 1998, at G5 (quoting Cyrus Reed of the Texas Center for Policy Studies).

actually implementing clean-up and change. The border communities continue to be plagued by monstrous pollution, resulting not only in harm to their ecological systems, but also in well documented health problems suffered by members of border communities. This Article compares the progress of our most recent treaty, the North American Free Trade Agreement (NAFTA)² and its environmental supplement with the previous attempts. These newest treaties implement some of the most progressive adaptations in treaty making and provisions premised on advice from scholarly critics for what is necessary to effectuate environmental change in the international arena. This Article examines the progress of these innovations in their clean-up of the United States-Mexico border area.

I. INTRODUCTION

While the border has been assaulted by all manner of pollution, via the air, soil, and water, the most visible focus has been on the waterways that cut through this arid part of the world. Most Mexican cities do not have the modern sewage treatment plants that exist in the United States.³ The rapid development and population explosions in cities such as Nuevo Laredo, Tamaulipas and Ciudad Juarez have resulted in an overflow of industrial and organic sewage into the Rio Grande.⁴ As the Rio Grande flows downstream, the consequences of this discharge and its accompanying stench flow into El Paso, Texas.

The New River crosses the border between Mexicali, Mexico, and Calexico, California, taking along with it Mexicali's largely untreated municipal and industrial sewage.⁵ In 1989, reporters described the New River's poisonous waters as, "a swirling, olive-green soup of chemicals and bacteria, reek[ing] of dead animals, industrial waste and human excrement."⁶ Not surprisingly, The California Regional Water Quality Control Board, a state body acting

2. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (pts. 1-3) and 32 I.L.M. 605 (pts. 4-8 & annexes).

3. See Nick Johnstone, *International Trade, Transfrontier Pollution, and Environmental Cooperation: A Case Study of the Mexican-American Border Region*, 35 NAT. RES. J. 33, 42 (1995). See generally Sam Howe Verhovek, *NAFTA Failing to Help Stem Pollution Along Mexican Border*, THE PLAIN DEALER, July 4, 1998, 1998 WL 4143087. (outlining the various air, water and hazardous waste pollution that continues to haunt the border despite NAFTA promises).

4. See Johnstone, *supra* note 3, at 43.

5. See *id.*

6. John Dillin, *Putrid Border River Typifies Pollution Crisis*, L.A. TIMES, Dec. 31, 1989 at A3.

under the Clean Water Act's federal authority, found alarmingly high levels of fecal coliform and other pollutants in the river.⁷

Similarly the city of Tijuana, Mexico, while currently working toward a sewage treatment facility, has long discharged sewage into the Pacific.⁸ This discharge makes its way on to California's beaches with regularity.⁹ Partly due to NAFTA's invitations to foreign countries to relocate there, Tijuana has grown exponentially, and its existing sewage treatment plants have not been able to handle the growth.¹⁰ The city's sewage system drains into the Tijuana River which flows north into the United States; high rainy seasons cause the river to overflow onto San Diego's beaches.¹¹ The river's waters, which Mexicans have described as the "black waters," pass through a federally protected saltwater estuary before emptying into the Pacific Ocean.¹²

Although much of the border pollution controversy focuses on water pollution, air pollution has recently been a hot topic. Much of the attention has been focussed on the "haze" that has descended upon Big Bend National Park in Texas, decreasing its renowned visibility by nearly sixty percent.¹³ The sulfates that combine with water vapor to form the haze are thought to blow from Mexican carbon plants, which operate without any pollution control equipment, approximately one hundred and twenty-five miles southeast of the park.¹⁴

These multiple pollution problems are only the most visible challenges confronting border communities. While less perceptible it is just as odious that the health of residents in these cities, particularly those in Mexico, has been seriously threatened by the unchecked environmental degradation.¹⁵ The Environmental Health Workgroup,

7. *See id.*

8. *See* William Booth, *San Diego Fights Mexican Sewage Pipe to Take Treated Waste to Sea*, THE RECORD, Dec. 28, 1998, at A11 (hailing a cross-border agreement which provides for the treatment, channelization, and dumping of Tijuana's waste).

9. *See id.*

10. *See id.*

11. *See id.*

12. *See* William Branigin, *Pollution Problems Grow at the U.S.-Mexican Border*, HOUS. CHRON., Oct. 29, 1989, at A1.

13. *See* Randy Lee Loftis, *U.S., Mexico End Impasse Over Air Pollution Research: Deal Clears Way for Border Study Focussing on Industrial Plants*, DALLAS MORNING NEWS, Nov. 17, 1998, at 1A (describing an agreement to begin scientific research to pinpoint the source of Big Bend's haze).

14. *See id.*

15. *See* U.S. Environmental Protection Agency et al., U.S.-Mexico Border XXI Program, UNITED-STATES BORDER ENVIRONMENTAL INDICATORS, 1997, at 10 [hereinafter BORDER ENVIRONMENTAL INDICATORS].

a joint effort of the United States and Mexico formed to address the health needs of border communities, has listed several diseases that are caused largely by the contamination of air, water and soil in the region.¹⁶ The known problems listed by this Workgroup include asthma, tuberculosis, elevated blood lead levels in children, multiple myeloma (a form of bone-marrow cancer), systemic lupus erythematosus (an autoimmune disorder), hepatitis A, and infectious gastrointestinal diseases such as shigellosis and amebiosis.¹⁷ In addition to these documented health alerts it was just five years ago when several industrial plants in Mexico settled lawsuits, in which it was alleged their pollution was the cause of the birth defect, anencephaly, among babies born to eight families in Texas.¹⁸ While these lawsuits do not in themselves provide proof of causation, the eagerness of the defendants to settle does provoke scrutiny.

These larger medical problems in and around the border are highlighted by the tragedies of swimmers whose exposure to fecal matter while in the Rio Grande and off the San Diego coast has caused severe illness and death.¹⁹ Faced with these devastating medical problems, it is little wonder that border residents and environmental advocacy groups are fighting mad. The attention that these life and death consequences bring to the U.S.-Mexico Border necessitates new solutions to an old international dispute.

II. THE FAILURE OF PAST INTERNATIONAL LAW ATTEMPTS TO SOLVE BORDER POLLUTION PROBLEMS

Before environmental pollution was a hot topic, Mexico and the United States shared the water supply of the Colorado River and the Rio Grande.²⁰ Concerns over resource allocation, and subsequent water quality degradation, were manifested in the 1889 agreement

16. See *id.* at 18.

17. See *id.*

18. See Elizabeth A. Ellis, *Bordering on Disaster: A New Attempt to Control the Transboundary Region*, 30 VAL. U. L. REV. 621, 622 n.10 (1996); see also Michael A. Fallek, *Trouble on the U.S.-Mexico Border: The Mysterious Anencephaly Outbreak*, 31 TEX. INT'L L.J. 287, 289-94 & n.32 (1996).

19. See Ellis, *supra* note 18, at 632-33 & nn.83-84 (describing the death of a boy in Laredo, Texas that was due to an amoebic brain infection acquired after swimming in the Rio Grande and the similar near death experience of two surfers suffering from inner ear infections after surfing the San Diego shores.)

20. See Mark A. Sinclair, *The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problems of the Borderlands*, 19 CORNELL INT'L L.J. 87, 91-92 (Winter 1986).

that set up the International Boundary Commission.²¹ As environmental awareness grew, so did the recognition of the need for increased international cooperation on the border. This need was addressed by the Water Utilization Treaty (Water Treaty or Treaty) in 1944, which superseded the prior agreement and authorized the International Boundary and Water Commission (IBWC) to consider the preservation of water quality in conjunction with conservation concerns.²² This genesis environmental cooperation agreement acknowledged the importance of border pollution problems and empowered the IBWC to deal with water sanitation issues.²³ However, when faced with growing development in Mexico and worsening pollution throughout the border region, the treaty proved inadequate. Instead of dealing with all pollution, it focused on developing sewage treatment facilities and was even skittish on those projects.²⁴

IBWC, as created by the Water Treaty, is composed of two National Sections, and each country placed their respective sections under the control of their foreign offices.²⁵ This decision limited the IBWC by forcing all resolutions through time consuming diplomatic channels.²⁶ The Treaty's effectiveness was further circumscribed by IBWC's limited jurisdiction to surface waters in close proximity to the border.²⁷ More sophisticated pollution violations, such as air pollution, toxic dumping and groundwater contamination, remained unchecked by the IBWC.²⁸ Most of the flaws in the Water Treaty were due to the inability of international law to effectively address environmental issues. It should also be noted that in the year of its passage, knowledge of environmental conservation was limited and IBWC's scope became dated. Notwithstanding the Treaty's defects, the sanitation and sewage progress it made has contributed to a better border environment.

21. See Louann C. Troutman, *The Border XXI Program: Promoting Cooperation and Communication to Improve the United States-Mexico Border Environment*, 3 ENVTL. L. 939, 940-42 (1997).

22. Treaty Relation to the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, 59 Stat. 1219.

23. See Sinclair, *supra* note 20, at 109-111; see also Johnstone, *supra* note 3, at 56 ("Originally signed in 1944 the binational IBWC was designed to deal with sanitation and sewage issues in the border region."). *Id.*

24. See Sinclair, *supra* note 20, at 112-13.

25. See *id.* at 114.

26. See *id.*

27. See *id.*

28. See *id.*

While there were informal attempts to rectify the Water Treaty's flaws, through international anomalies such as the 1978 Memorandum of Understanding (MOU)²⁹ executed between the EPA and its then-Mexican Counterpart, the Subsecretariat of Environmental Improvement of the Ministry of Health, ultimately a new agreement had to be executed.³⁰ In 1983, Mexico and the United States executed the Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area (the La Paz Agreement).³¹ This new agreement endeavored to cure past failures by "establish[ing] formal methods for both countries to work cooperatively on the border environment."³² Although most of the agreement is general in nature, specific goals were addressed through supplemental annexes.³³ The detail of these annexes intended to harmonize environmental standards between the two countries and to address the myriad of pollution problems with specific solutions.³⁴ Before NAFTA, the La Paz Agreement was arguably the most significant environmental agreement affecting the border, but it suffered from insufficient

29. Memorandum of Understanding between the Subsecretariat for Environmental Improvement of Mexico and the Environmental Protection Agency of the United States for the Cooperation on Environmental Problems and Transboundary Problems, June 14-19, 1978, U.S.-Mex., 30 U.S.T. 1576. The MOU committed the two nations to "a cooperative effort to resolve the environmental problems of mutual concern in border area." *Id.* It also established parallel projects such as pollution abatement and control programs, mutual review of national environmental policies and strategies, and data gathering and exchange of information. *Id.* at 1576-77.

30. See Luis R. Vera-Morales, *Dumping in the International Backyard: Exportation of Hazardous Wastes to Mexico*, 7 TUL. ENVTL. L.J. 353 (1993).

31. Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, 22 I.L.M. 1025 (1983) [hereinafter La Paz Agreement].

32. U.S. Environmental Protection Agency, Office of International Activities, *EPA's Work on the U.S.-Mexico Border* (visited Jan. 14, 1999) <<http://www.epa.gov/oiamount/mex.1.htm>>; see also La Paz Agreement, *supra* note 31, art. 6.

33. See Ellis, *supra* note 18, at 641. The five annexes are: Annex I-Agreement of Cooperation Between the United States of America and the United Mexican States for Solution of the Border Sanitation Problem at San Diego, California-Tijuana, Baja California July 18, 1985, U.S.-Mex., 26 I.L.M. 18 (1987); Annex II-Agreement of Cooperation Between the United States of America and the United Mexican States Regarding Pollution of the Environment Along the Island International Boundary by Discharges of Hazardous Substances, July 18, 1985, U.S.-Mex., 26 I.L.M. 19 (1987); Annex III-Agreement of Cooperation Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances, Nov. 12, 1986, U.S.-Mex., 26 I.L.M. 25 (1987); Annex IV-Agreement of Cooperation Between the United States of America and the United Mexican States Regarding Transboundary Air Pollution Caused by Copper Smelters Along Their Common Border, Jan. 29, 1987, U.S.-Mex., 26 I.L.M. 33 (1987); Annex V-Agreement of Cooperation Regarding International Transport of Urban Air Pollution, Oct. 3, 1989, U.S.-Mex., 29 I.L.M. 29 (1990).

34. See Ellis, *supra* note 18, at 642-43.

funding and drafting problems that allowed either country to opt-out when standards proved “too taxing.”³⁵

The La Paz Agreement is still in effect today, but is supplemented by its progeny, the Integrated Environmental Plan for the U.S.-Mexico Border Area (the Border Plan), and NAFTA’s environmental provisions.³⁶ The Border Plan attempts to translate the esoteric ideals of the La Paz Agreement into reality. NAFTA was in the negotiation stage prior to the Border Plan’s creation, and environmentalists and scholars alike lodged heavy criticism against NAFTA’s environmental consequences.³⁷ President Bush launched the Border Plan in an attempt to quiet these protests and ease the passage of NAFTA.³⁸ The Border Plan established programs to focus on specific environmental concerns that plagued the area.³⁹ It also sought to rectify problems in the La Paz Agreement by encouraging cross-border communication and by identifying significant pollution sources to target regulations.⁴⁰

III. COMMENTATORS HAVE ATTRIBUTED THE FAILURE OF PAST AGREEMENTS TO ECONOMIC CONDITIONS AND INEFFECTIVE COMMUNICATION

As is often the case with broad-reaching international agreements, the La Paz Agreement and the Water Treaty failed to account for the reality of national conditions and limitations. During the periods in which they operated, Mexico was understandably focused on the governmental role of encouraging economic development.⁴¹ The effects of the Bracero Program, enacted during World War II to allow Mexican laborers to work seasonal agricultural jobs in the United States, and its subsequent revocation created a border community plagued with poverty and unemployment.⁴² Since Mexico’s overriding border policy was to help its nationals achieve some level of economic stability, it initiated the Border

35. See Fallek, *supra* note 18, at 310; see also La Paz Agreement, *supra* note 31, arts. 2, 18.

36. 32 I.L.M. 1480 (1994) (First Stage, 1992-1994)(1991) *microformed* on EP1.2 (U.S. Environmental Protection Agency).

37. See Ellis, *supra* note 18, at 654-55.

38. See *id.*

39. See *id.* at 646-47.

40. See *id.* at 647-48.

41. See Sinclair, *supra* note 20, at 103. Poor housing, nutrition, and unemployment are problems that can be solved by economic development and the health of the environment had to come second to the survival of Mexican nationals around the border. See *id.*

42. See Ellis, *supra* note 18, at 628.

Industrialization Program in 1965 to attract foreign businesses and jobs to the area.⁴³ This program far-exceeded its modest goals and led to an exponential growth in industry and population along Mexico's border.⁴⁴ The industries that located to Mexico as a result of this program are known as maquiladoras.⁴⁵ In return for bringing jobs to the area, maquiladoras obtain tax breaks on trade across the border.⁴⁶ Many believe that the rapid growth of maquiladoras helped cripple the newborn international environmental agreements along the border, which were unable to grapple with the ever-increasing pollution produced in the borderland.⁴⁷

Adding to these socioeconomic hurdles were the underlying political tensions between the United States and Mexico.⁴⁸ After the Mexican Revolution of 1910, the country reviled against foreign controls and manipulation of its sovereign status.⁴⁹ This history, coupled with the United States' bad blood in Mexico's history, made international relations quite tense and unproductive. The two sovereigns needed a new approach to mitigate their unsolved problems and it was in NAFTA that citizens and environmentalists saw either a window or a wall.

IV. NAFTA'S SUPPLEMENTAL COMMISSION FOR ENVIRONMENTAL COOPERATION

When NAFTA was ready to be signed, environmentalists were demanding that the environment be accounted for in the face of heightened development.⁵⁰ NAFTA's original environmental provisions were weaker than the Water Treaty or the La Paz

43. See *id.* at 629.

44. See BORDER ENVIRONMENTAL INDICATORS, *supra* note 15, at 4-5. "Population growth on both sides of the border has been noticeably rapid, growing far faster than that of the population as a whole in either country. In the border area of Mexico, the growth rate is 3 percent. In the U.S. border area, the growth rate is 2.7 percent." *Id.* at 4 (discussing the rapid increase of maquiladoras from the 1960s to the present).

45. See *id.* at 5.

46. See *id.*

47. See Johnstone, *supra* note 3, at 55.

48. See Sinclair, *supra* note 20, at 108; see also Elia A. Pirozzi, *Resolution of Environmental Disputes in the United States-Mexico Border Region and the Departure from the Status Quo*, 12 J. ENVTL. L. & LITIG. 371 (1997).

49. See Brandon W. Freeman, *An Overview of Foreign Direct Investment in Mexico*, 3-AUT. NAFTA: L. & BUS. REV. AM 123, 123 (Autumn 1997) (citing Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259, 279 (1994)).

50. See, e.g., David G. Schiller, *Great Expectations: The North American Commission on Environmental Cooperation Review of the Cozumel Pier Submission*, 28 U. MIAMI INTER-AM. L. REV. 437, 439-40 (1997).

Agreement. Environmentalists as well as border residents realized that if these agreements had done little to help their plight, NAFTA would provide even less relief.⁵¹ NAFTA's supplemental environmental agreement (the Side Agreement) was added as a result of direct pressure from U.S. Courts and environmentalists.⁵² A federal district judge, Judge Charles Richey, had ruled that an environmental impact statement should accompany NAFTA prior to its enactment.⁵³ While the Court of Appeals later vacated this opinion due to concerns with standing, the lower court ruling caught the attention of the oval office.⁵⁴ Bush signed the Border Plan in an attempt to silence these cries, but NAFTA's prospects for increased development and industry still threatened to dwarf environmental conservation concerns.⁵⁵ Many commentators accused President Bush of executing an agreement that was merely symbolic and that did nothing to improve international relations when it came to environmental matters.⁵⁶ This criticism came largely from analysis of NAFTA's own language which, before the Side Agreement, clearly subordinated pollution regulations to trade concerns.⁵⁷ Prior to the supplemental environmental provisions, NAFTA contained general language of treaty interpretation in Articles 2001-2022.⁵⁸ The parties to the NAFTA agreed to continue to enforce all existing environmental provisions and created a Committee to promote cooperation and upward harmonization of existing standards.⁵⁹ Despite these token concessions, NAFTA enforcement suffered from standing problems,

51. See Ellis, *supra* note 18, at 654-55 (discussing the "well-founded" concern at the border of the environmental effects of NAFTA).

52. See CLYDE HUFBAUER & JEFFREY J. SCHOTT, *NAFTA: AN ASSESSMENT* 159 (Revised Edition 1993); North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480.

53. See HUFBAUER & SCHOTT, *supra* note 52, at 159; see also Martin Coleman, *Environmental Barriers to Trade and European Community Law*, at 133, in *ECONOMIC REGULATION AND ECONOMIC GROWTH* (Boyle ed. 1994).

54. See *id.*; *Public Citizen v. Office of the United States Trade Representative*, 822 F. Supp. 21 (D.D.C.), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993) (holding that NAFTA required an Environmental Impact Statement in the Court of First Instance but reversing later). *But c.f.* *Public Citizen v. Office of the United States Trade Representatives*, 970 F.2d 916 (1992).

55. See Ellis, *supra* note 18, at 655 ("Created by the Bush administration, the Border Plan was intended to negate any criticism directed towards NAFTA's omission of environmental provisions.").

56. See *id.* ("The existence of this supplemental document did very little to suppress criticism or concern, especially since the Border Plan itself is ineffective in its attempts to control the border environment.").

57. See Pirozzi, *supra* note 48, at 374-75.

58. See NAFTA, *supra* note 2, arts. 2001-2022 and annexes, 2001-2004, 32 I.L.M. at 693-699.

59. See Pirozzi, *supra* note 48, at 375.

as NAFTA allowed only signatory parties to challenge a failure to enforce environmental laws.⁶⁰ This accessibility problem was accentuated by the political composition of NAFTA's dispute panel and the confidentiality that panel deliberations enjoyed under the treaty.⁶¹ It was Article 712.1, however, that troubled environmental advocates most. Its provisions stated that NAFTA parties have the right to adopt measures to protect "human, animal or plant life" so long as those measures are applied "only to the extent necessary to achieve the appropriate level of protection taking into account technical and economic feasibility."⁶² Commentators read this provision to mean that free trade and development would in itself trump environmental standards.⁶³ NAFTA was thought to allow further degradation of the environment and provide grounds for a refusal to enforce the standards already in place.⁶⁴ This fear was premised on the phrase "to the extent necessary" which had been interpreted in certain international dispute resolution panels as the least trade restrictive environmental measure.⁶⁵

Many anticipated that NAFTA would create a boom in economy thereby adding new sources of pollution. Thus while NAFTA stated it was "inappropriate" to tailor environmental standards or lower existing standards to attract business, it provided no remedy for injured nonsignatory parties if a violation occurred.⁶⁶ The little that was written in NAFTA regarding the environment was of a general nature.⁶⁷ This failure to address the specifics of remediation issues provided an easy escape for signatory countries to avoid compliance with NAFTA's environmental standards.⁶⁸

President-elect Bill Clinton seized upon these flaws in his campaign, and promised to execute supplemental agreements to NAFTA that would strengthen its environmental protections.⁶⁹ He kept this campaign promise to the American people and, bolstered by congressional approval, worked to supplement NAFTA. The Side Agreement was signed in September of 1993, creating the

60. *See id.* at 375-76.

61. *See id.*

62. *See* GARY CLYDE HUFBAUER & JEFFREY J. SCOTT, *NAFTA: AN ASSESSMENT* 93 (Revised Edition 1993) (quoting David Wirth, statement before the House Committee on Science, Space and Technology, September 30, 1992).

63. *See id.* at 93-94.

64. *See id.*

65. *See id.*

66. *See id.* at 148.

67. *See id.*

68. *See id.* at 93-94.

69. *See id.*

Commission for Environmental Cooperation (CEC).⁷⁰ The CEC is comprised of “top environmental authorit[ies] in each signatory country, a secretariat, and a public advisory committee.”⁷¹ The CEC considers submissions from individual or nongovernmental groups that allege one of the treaty parties is in noncompliance and then issues a report.⁷² This complaint process is tailored to correct the lack of accessibility nongovernmental parties suffered in the NAFTA dispute process.⁷³ In addition, the United States and Mexico signed an agreement which set up the Border Environment Cooperation Commission (BECC) and the North American Development Bank (NADBank).⁷⁴ The BECC coordinates state and local government environmental projects and NADBank finds financing.⁷⁵ Finally, the Clinton Administration worked to improve NAFTA’s lack of public accountability by opening the debate of BECC meetings to the public eye.⁷⁶

Border XXI is the latest planning mechanism created under the La Paz and the Side Agreements. “Border XXI emphasizes public participation and strengthened cooperation with state and local agencies to achieve sustainable development along the border.”⁷⁷ The program lists as its central strategies “public involvement, decentralization of environmental management through state and local capacity building, and improved communication and cooperation among federal, state and local government agencies.”⁷⁸ The strategies are carried out by nine binational workgroups for “Natural Resources, Water, Environmental Health, Air, Hazardous and Solid Waste, Contingency Planning and Emergency Response, Environmental Information Resources, Pollution Prevention, and Cooperative Enforcement and Compliance.”⁷⁹ NAFTA carries forward the specificity of the La Paz Agreement into a cooperative framework

70. See North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480.

71. See Fallek, *supra* note 18, at 305.

72. See *id.*

73. See *id.*

74. See Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 16, 1993, U.S.-Mex., 32 I.L.M. 1545 (1993) [hereinafter BECC-NADBank Agreement].

75. See *id.*

76. See Pirozzi, *supra* note 48, at 375.

77. U.S. Environmental Protection Agency, *supra* note 32.

78. U.S. Environmental Protection Agency, U.S.-Mexico Border XXI/Frontería XXI, *Environmental Issues & Problems* (visited Jan. 29, 1999) <<http://www.epa.gov/usmexicoborder.ef.htm>>.

79. *Id.*

with the hope that better communication will end the paralysis of prior treaty attempts.

V. HOW IS NAFTA RESPONDING TO REPAIR PAST TREATY FAILURES?

The BECC's integration of economic development, environmental concerns and other community quality of life issues, makes it a unique institution.⁸⁰ Policy commentators have noted that this approach to border environmental problems is entirely new to international treaty making: it takes into consideration past failures brought on by differing national goals and bureaucratic stalemate.⁸¹ While the BECC's youth makes it difficult to assess its success, the open communication it has fostered allows for optimism.⁸²

The Side Agreement's focus on sustainable development as a contextualized environmentalism is a response to the criticisms of international law commentators who recognized the problems contained in the previous treaties.⁸³ The limitation on the detached scientific approach to handling the environment has been noted in Brazil, China, Indonesia and Mexico, where developed countries have urged developing economies to be responsive to pollution control priorities not shared by them.⁸⁴ Diplomacy seemed to necessitate that developed countries make a concession by opening their markets, forgiving debt, providing access to technologies, or ending the drain of capital in return for these proposed environmental regulations.⁸⁵ President Clinton's suggestion of the Side Agreement was a genesis attempt to impose environmental provisos on industries that received the benefits of free trade.⁸⁶

Theorists base global environmental solutions in both national economic positions and scientific realities.⁸⁷ Environmental challenges, which impact on a global scale, have created the need for a dispute resolution process whereby the "information and analysis that informs . . . decisions" and the politics of "arriving at decisions as

80. See Leonand Milich & Robert G. Varady, *Managing Transboundary Resources: Lessons from River-Basis Accords*, 40 ENVTL. 8, 11-12 (Oct. 11, 1998).

81. See *id.*

82. See *id.* at 13.

83. See *id.* at 11-13.

84. See LAWRENCE E. SUSSKIND, ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS 90 (1994).

85. See *id.*

86. See *id.* at 96.

87. See e.g., LEE A. KIMBALL, TREATY IMPLEMENTATION: SCIENTIFIC AND TECHNICAL ADVICE ENTERS A NEW STAGE 7 (1996).

to how societies will respond” are becoming one inquiry.⁸⁸ On the international level of environmental problem-solving, the cultural concerns of those communities affected by pollution and the tension between varying national priorities exacerbates this commingling.⁸⁹ The world community’s recent trend toward rapid demographic and technological change alters scientific assumptions and formalistic policy assumptions with marked speed.⁹⁰ “The growth in membership of the international community is directly responsible for the shift toward sustainable development,” the need to find the “social and economic roots of environmental problems,” and the belief that scientific evidence must be examined through a critical socioeconomic lens.⁹¹

During the 1992 United Nations Conference and Development, scientific presentations were challenged with demands for more emphasis on sustainable development. One participant stated, “[t]he developing countries in this world demand equities in developmental issues as we talk about environmental global protection.”⁹² The challenges that border environmental problems present often create fresh solutions in the realm of international law.⁹³ “[I]nternational decision-making rests on balancing well-defined national positions . . . it is a continuing process of discovery and adjustment, particularly in the field of environmental management.”⁹⁴

New approaches to present international environmental problems, such as NAFTA’s Side Agreement and Border XXI, aspire to integrate scientific expertise and socioeconomic realities to produce effective solutions. “Treating pollution as an inevitable byproduct is a backward concept in a competitive world. The time has come to emphasize the production process itself, use energy and materials more efficiently and reduce the quantity and toxicity of wastes before they are generated.”⁹⁵ Current suggestions, which have ranged from creating a global counterpart of the EPA to executing conventions that require member states to open their courts to private parties seeking relief for environmental noncompliance, appear to provide a solution

88. *Id.*

89. *See id.*

90. *See id.* at 7-8.

91. *Id.* at 8.

92. Michael Deland, *Opening Address: Global Stewardship and the New World Order*, in *STANDING COMM. ENVTL. L., ABA, THE ROLE OF LAW IN THE 1992 UNITED NATIONS CONFERENCE ON ENV’T AND DEV.* 4 (1992).

93. *See id.* at 7, ELLIOT RICHARDSON, KEYNOTE PRESENTATION.

94. *See KIMBALL, supra* note 87, at 7.

95. Deland, *supra* note 92, at 3.

to the world's environmental dilemmas; however, implementation of these suggestions is problematic.⁹⁶ These proposed solutions force states to bestow unprecedented power upon an international body, making sovereign states hesitant to submit to such an agreement.⁹⁷ The realistic suggestions, as opposed to the former, involve more cooperative and flexible agreements, offering incentives to all members and representing a "rolling process of intermediate self-adjusting agreements that respond quickly to scientific information."⁹⁸

VI. HOW HAS NAFTA'S SIDE AGREEMENT ACCOMPLISHED THESE GOALS?

One of the most successful achievements of the Side Agreement and Border XXI has been the improvement in communication between Mexico and the United States and in public participation. The BECC has a board of directors consisting of the administrators from the U.S. Environmental Protection Agency and its Mexican counterpart, the Secretariat of Environment, Natural Resources and Fisheries.⁹⁹ Last year, other members were added, including people affiliated with private organizations and state or local governments.¹⁰⁰

On the public communication front, the BECC receives input and complaints from border communities and environmental groups. "The Environmental Information Resources Workgroup is addressing the need for increased public access to a wide variety of information on Border XXI through the Internet, Border XXI repositories, and the U.S.-Mexico Border toll-free telephone line."¹⁰¹ Adding to this open policy of communication is the EcoWeb project, expected to be completed in early 1999.¹⁰² EcoWeb will "include a comprehensive inventory of existing accessible environmental data and information and a directory with descriptions of projects and points of contact at Federal, state, local, and international agencies, and other sectors involved in border environmental activities."¹⁰³ Educational programs

96. See *id.* at 7, ELLIOT RICHARDSON, KEYNOTE PRESENTATION, *International Environmental Negotiations: The Legal Framework*, in STANDING COMM. ENVTL. L. ABA, THE ROLE OF LAW IN THE 1992 UNITED NATIONS CONFERENCE ON ENV'T AND DEV. 4 (1992).

97. See *id.* at 8.

98. Deland, *supra* note 92, at 4 (quoting Jessica Tuchman Matthews, *Redefining Security*, in FOREIGN AFFAIRS, Vol. 68, No. 62, 162-77 (Spring 1989)).

99. See Milich & Varady, *supra* note 80, at 12.

100. See *id.*

101. BORDER ENVIRONMENTAL INDICATORS, *supra* note 15, at 20. For an up to date status report on specific projects which are still in process as this article goes to print, call the Border XXI hotline at 1-800-334-0741.

102. See *id.*

103. *Id.*

in and around the border area will supplement these outreach attempts.¹⁰⁴ Another avenue for public input exists through BECCnet, an Internet discussion group composed of subscribers from academia, political officials, concerned citizens, community groups, and the private sector.¹⁰⁵ One instance typifying BECC's commitment to these informational tools was the rescheduling of a meeting due to e-mail protests which complained that BECC was not following its own guidelines.¹⁰⁶ BECCnet has influenced decision making at least six times in the past four years.¹⁰⁷

Repair and installation of waste water treatment systems is currently under way throughout much of the border, courtesy of BECC. A status report in 1997 claimed that eleven short-term drinking water, sewer and wastewater treatment projects were approved and their construction initiated under the program's direction.¹⁰⁸ The rehabilitation of water lines in the city of Nogales, Sonora which currently leak forty percent of the water they carry, is currently under way.¹⁰⁹ This project expects to benefit 215,000 residents.¹¹⁰ The Industrial Park in Matamoros, Tamaulipas, Mexico, will be treating its municipal wastewater, generated by its more than 22,000 employees, when construction is complete.¹¹¹ This one million dollar project received financing approval through NAFTA's NADBank and includes a rare occurrence: the development of a fifty thousand dollar community investment project.¹¹² Another innovative project is the on-site self-help loan project underway in the Colonias of El Paso County, Texas.¹¹³ This project will provide no-interest loans to help 180 colonia families install septic tanks and treat their

104. *See id.* at 21.

105. *See* Milich & Varady, *supra* note 80, at 12.

106. *See id.*

107. *See id.*

When the commission failed to adhere to self-imposed guidelines for a forthcoming meeting, for instance, email protests were so numerous that the directors rescheduled the meeting. Similarly, at another meeting attended by about 200 people, the chairman gavelled the proceedings closed before allowing public comment; the cascade of protests on BECCnet led to a public apology and a binding modification of the procedures for such comment.

Id.

108. *See* Border Environmental Cooperation Commission Project Certification as of December 3, 1998.

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

household sewage.¹¹⁴ It was sponsored, not by NADBank, but through El Paso Interreligious Sponsoring Organization and the University of Texas at El Paso.¹¹⁵ This reflects how BECC is opening the political process to creative solutions and community involvement.

Progress has also been made with regard to the air pollution that clouds visibility at Big Bend National Park in Texas.¹¹⁶ The controversy over the Big Bend haze, complete with finger pointing and an international diplomatic stalemate, has finally been addressed with the agreement to release scientific data and to submit to a new study that officials hope will identify industrial facilities in both countries whose pollution contributes to Big Bend haze.¹¹⁷

The South Bay Ocean Outfall is a long-standing project springing from an agreement in 1990 and slated for immediate operation.¹¹⁸ It will come to fruition during the governance of NAFTA's Side Agreement but has been ongoing throughout nearly a decade of differing international agreements.¹¹⁹ This project is colloquially known as the "Big Pipe" due to its 3.6-mile tunnel underneath the ocean floor that will discharge Mexico's treated industrial waste three miles offshore into the Pacific.¹²⁰ This "miracle of engineering" was constructed with a drilling mole the size of a locomotive and identical to that which created the Channel Tunnel between England and France.¹²¹ "The sewage pipe is 11 feet wide, runs 200 feet beneath the ocean floor in some sections, crosses 14 fault zones, and was hardened to withstand an earthquake measuring 7.5 on the Richter scale."¹²² The construction of this one hundred and sixty million dollar pipe hopes to finally divert Tijuana's waste away from San Diego's shores.¹²³ It was commissioned in 1990, before NAFTA and the Side Agreement came into effect, and involved a cross-border agreement between the City of San Diego, the EPA and the IBWC to construct an international wastewater-treatment plant, the first of its kind in Mexico.¹²⁴

114. *See id.*

115. *See id.*

116. *See* Loftis, *supra* note 13, at 1A, 8A.

117. *See id.* at 1A.

118. *See* EPA No. 160-R-96-004, U.S.-MEXICO BORDER XXI PROGRAM-1996 IMPLEMENTATION PLANS (October 1996).

119. *See* Booth, *supra* note 8, at A11.

120. *See id.*

121. *See id.*

122. *Id.*

123. *See id.*

124. *See id.*

While the completion of the Big Pipe is a source of pride for border administrators of international environmental programs, California fears that Mexico's sewage treatment facility will not sufficiently clean the sewage discharged from Big Pipe.¹²⁵ The plant slated to handle this discharge was the first of its kind in the country and was constructed under the government of the beloved Miguel de la Madrid.¹²⁶ "The Mexicans are very proud of what they've done," said one official, "but it's not up to the standards we have here. It [is] a touchy issue."¹²⁷ The plant, which treats Tijuana sewage, does not meet U.S. government standards and consistently fails tests for acute toxicity (meaning its water output would kill aquatic life).¹²⁸ A recently proposed upgrade of the border treatment plant experienced delay due to disagreement between IBWC and the EPA as to which secondary treatment method would be best.¹²⁹

Although border administrators hail Big Pipe as a success of international border commissions and treaties, in reality the project points to how ineffective the old systems of the La Paz Agreement and the Water Treaty were without the Side Agreement. The pollution problem was apparent back in 1990, but the cumbersome negotiation structures of La Paz and the Water Treaty made funding challenging and practical solutions difficult. The raw sewage on California's shores represents a highly visible problem and attracts a great deal of media attention, yet the area residents have been waiting almost a decade for plan fruition.

Among the most visible failures of NAFTA is the pier built in Cozumel, Quintana Roo, Mexico, that endangers the Paradise Reef. Environmentalists fought against the construction of the pier because they believed that visiting ships would break and eventually destroy the protected reef, a valuable and marvelous natural resource.¹³⁰ These environmentalists petitioned the BECC and argued that Mexico was violating or ignoring its own environmental laws; BECC subsequently issued a report in agreement with their arguments.¹³¹ Mexico's Secretariat responded to these charges by raising procedural

125. See SAN DIEGO SOURCE, Sewage From Mexico to be Dumped Off California Coast, Oct. 15, 1998 (visited Jan. 30, 1999) <<http://www.sddt.com/files/librarywire/98/10/15cg.html>>.

126. See Branigin, *supra* note 12, at A1.

127. *Id.*

128. See SAN DIEGO SOURCE, *supra* note 125.

129. See *id.*

130. See Ferriss, *supra* note 1, at G5.

131. See *id.*

issues.¹³² The failure to stop construction has been highlighted as a NAFTA failure, pointing to BECC's inability to enforce its findings.¹³³

VII. WHAT DO BORDER COMMUNITIES THINK OF NAFTA'S SUCCESS ON ENVIRONMENTAL ISSUES?

Community activists and border residents remain unimpressed with the Side Agreement and its progress. Critics point to the fact that while NADBank lists over twenty projects for which it has helped to secure financing, not a single water or sewage treatment plant has been built under its financial wing.¹³⁴ The Nuevo Laredo plant was the exception.¹³⁵ The Nuevo Laredo, Tamaulipas plant, which was inaugurated in 1996, was cited by President Clinton as a NAFTA success story but investigators later discovered it is not properly connected to the growing communities in the area.¹³⁶ The repairs are expected to cost millions of dollars and, in the meantime, border residents continue to see raw sewage pollute the Rio Grande.¹³⁷

Further criticism is directed towards NADBank because its concept was based on luring private capital to Mexico for infrastructure projects that in the United States would have been financed with government money.¹³⁸ This position is bolstered by the fact that EPA has supplemented the NADBank loan program with one hundred and seventy million dollars in grants supplied with U.S. tax dollars.¹³⁹ Upon questioning from reporters regarding NADBank's financing problems, NADBank director Victor Miramontes commented that "[w]ithout grants, this system doesn't work."¹⁴⁰

Border communities also find fault with the BECC's lack of enforcement power. The citizens quickly learned that BECC has no power to take sides on petitioned complaints, but merely issues factual reports which are intended to illuminate the lack of

132. See Schiller, *supra* note 50, at 460. The BECC relays its opinions on the complaints it receives to the Environmental Agencies within the offending country. In response to this particular situation Mexico's Secretariat replied, by way of defense, that the internal national remedies had not been exhausted prior to the BECC complaint. See *id.* The substantive breach of environmental law in Cozumel was, therefore, not addressed by the Mexican agency.

133. See Ferriss, *supra* note 1, at 65.

134. See *id.* ("[A]rguing that Mexican laws had been ignored or violated in the pier's planning, the petitioners had hoped the commission would fine or at least chastise Mexico . . .").

135. See Schiller, *supra* note 50, at 460.

136. See *id.*

137. *Id.*

138. See *id.*

139. See *id.*

140. *Id.*

enforcement.¹⁴¹ The belief that disclosure will shame either country into compliance assumes that the failure to enforce is intentional or at least avoidable.¹⁴² Most researchers find that rather than being victim to purposeful neglect, the border has been overwhelmed despite its good environmental intentions.¹⁴³ Trade-based sanctions, when levied against developing countries, come under reproach.¹⁴⁴ The prevalence of foreign investment in Mexico is responsible for much of the pollution.¹⁴⁵ Besides the hypocritical aspect of charging Mexico with pollution costs that United States companies are generating, such a policy would violate customary international law.¹⁴⁶ Western conceptions of what is environmentally correct policy cannot be forced upon developing countries who do not share our vision.¹⁴⁷

In addition to the international law limitations on increased enforcement, NAFTA faces other limitations. Stronger methods of enforcement were suggested during Side Agreement negotiations, such as mandatory trade sanctions, but the parties rejected these proposals.¹⁴⁸ Therefore, the claims of ineffective enforcement are blind to the obstacles faced by the neighboring countries in both their abilities and their independence.¹⁴⁹

The consistently “high rates of birth defects [that] have been reported in the industrial areas along Mexico’s border are not only cited as one of the Side Agreements failures, but are often accredited to NAFTA and its role in increased industrialization of the border area.¹⁵⁰ The Texas Department of Health continues to report a statistically high proportion of certain birth defects, stating that, “[t]here is no question that this is a high risk area because of poverty and the growth of the maquila (assembly) plants.”¹⁵¹ Residents note

141. *See id.*

142. Certainly neither country can be shamed for its financial limitations.

143. *See* U.S.-Mexico Border XXI Program Framework Document, Oct. 7, 1996, U.S.-Mex. EPA No. 160-R-96-003 (Oct. 1996) at III. 2. (stating that growth in industry and population along the area has overwhelmed existing pollution control.)

144. *See* Coleman, *supra* note 53, at 169.

145. *See* Troutman *supra* note 21, at 940.

146. *See* SUSSKIND, *supra* note 84, at 101. “Because international law enshrines the right of sovereignty, all efforts to monitor performance, establish the accuracy of claims of non-compliance, punish proven noncompliers, or impose remedial action must be accepted voluntarily by the parties to a treaty.” *Id.*

147. *See* Coleman, *supra* note 53, at 169.

148. *See* HUFBAUER & SCHOTT, *supra* note 52, at 7.

149. *See id.*

150. Danielle Knight, Health: Birth Defects Continue in U.S.-Mexico Border Areas, INTER PRESS SERVICE, June 18, 1998, available in 1998 WL 5987849.

151. *Id.* (quoting Russell Larson, public health scientist and medical doctor with the Texas Department of Health).

that despite media coverage and public attention, these statistics have not improved since NAFTA's Side Agreement took effect in 1993.¹⁵² The situation is even more severe in Mexico where Tamaulipas reported 386 cases of anencephalic babies between 1987 and 1992.¹⁵³ Recently, some of the families of the dead and deformed babies in Texas and Mexico elected to take their grievances not to NAFTA's environmental body, but rather to take them to the courthouse.¹⁵⁴ The swift settlement of these claims did not result in an admission of guilt from the defendant maquiladoras, but when considered together with NAFTA's lack of progress with health issues, it bolsters complaints that NAFTA is not helping to save lives.¹⁵⁵ In fact, much of the Health Workgroup's agenda leans toward public education and the study of the problem's extent rather than preventative solutions to border health.¹⁵⁶

Some of the crossfire appears to be coming from NAFTA's failure to provide a healthier economic environment for workers on either side of the border, an issue which compounds NAFTA's perceived environmental failures.¹⁵⁷ The instability of the Peso, plummeting oil prices, and growth of Mexico's population have crippled improvement, both in the border economy and environmental conditions.¹⁵⁸

VIII. CONCLUSION

The Border XXI program and the Side Agreement are operating in earnest within the constraints of their design. Communication between Mexico and the United States has improved, but the inequalities in the resources each state brings to the table coupled with differences regarding public participation limit the effectiveness of environmental cooperation. The funding inadequacies of NADBank are receiving some measure of repair via EPA grants and alternative sources of fundraising, such as community groups. Arguably, it is the innovative construction of the BECC that has allowed for these creative approaches to change. The BECC opens the door to involvement by citizens, community groups, and environmental activists in drafting border solutions. Since these groups have always

152. *See id.*

153. *See id.*

154. *See id.*

155. *See id.*

156. *See* BORDER ENVIRONMENTAL INDICATORS, *supra* note 15, at 18-20.

157. *See* Coleman, *supra* note 53, at 133.

158. *See* Booth, *supra* note 8, at A11.

been the real impetus for environmental change, their inclusion has a positive impact on the BECC's efforts.

Complaints surrounding the BECC's ability to enforce environmental standards center upon the limitations of international law conceptions of sovereignty rather than NAFTA's failure. It has been suggested that the United States should compel Mexico's compliance with our environmental standards.¹⁵⁹ However, an expectation that Mexico will be a willing signatory to such an agreement is both imperialistic and naïve.¹⁶⁰ The impressive layout of Mexico's environmental regulations, often on the books more stringent than U.S. standards, evidences Mexico's commitment to the presentation of its ecosystem.

The paltry enforcement of Mexican regulations reflects the youth of its environmental concern, and the constraints of its administrative budget. Therefore, it is not Mexico's will that needs compulsion, instead it is Mexico's financial inability to achieve environmental commitments without compromising the chance to better its standard of living. The maquiladoras, largely American-owned, unquestionably contribute significantly to the pollution of the border. Attempts by the EPA to exercise extra-territorial jurisdiction over these polluters have recently resulted in ninety-five subpoenas to United State companies mandating responses to inquiries regarding their internal scientific operations.¹⁶¹ While the case was later settled, the agency assertion of extra-territorial power remains.¹⁶² The EPA may not be able to follow through on its enforcement against these companies, but may succeed in making a showing of good faith to Mexican regulatory agencies who may have sensed a double standard in NAFTA's provisions.

Despite all the inroads the Side Agreement and the La Paz Agreement have made, activists are still justified in their complaints. The ongoing health problems caused by pollution throughout the border create a sense of urgency but the gargantuan problems slow

159. See SUSSKIND, *supra* note 84, at 113. [C]ompliance with global environmental treaties, according to theorists, rests on either enforcement by an international police force strong enough to impose the law on indirect strategies for inducing appropriate governmental behavior. Given the prominence of the principle of sovereignty, and the unwillingness of the United Nations to use force to achieve treaty compliance, it is important to do more to convince each nation that its self-interest is best served by complying. *Id.*

160. *See id.*

161. See Elia V. Pirozzi, *Compliance Through Alliance: Regulating Reform and the Application of Market-Based Incentives to the United States-Mexico Border Region Hazardous Waste Problem*, 12 J. ENVTL. L. & LITIG. 337, 364-65 (1997).

162. *See id.*

solutions in an area that has been neglected for decades and may take decades to heal.

The groundbreaking openness and honesty surrounding the Side Agreement allows it to be as equally criticized as it is championed. The most innovative aspect of the agreement is its linking of the economy and the environment. The recognition that Mexico's concern with its economy and the wealth of its people must precede environmental conservation in the nation's thoughts is laudable. The United States' exploitation of Mexico's resources through the maquiladoras cannot be separated from the discussion of border ecology. In this spirit, wastewater treatment plants to repair the border systems are being built and becoming operational. Mexico is opening the door to more stringent air pollution regulations through joint governmental investigations. These modest successes can be praised as a victory for the evolution of international treaty making. NAFTA's role in increased industrialization will stand in opposition to its environmental provisions until industry is no longer foremost in Mexico's mind, and can be halted for purely ecological reasons.

The boundary of Mexico and the United States is a human construct. Mother Nature pays it no respect but pointedly accents its artificiality by allowing her waters and winds to cross without passports. Notions of sovereignty have never been compatible with global environmental conservation. International law has changed in response to these geographical realities by creating new responses to long-arriving problems. The radical changes that were necessary suggest that there may have been a deeper problem in the original construction of these agreements. The notions of sovereignty were wrong and a new realization of interdependence and respect is the pathway to better solutions in the international environmental arena.

The Big Pipe that tunnels underneath the ocean floor started as a negotiation project between two sovereign governments on either side of the border. Officials from San Diego and Tijuana spearheaded this cooperative effort to solve an international dilemma, which diplomatic channels could not repair. NAFTA, by beginning to listen to the voices of citizens and communities surrounding the problem, incorporates the method of projects that have worked. The resulting international bodies monitoring the border environment may erode the formality of traditional international foreign relations and finally provide a cleaner home for both sides of the border.