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Baucus - Statement on NAFTA [North American Free Trade Agreement]/NACE [North American
Commission on the Environment] - Proposed Complaint Process

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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
 WASHINGTON, DC 20510-6175

March 11, 1993

TRANSMITTED BY FACSIMILE

Ms. Katie McGinty
 Director
 White House Office of Environmental Policy
 Room 358
 Old Executive Office Building
 Washington, D.C. 20501

Dear Katie:

It was good to speak with you last night. I appreciate you taking so much time to go over some of the issues we're working on in the Committee. As we discussed, I am forwarding to you some information regarding Senator Baucus' proposal on the North American Commission on the Environment (NACE). I have attached a statement of his from yesterday, as well as a chart outlining how the NACE process would work and further explanation as well.

I think we both agree that in order for the environmental issues to be satisfactorily addressed in the side agreement to the NAFTA there must be some viable enforcement mechanism to ensure that Mexican laws are enforced. We are not talking about changing any laws or impeding on the sovereignty of Mexico. However, we believe that we are faced with an historic opportunity to raise the standard of environmental protection in North America and set a precedent for future international trade agreements. As the recent GAO study demonstrated, there is an overwhelming lack of compliance with Mexican environmental laws. If we don't have an enforceable mechanism in place to guarantee compliance, we are inviting U.S. companies to move to Mexico to gain that competitive advantage.

I hope you'll give this proposal your consideration. If there is any other information that you need that you think would be helpful, please don't hesitate to let me know. I'm looking forward to working closely with you on these and other issues.

Best regards,

Sincerely,

Peter L. Scher

Attachments

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STATEMENT OF SENATOR MAX BAUCUS NAFTA AND THE ENVIRONMENT: ACCOMPLISHMENTS AND GOALS March 10, 1993

Mr President, In 1961, Mexican Nobel laureate Octavio Paz wrote that "New facts, radically contrary to the predictions of theory, demand a new set of instruments, or at least a sharpening of those we already possess."

In our rapidly changing world, these words still apply. And they apply with particular force to the global environment. Every day, we learn more about the environmental costs that economic development can bring. And as we sharpen our tools for international trade, we must keep this new environmental fact in mind. That is why it is so important that the groundbreaking North American Free Trade Agreement, the so-called NAFTA, contain strong provisions to protect the environment.

Mr. President, NAFTA truly is revolutionary. If agreed to, NAFTA will create the largest trading bloc in the world. It will link the economies of two of the world's most advanced nations with the struggling economy of a developing country.

It also will be the first Free Trade Agreement completed in the post-Rio era. The Earth Summit exposed the fact that economic growth has environmental costs. Costs to local populations, who must breathe the air and drink the water near the factories. And global costs, because the flow of water and air carries pollutants beyond their source.

Trade rules are the only global controls on economic development. NAFTA gives us a chance to move toward a new era in international relations; an era in which trade relations reflect ecological realities. We can use NAFTA to protect and encourage sound environmental practices.

Let me begin by stating that I believe NAFTA is a good idea. In general, I support the text as it stands.

I also must point out that NAFTA cannot solve all of North America's environmental problems. But it can help solve some of them, and help us begin to solve many more.

Some environmental protections are included in the existing text: protection for health standards; a ban on reducing standards to attract investment; dispute resolution safeguards.

[more]

In the side negotiations, a North American Commission on the Environment, or NACE, was agreed on. It was seen as an environmental watchdog, but its duties were undefined. Since then, a number of proposals have suggested duties and responsibilities for NACE. I want to review and discuss those proposals briefly here.

The previous Administration saw NACE as a consulting body. The Commission would meet at regular intervals. It would issue reports on environmental progress in North America. NACE could shed light on environmental concerns. It would create public pressure for solutions.

I do not underestimate the power of the "sunshine" of public opinion. In many cases, publicity can drive real changes. In others, it can stimulate public debate on difficult choices. I certainly support this formal, report-writing side of the Commission.

Likewise, I agree that NACE should serve as a forum for consultation among the three governments. NACE can head off environmental disputes and coordinate programs for sustainable development.

But we have to go further. We face concrete environmental problems that call for concrete solutions. Under NAFTA, American businesses will have direct competition from firms that have not borne the same environmental regulatory costs. Mexico's environmental regulators are playing catch-up, and they are already over-burdened. Some companies may gamble that non-compliance will pay off.

We have to change the stakes. How? By using NACE to assure that environmental laws are enforced. Clearly this is difficult. It involves complex issues of sovereignty and procedure. But assuring enforcement is necessary. Otherwise, the American people will not have confidence that NAFTA will not undermine environmental protection.

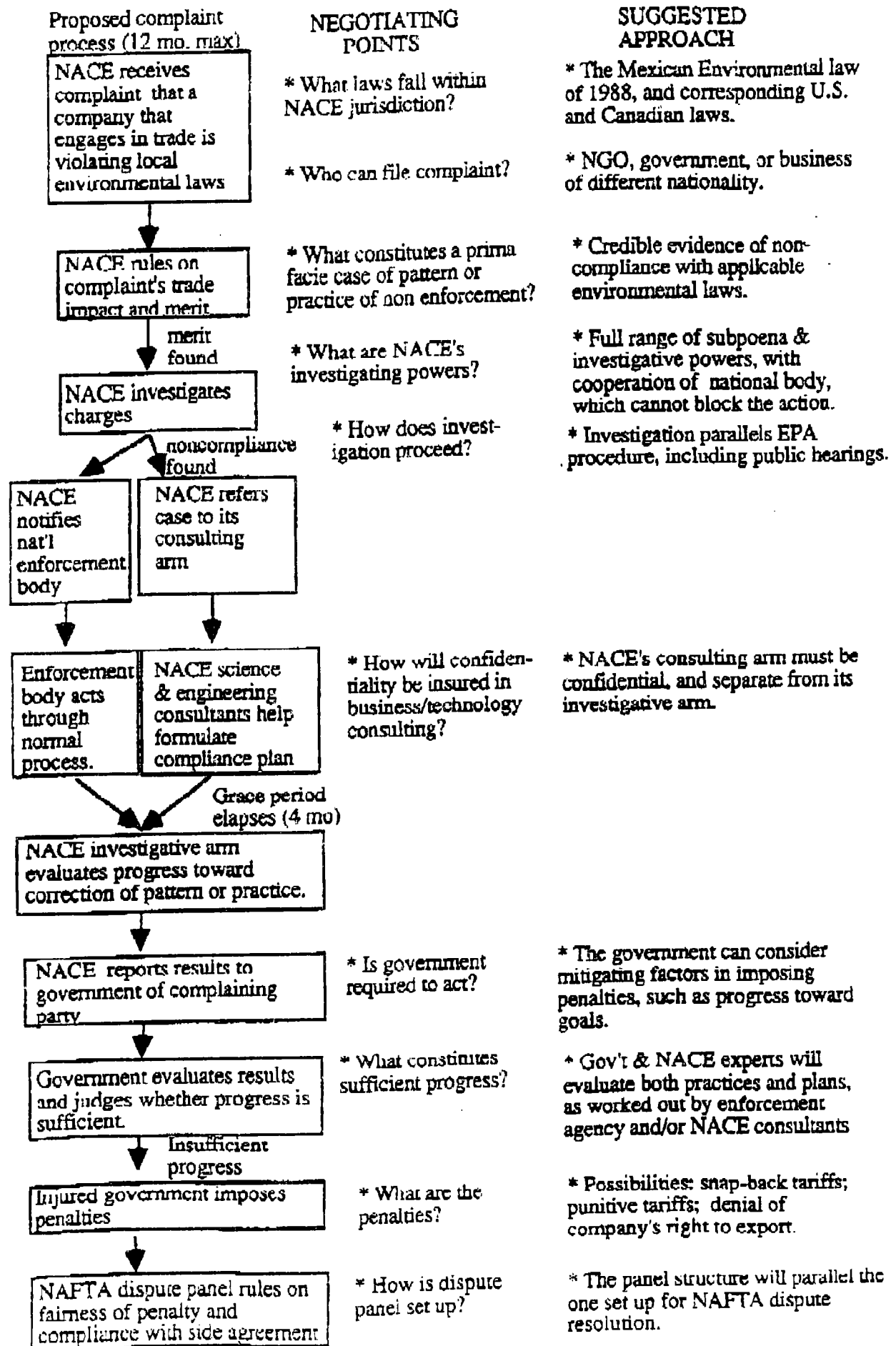
Mr. President, I have proposed a structure for NACE, designed to respect sovereignty and maintain flexibility--but also to ensure enforcement.

In a nutshell, NACE will receive and investigate complaints of violations of environmental laws. It will offer technical and financial consulting to help violators cut pollution. And it will gauge progress on compliance, so that the complaining nation can decide whether to impose penalties.

This complaint process offers both carrot and stick. The threat of penalties provides impetus to the stubborn polluter. But the offer of assistance is the offer of partnership, an alliance between our governments, our businesses, and our citizens to respond to the new reality we face.

Mr. President, I ask my colleagues to work with me and with the Administration, to assure that NAFTA becomes an agreement that we, and the American people, can support.

SENATOR BAUCUS' NACE PROPOSAL



PROPOSED NACE COMPLAINT PROCESS

Mexico has made substantial progress in its handling of environmental problems. NAFTA and the economic development it promises will likely lead to further progress in the long term. However, Mexico cannot expand its technical community fast enough even to meet its present environmental needs, and industrial development encouraged by NAFTA will only worsen the situation. Industries may take advantage of this situation, and NAFTA might inadvertently lead to increased environmental degradation in Mexico, as well as providing a subsidy to industries that operate without the cost of environmental compliance. The plan proposed here will offer oversight and remedies for parties that might be injured by this non-compliance, as well as providing technical assistance to help firms meet environmental standards.

Initiation of Complaint

The complaint process should take no more than 12 months. It begins when a complaint is lodged with NACE, providing evidence that a firm that produces goods traded under NAFTA is violating federal environmental regulations, or that a pattern of non-enforcement is underway. Standing to file a complaint and the laws that fall within NACE's jurisdiction are negotiable. We suggest that NGOs, business, or government of a different nationality from the offending business be eligible to file, and that the Mexican Environmental Act of 1988 and corresponding U.S. and Canadian laws be within the NACE jurisdiction.

NACE Investigation

The NACE tri-national panel of experts rules on the complaint's trade impact (i.e., is the firm engaging in trade under NAFTA?) and merit (i.e., does the evidence

filed with the complaint warrant further investigation?). If not, the complaint dies there. Otherwise, NACE begins its investigation. If searches and subpoenas are necessary, then NACE will act through the national enforcement body (EPA or SEDESOL). Though the national body will obtain necessary court orders and carry out searches, with a NACE observer, it may not block NACE requests. The investigation process will parallel EPA procedures, including public hearings.

Enforcement and/or Consulting

If a pattern of non-compliance or non-enforcement is found, then NACE notifies both the national enforcement body and the NACE consulting arm of its findings. The enforcement body then acts on the findings, using its normal procedures. On a parallel track, the NACE consultants work with the industry to identify technologies and processes that would bring its production process into compliance with environmental regulations. In order to assure that the industries are open with the consultants, they must be confident that their disclosures are confidential. The investigative and consulting arms of NACE must, therefore, be entirely separate.

Dispute Resolution Process

After a grace period of 4 months, the investigative arm of NACE conducts another inquiry to establish what progress has been made. The results are reported to the government of the complaining party, which evaluates the results. If there has been insufficient change in procedures or plans, then the government may decide to enact a penalty. Penalties might include snap-back or punitive tariffs, or denial of a company's

right to export. However, if the government becomes convinced that progress has been made toward correcting the problem, the government may decide not to act. If penalties are imposed, a NAFTA dispute panel may rule on their fairness and compliance with the terms of the side agreement.