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# The North American Development Bank

*Brian Kimzey, Student Editorial Board*

## I. Introduction

Public concern over the environment and cooperation among the three countries, particularly between the United States and Mexico, have led to unprecedented environmental provisions in the North American Free Trade Agreement<sup>1</sup> and its supplemental agreements. One of those supplemental agreements is the Agreement Between the Government of the United States of America and the Government of the United Mexican States Border Agreement concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank.<sup>2</sup> The Border Agreement established two binational agencies to address the environmental problems plaguing the border states of both countries.<sup>3</sup>

This article will focus on one of those binational agencies, the North American Development Bank ("NADBank" or the "Bank"). To fully understand the current development of the NADBank, this article will outline the Border Agreement detailing the NADBank, the current status of the Bank, the commitment from both countries, and the public's role in the Bank.

## II. The Border Agreement

The Border Agreement is broken down into a preamble and three chapters.<sup>4</sup> The Border Agreement's preamble explains the reason for establishing the two agencies and briefly lists the goals and objectives.<sup>5</sup> The Border Agreement parallels the NAFTA's environmental goals, "[a]cknowledging that the border region of the United States and Mexico is experiencing environmental problems which must be addressed in order to promote sustainable development."<sup>6</sup> As mentioned above, the Border Agreement also established two binational agencies: the Border Environmental Cooperation Commission ("BECC") in Chapter I, and the NADBank in Chapter II.<sup>7</sup> The last chapter establishes the general provisions and legal effects of the agreement.<sup>8</sup>

1. The North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 605 [*hereinafter* NAFTA].
2. 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-Nov. 18, 1993, U.S.-Mex., 32 I.L.M. 1545 (entered into force Jan. 1 1994) [*hereinafter* Border Agreement].
3. Border Agreement, *supra* note 2, at Introductory Article.
4. *Id.*
5. *Id.* at preamble.
6. *Id.* at preamble.
7. *Id.* at chs. I and II.
8. *Id.* at ch. III.

The BECC's purpose is to improve the environment and the health of the people in the border region by working with the "North American Development Bank and other national and international institutions, and with private sources supplying investment capital."<sup>9</sup> The BECC has two main functions: assisting in the development and implementation of environmental infrastructure projects with states, local communities and other sponsors; and certifying certain projects for NADBank financing.<sup>10</sup> BECC's powers reside with a 10 member board of directors composed of five members from each country.<sup>11</sup> An Advisory Council was also established to give the public unprecedented access and representation.<sup>12</sup> The BECC is considered a legal entity characterized with governmental privileges and immunities in both countries.<sup>13</sup>

Chapter III states that the Border Agreement will go into legal effect January 1, 1994, immediately after the NAFTA is implemented.<sup>14</sup> Officially, the Border Agreement went into effect May 13, 1994 with Executive Order 12916.<sup>15</sup> Chapter III also establishes the right to amend the Border Agreement along with its relation to other agreements.<sup>16</sup> The Border Agreement essentially does not limit or contradict any prior arrangements.<sup>17</sup>

### III. The NADBank

Chapter II of the Border Agreement establishes and outlines the NADBank, and is composed of ten articles.<sup>18</sup> The NADBank's primary environmental focus is strictly regional with particular emphasis on wastewater treatment, water pollution, and municipal solid waste.<sup>19</sup> The NADBank's regional approach will give communities the ability to decide their own needs and promote local decision making.<sup>20</sup>

Article I of the NADBank chapter defines the Bank's purpose. The NADBank is to provide the financing of both border environmental projects and related community adjustment and investment.<sup>21</sup> To carry out its purpose, the Bank will not only use its own funds, but also promote public and private investment and provide assistance to the border projects in conjunction with the BECC.<sup>22</sup> The NADBank's goal is to provide the critical mass needed to foster the expanded participation of private capital.<sup>23</sup>

9. *Id.* at ch. I art. I § 1(b).

10. *Id.* at ch. I art. I § 2.

11. *Id.* at ch. I art. III § 3(a).

12. *Id.* at ch. I art. III § 5.

13. *Id.* at ch. I art. IV.

14. *Id.* at ch. III art. I.

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

16. Border Agreement, *supra* note 2, at ch. III art. II.

17. *Id.* at ch. III art. III.

18. *Id.* at ch. II.

19. *Id.* at preamble.

20. NADBank, Status Report Dec. 18, 1995 (1995) [*hereinafter* Status Report].

21. Border Agreement, *supra* note 2, at ch. II art. I § 1.

22. *Id.* at ch. II art. I § 1(a).

23. Telephone Interview with Annie Alvaravo, Community and Government Affairs Officer, NADBank (Nov. 8, 1995).

Article VI of the Border Agreement outlines the organization and management of the NADBank.<sup>24</sup> Section 1 states that the Bank shall have a board of directors (the "Board"), a managing director of the Bank (the "Manager") and "such other officers and staff as may be considered necessary."<sup>25</sup> Section 2 of the NADBank chapter also states that the Board shall be composed of an equal number of representatives from the U.S. and Mexico.<sup>26</sup> The U.S. representatives on the Board are the Administrator of the Environmental Protection Agency, the Secretary of State, and the Secretary of the Treasury.<sup>27</sup> The Mexican representatives are the Secretario de Hacienda, Secretario de Comercio, and the Secretario de Desarrollo Social.<sup>28</sup> In addition, the chairperson of the Board is appointed by either the U.S. or Mexico on an alternating basis for a one-year term.<sup>29</sup> Further, section 4 of article VI provides that the Manager of the Bank serves at the leisure of the board for a three-year term.<sup>30</sup> Also, the basic organization of the Bank is to be determined by the Board and the remainder of the staff should be composed of a balance of nationals from each party, where appropriate.<sup>31</sup>

Article II states that the NADBank will initially provide \$2-3 billion in loans to public or private entities.<sup>32</sup> In order for the NADBank to provide financing to border projects, the U.S. and Mexico have agreed to subscribe to shares of the Bank.<sup>33</sup> The number of subscriptions are set forth in Annex A of the Border Agreement and are divided into paid-in and callable shares.<sup>34</sup> Specifically, the U.S. and Mexico will each provide \$225 million in paid-in capital over a four-year period (see Figure 1).<sup>35</sup> The NADBank is also to receive an Instrument of Subscription<sup>36</sup> from each party denoting the commitment of each party to financing the Bank.

Article IV of the NADBank chapter allocates the capital of the Bank and limits the methods of financing.<sup>37</sup> 90% of the Bank's capital will go to supporting BECC approved projects and the remaining 10% will be available for community adjustment and investment.<sup>38</sup> The BECC projects are funded through loans and guarantees governed by private

24. Border Agreement, *supra* note 2, at ch. II art. VI.

25. *Id.* at ch. II art. VI § 1.

26. *Id.* at ch. II art. VI § 2(a).

27. The current United States representatives are Carol Browner, Warren Christopher, and Robert Rubin, respectively. Exec. Order No. 12,916, 59 Fed. Reg. 25,779 (1994).

28. The current Mexican representatives are Guillermo Ortiz, Herminio Blanco, and Carlos Rojas, respectively. NADBank, Loan and Guaranty Policies and Operational Procedures for Projects Certified by the Border Environment Cooperation Commission 5 (1995).

29. Border Agreement, *supra* note 2, at ch. II art. VI § 2(a).

30. *Id.* at ch. II art. VI § 4(a).

31. *Id.* at ch. II art. VI § 4(c).

32. *Id.* at ch. II art. II.

33. *Id.* at ch. II art. II § 2.

34. *Id.* at annex A.

35. *Id.* at ch. II art. II § 3(a).

36. 22 U.S.C.S. § 290m (Law Co-op. 1995).

37. Border Agreement, *supra* note 2, at ch. II art. III § 1.

38. *Id.* at ch. II art. III § 4.

sector taxable financial markets. Therefore, no grants or subsidies are provided for BECC projects.<sup>39</sup> Grants are only permitted for use in the community adjustment program so long as they satisfy the requirements under the Border Agreement and NADBank financial criteria.<sup>40</sup> The U.S. branch of the community adjustment window, established in Los Angeles, will provide the procedures for that program.<sup>41</sup>

Like the BECC, article VIII states that the NADBank is a legal entity enjoying governmental immunities and privileges in both countries.<sup>42</sup> However, the NADBank is responsible for any liabilities stemming from its investment activities and loans.<sup>43</sup> If there is any conflict in the interpretation of the NADBank chapter, article IX describes the procedure for arbitration.<sup>44</sup> The last article in the NADBank chapter deals mainly with general preliminary matters such as location of the Bank and commencement of operations.<sup>45</sup>

#### IV. Current Status of the NADBank

The NADBank Board met in 1994 to work out preliminary matters before the Bank actually opened its doors.<sup>46</sup> In February, 1995, NADBank officially started its operations with Alfredo Phillips Olmelda<sup>47</sup> as the current Manager.<sup>48</sup> After the July 3, 1995 board meeting, an organizational chart was established (see Figure 2).<sup>49</sup> The Board has also established a maximum allowable number of staff at 22; the current staff level is 15.<sup>50</sup>

The NADBank Board held its first public meeting December 18, 1995.<sup>51</sup> At this meeting, the Board passed the Loan and Guaranty Policies and Operational Procedures for Projects Certified by the Border Environment Cooperation Commission.<sup>52</sup> This 39 page manual establishes the terms and conditions for NADBank financing.<sup>53</sup> The preliminary guidelines for approval are the following: (1) BECC certification, (2) the project addresses environmental concerns along the 100km region on both sides of the border, (3) projects must be able to repay their loans and guarantees, (4) the beneficiaries must share costs

39. *Id.* at ch. II art. III § 4(a).

40. *Id.* at ch. II art. III § 3.

41. 22 U.S.C.S. § 290m-2 (Law Co-op. 1995).

42. Border Agreement, *supra* note 2, at ch. II art. VIII.

43. *Id.* at ch. II art. V.

44. *Id.* at ch. II art. IX.

45. *Id.* at ch. II art. X.

46. Status Report, *supra* note 20.

47. Mr. Olmelda has held positions with the Bank of Mexico, the National Foreign Trade Bank, representative to the International Monetary Fund, and has most recently served as Assistant Minister of Housing in the Social Development Ministry, and Director of the National Workers' Trust. *NAFTA Development Bank Names Head*, UPI, Jan. 30, 1995, available in LEXIS, Nexis Library, UPI File.

48. Status Report, *supra* note 20.

49. NADBank, Organization Chart (1995).

50. Telephone Interview with Annie Alvaravo, *supra* note 23.

51. *Id.*

52. NADBank, Loan and Guaranty Policies and Operational Procedures for Projects Certified by the Border Environment Cooperation Commission (1995).

53. *Id.*

and/or responsibilities, and (5) the projects must use low cost solutions for long term operation and maintenance.<sup>54</sup> There are currently three projects certified by the BECC under review by the Bank's staff: a \$14.45 million wastewater treatment and agricultural reuse plant for Ensenada, Baja California Norte, Mexico;<sup>55</sup> an \$11.63 million wastewater treatment and reuse project for the city of El Paso, Texas;<sup>56</sup> and a \$25.4 million water treatment plant in Brawley, California.<sup>57</sup> Of these projects, the NADBank expects to finance \$6.45 million for Ensenada, \$10.8 million for El Paso, and \$17.2 million for Brawley.<sup>58</sup> The timeline for the approval process has not been set, but Ms. Annie Alvaravo, Community and Government Affairs Officer of the NADBank, stated the Board is close to approving the Brawley, California project.<sup>59</sup>

As stated above, U.S. and Mexico's commitment to the Border Agreement covers a four year period amounting to \$450 million in paid-in capital.<sup>60</sup> The economic instability of Mexico has been an issue for critics of the Border Agreement to show that Mexico will not be able to pay the capital due.<sup>61</sup> However, Ms. Alvaravo stated that Mexico has fully paid the expected \$56 million and she expects no problem in paying the future installments.<sup>62</sup> On the other hand, the U.S. has yet to pay the \$56 million currently due. In early October 1995, the U.S. Congress, specifically a Senate subcommittee announced that the U.S. would not allocate any funds.<sup>63</sup> However, the Senate, on October 25, 1995, agreed to allocate the full \$56 million.<sup>64</sup> Currently, the bill is awaiting Congressional approval and President Clinton's signature.<sup>65</sup>

54. *Id.* at 17.

55. "The current wastewater treatment plant in Ensenada is an outdated and failing facility, posing a risk to public health and adding to pollution in the Ensenada Bay." Status Report, *supra* note 20, at 8.

56. The current El Paso water system provides water to the city from dwindling ground water sources. Due to El Paso's need for water, the city must implement broader conservation practices. One practice would include a water reuse system reducing the city's need on ground water. *Id.* at 9.

57. "At present, the existing plant for processing potable drinking water does not meet quality treatment levels required by state authorities and cannot be modified to meet state standards. A new treatment plant has been designed to meet the growing needs of the population...., as well as meeting state water quality requirements." *Id.*

58. *Id.*

59. Telephone Interview with Annie Alvaravo, Community and Government Affairs Officer, NADBank (Jan. 11, 1996).

60. Border Agreement, *supra* note 2, at ch. II art. II § 3(a).

61. Thaddeus Herrick, *Cleaning up on the Border; Environmental Bank Falling Short*, The Hous. Chron., Jan. 19, 1995, at Business 1.

62. Telephone Interview with Annie Alvaravo, *supra* note 23.

63. Gregg Cooke, *Development Bank Vital to Free Trade*, The Dallas Morning News, Oct. 11, 1995, at Viewpoints 13A.

64. Status Report, *supra* note 20.

65. *Id.*

Public participation is vital to the environmental success of the border region projects. The BECC is the main corollary between the public and the NADBank.<sup>66</sup> However, NADBank plans to hold a public forum at least once a year to strengthen public involvement in the projects.<sup>67</sup> At the December 18th meeting of the NADBank, Alfredo Phillips Olmelda established goals for the future success of the NADBank, and the Border Agreement in his statement to the Board of Directors.<sup>68</sup> He stated that the Bank should be prepared to support several projects in 1996, but the success of the Bank should not rest with the amount of lending it accomplishes.<sup>69</sup>

## V. Conclusion

Critics of the NADBank say that the Bank is not acting quickly enough.<sup>70</sup> Ms. Alvaravo stated that the Board has taken a slow approach to lay down a strong foundation for the long-term success of the Bank.<sup>71</sup> Critics also state that the NADBank will not be able to finance the needed border projects.<sup>72</sup> Figures indicate it will take \$20-30 billion dollars to preserve the environment of the border region.<sup>73</sup> However, as stated above, the NADBank expects to facilitate the needed capital by encouraging private investment in the projects, similar to an investment bank.<sup>74</sup> Currently, the NADBank is negotiating with interested Mexican and U.S. financiers and there have been no problems attracting investors.<sup>75</sup>

The NADBank is currently located in San Antonio, Texas at 425 Soledad, Suite 610, 78205, Tel: (210) 231-8000, Fax: (210) 231-6232.<sup>76</sup> There are plans to move the headquarters of the NADBank because the present offices are insufficient.<sup>77</sup> The NADBank offers a two page "Fax Facts Summary" outlining the Bank's purposes, and if interested, the Loan and Guaranty Policies and Operational Procedures for Projects Certified by the Border Environment Cooperation Commission is also available.

66. Border Agreement, *supra* note 2, at ch. I art. II § 4.

67. NADBank, By Laws of North American Development Bank (1995).

68. Alfredo Phillips Olmelda, Statement to the Board of Directors (1995).

69. *Id.*

70. *Trade Deal Worsened Environment, Health Along Border, Group Says*, 13 Int'l Trade Rep. (BNA) 8, (Jan. 3, 1996).

71. Telephone Interview with Annie Alvaravo, *supra* note 23.

72. Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 Stan. J Int'l L. 379, 421 (Summer 1994).

73. *Id.*

74. Border Agreement, *supra* note 2, at ch. II art. I § 2.

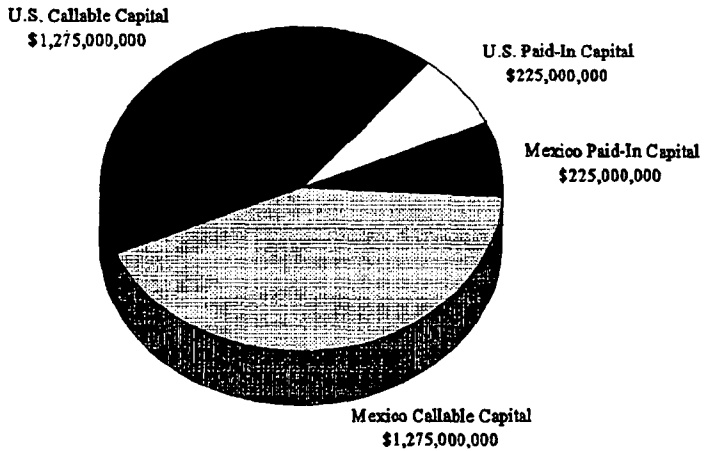
75. *NADBank to Seek U.S. Private Loans for Mexican Infrastructure Projects*, 13 Int'l Trade Rep. (BNA) 6, (Jan. 3, 1996).

76. Telephone Interview with Annie Alvaravo, *supra* note 23.

77. Status Report, *supra* note 20.

Figure 1

## Capital of the Bank to Total \$3 Billion



## Initial Subscriptions to the Authorized Capital Stock of the Bank

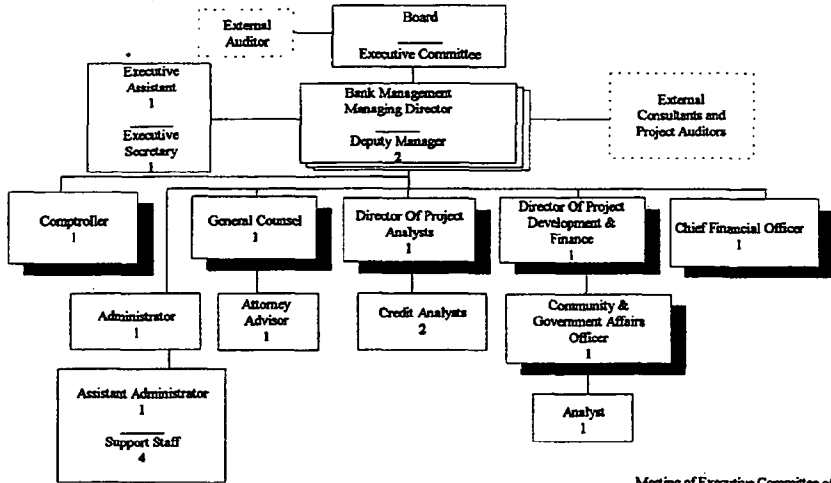
(In Shares of U.S. \$10,000 each)

	Paid-in Capital	Callable Capital	Total Capital
United States	22,500	127,500	150,000
Mexico	22,500	127,500	150,000
Total	45,000	255,000	300,000

Source: NADBank



### NORTH AMERICAN DEVELOPMENT BANK ORGANIZATION CHART



Meeting of Executive Committee of the Board of Directors  
July 3, 1995  
: 8/4/95 approved by APO  
last edit date: 8/4/95

Source: North American Development Bank Organization Chart