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TRADE AND ENVIRONMENTClinton-Gore Position

o Recognizing the relation between trade and environment, Clinton-Gore would work proactively to find ways to make trade and environmental policies mutually reinforcing.

o All new trade agreements negotiated under GATT, NAFTA, or elsewhere, should include environmental components which provide:

-- Incentives to encourage increasing levels of worldwide environmental protection through "upward harmonization."

>> We already have incentives for upward harmonization in intellectual property protection and worker rights under Section 301, GSP, and Caribbean Basin Initiative.

-- That expanded free trade is accompanied by expanded environmental protection in other countries, in order to protect U.S. workers from foreign competition benefitting from unfair "environmental subsidies."

>> This is similar to, but less offensive than, Gephardt's NAFTA proposal of a border tax to compensate in trade competitiveness terms for lower environmental protection costs in Mexico.

-- Explicit mutual agreements that allow trade sanctions to be used to enforce bilateral and multilateral environmental agreements made by trading partners.

>> Once trading partners specifically agree on levels of environmental protection and appropriate trade sanctions, as they have done in the case of the Montreal Protocol and its amendments, there will be no GATT or other international law problem with implementing those trade sanctions to enforce the multilateral environmental agreement.

>> Note that Article 104 of the NAFTA agreement allows for trade sanctions to be employed in the implementation of certain multilateral environmental agreements, including the Montreal Protocol, CITES, Basel Convention, as well as certain U.S.-Canada and U.S.-Mexico bilateral environmental agreements. However, unilateral action (such as the trade sanctions

called for by the Marine Mammal Protection Act) would not be allowed.

o The NAFTA and the Uruguay Round should not be rejected on the basis of their failures to effectively address these issues.

>> However, the Administration's failure to seriously address these issues since they became matters of concern over two years ago, is a serious dereliction of duty.

Bush-Quayle Record

o Over the past year, there have been a number of serious clashes between environmental and international trade policies.

>> The Bush-Quayle approach to resolving these disputes has been, in order, resistant, reactive, and short sighted.

>> The Bush-Quayle approach fails to capitalize on opportunities for mutually re-enforcing trade and environment policies that can make U.S. industry more competitive.

-- In the NAFTA process, Bush-Quayle promised not to compromise U.S. environmental laws only when it was clear that Congressional approval of "fast track" authority would require this promise.

-- Bush-Quayle failure to integrate environmental protection issues into the mainstream of NAFTA and the GATT Uruguay Round imperil both accords and could lead to numerous legal challenges.

-- Bush-Quayle short-sightedness led to a trade confrontation with Mexico over dolphin protection.

> The confrontation could have been avoided through greater efforts to gain international standards for marine mammal protection or through bilateral negotiations.

-- Administration's narrow focus on narrow issues like the EC ban on imports of U.S. beef containing certain hormones overshadows broader health, safety, and environmental issues as well as imperiling longer term U.S. competitiveness.

TRADE AND ENVIRONMENT

In a Nutshell

o Over the last decade, environmental criteria have been successfully incorporated into the world financial and development assistance systems: World Bank, regional development banks, many bilateral and multilateral assistance agencies

o During the 1990s, efforts to further integrate environmental protection into economic activity will move into what is arguably the most politically and economically complex of global economic systems: world trade.

-- The issue has been most visible in connection with the NAFTA, and speculation over the environmental impact of--

>> expanded manufacturing activity in the border area.

>> expanded economic activity throughout Mexico, in light of Mexico's difficulties in actually enforcing its often strong environmental laws.

>> adjustments in environmental and health standards that may or may not occur in response to further integration of the U.S., Canadian, and Mexican economies.

-- The issue has also been raised in connection with the GATT, and in particular in connection with speculation over the environmental impact of the Uruguay Round.

>> There have been calls for the next GATT round to highlight environment, just as the current round has highlighted agriculture, intellectual property protection, and services.

>> It is worth noting that, particularly in the area of intellectual property protection, Bush-Quayle have been willing to offer trade concessions to developing countries, in return for better intellectual property protection. There is no difference between this position, and the position that we should offer trade concessions to developing countries, in return for better environmental protection. The "environmental subsidy" -- like intellectual property piracy -- has detrimental economic impacts on U.S. producers.

o The key to the issue is this:

-- Current language in the GATT treaty (the same language is used in the NAFTA) has been interpreted to mean that a country may not impose trade sanctions on the basis of the environmental impacts of production methods used in another country (i.e., we cannot ban Mexican tuna from our market because we do not approve of the production methods used by Mexican tuna fishermen).

>> This effectively removes trade (the most powerful tool of economic statecraft) from the instruments that a nation can use to influence the way products are produced abroad -- i.e., a country may not use trade to promote sustainable economic activity.

>> Note that to conclude otherwise is a dangerous two-edged sword: suppose Japan decides that it will ban all U.S. products whose manufacture uses more energy than a comparable Japanese product?

>> Note also that when U.S. environmental legislation affects U.S. producers, that legislation often includes a clause requiring that the EPA Administrator certify that foreign producers face similar laws in their own countries. This is because Congress does not want U.S. producers to face unfair competition from imports that benefit from an "environmental subsidy." For example, this was the case in the Marine Mammal Protection Act (which was the basis for banning Mexican tuna), and is also the case in CFC-related legislation. The judgement of the dispute panel in the GATT Mexican Tuna Case effectively means that such provisions are inconsistent with the GATT.

-- There is a middle ground--

>> The GATT dispute panel held that countries could negotiate bilateral and/or multilateral environmental agreements (e.g., to protect dolphins), and then could use trade sanctions to implement those agreements (as occurs in the case of the Montreal Protocol), and could agree that if the international environmental agreement conflicts with an international trade agreement, then the environmental agreement would rule the day.

>> In cases where components of a trade agreement itself have environmental consequences (e.g., pesticide standards), ensure trend is toward upward harmonization.

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September 22, 1992

MEMO TO:
RE: Options for NAFTA

There is no easy decision on NAFTA. Whichever way you end up going, there are serious pluses and minuses. This memo is an attempt to lay out your options and the positives and negatives of each possibility.

The general sense in the campaign is that you should make a decision fairly soon -- you want to be seen as leading on this issue and the Republicans are having an effect in charging that you are straddling the issue.

The decision comes down to basically two options:

- a) Support the agreement and try and remedy the agreement's shortcomings through an aggressive enforcement of provisions as President, coupled with good implementing legislation and some side agreements; or
- b) Oppose the agreement and go back to the negotiating table to fix the inadequacies, keeping in mind there is no guarantee you will get any of them. This would be coupled with the above steps as President of aggressive enforcement and good implementing legislation.

Timing

The Administration sent its the "almost final" text of its NAFTA agreement to Congress on September 18th, thereby starting the 90 day clock ticking. The President cannot sign the agreement before December 17th. He is not obligated to sign the agreement by any date but must do so by May 31, 1993 if he wants to keep the fast track authority Congress voted him last year.

The purpose of these 90 days is to give Congress the chance to press the Administration to review and possibly press for changes in the agreement and to begin discussions on the implementing legislation.

Once the final agreement is signed, negotiations begin between Congress and the Administration over the implementing legislation. The Administration then sends to Congress the agreement with draft implementing legislation. That action sets another 90 day clock ticking -- 90 legislative days. During that period, (probably next spring or early summer) Congress votes up or down on the agreement (no changes) and debates the implementing legislation under fast track procedure (or normal rules?)

Congress

Gephardt has come out against the treaty and called for renegotiation. Bensten and Rostenkowski are likely to wait but eventually support. In the end, the outcome of the treaty may simply depend on who is President at the time of the vote in

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Congress. Best guesses are that the House would vote against if Bush were President, that the Senate would probably support regardless of who is in the White House. ??

The treaty does not take effect until both Houses of Congress pass legislation implementing the treaty.

Policy Implications

From a policy standpoint, there are serious shortcomings to the agreement Bush negotiated which must be addressed. Had you been President, you would have negotiated an agreement that included key provisions on the environment, labor, and farmers.

However, the question is whether to send the negotiators back to the table or to take Bush's agreement and do the best you can with it.

Renegotiating NAFTA is no easy proposal and should not be done lightly. In considering this option, it is important to keep in mind that every one of your foreign policy and economic advisors urge you not to call for renegotiation but rather for fixing the agreement through side agreements or unilateral US action.

The best policy position to take is to support the agreement overall but to call for several additional steps to be taken before Bush signs the agreement. That is exactly what the 90 day period was designed to accommodate. And given how eager the Mexicans are for a NAFTA, we have strong leverage with them at this point.

Renegotiating the treaty opens the entire text up for debate and may seriously delay the process. It enables each interest to press once again for its own agenda. (Other reasons??)

Other policy issues to keep in mind are that increased trade with and relocation to Mexico is happening. AFL-CIO figures state that 500,000 jobs have already been created in the maquiladora industry in Mexico, "many of them directly exported from the United States." US companies are moving south now. The big "3" auto companies have already made the decision to move. NAFTA regulates this flow in a positive fashion but may increase the export of jobs.

There may also be a serious impact on your rejection of the agreement in Mexico. Some have predicted a collapse of the Mexican stock market if you announce your opposition to the agreement.

Finally, while we can clearly push the Mexicans a bit further in some key areas, it is unrealistic to expect Mexico to meet our own standards within the near future. At best, that goal will take a generation to meet and free trade will help to move Mexico faster toward that goal.

Key Problems

There are generally 7 areas in which the agreement falls short of the mark. Some of these would require renegotiating the text of the treaty, others could be done in either side agreements between the US and Mexico or unilaterally by the US government.

RENEGOTIATIONS

Requires renegotiating text -- there are 4 basic areas that cannot be adequately addressed without changing the text of the treaty:

1. Transition periods for autos and light trucks -- the agreement eliminates its substantial barriers to auto trade (20% tariff, 36% domestic content) over ten years. Mexico also eliminates 2 for 1 Mexico/US auto sale ratio. US would eliminate its 2.5% tariff immediately. Phases out 25% US tariff and 20% Mexico tariff on light trucks over 5 years, with an immediate reduction to 10% for both.

Labor wants a faster (preferably immediate) reduction to zero on the Mexican side and a longer reduction for the light truck industry for both sides (such as 15 years). Chrysler and GM most affected.

They also oppose Mexico's ability to require import licenses. The US has no such requirement. There is a fear Mexico might deny licenses as a way to keep business out.

Canada transition period was 10 years. Labor argues that capital will flow faster if these barriers remain for 10 years.

2. Rules of origin -- There are currently no rules for Mexico, only a requirement that goods be "substantially transformed." It is 50% for Canada. NAFTA would raise the figure to 62.5% incrementally over ten years, the big three auto companies were pushing for 65%.

Labor wants 80% and is concerned about the change in rules of how the percentage is computed. In Canada, the rule was a direct cost of assembly, NAFTA puts it at the net cost of production -- ie. NAFTA adds administrative costs unrelated to production which in effect lowers the 62.5%. The administration maintains other rules offset that effect by adding tracing costs (ie. looking at parts of items). It is not clear whether the two balance each other out.

Labor argues that 80% simply makes NAFTA preferential and that these figures are in line with the EC agreement, such as Britain and France. This level would help promote production in North American -- the goal of NAFTA. (where is Mexico now?)

Canada most strongly opposed 80% not Mexico. In fact, there is one exemption in the NAFTA to a Canadian plant that uses Japanese parts to the 50%.

NOTE: Any company that does not meet this level pays the applicable internationally negotiated tariff (MFN).

3. Dispute resolution -- agreement does not allow a country to use the formal, binding NAFTA process if another country violates current standards of environment, labor and health or if surges of imports occur. The current agreement only provides for government-to-government consultation.

In addition, there should be greater public participation.

One could certainly require that more of the proceedings be public. The other issues are more complicated and involve two key areas:

A) Enforcement of Laws -- Mexico often violates its own laws on environment, health, safety and child labor laws yet the NAFTA provides no recourse to US interests in this event -- despite the fact that the agreement does allow for improved enforcement of intellectual property and investment issues through Mexican laws and US import laws -- with law suits, damages, and injunctive relief. There is no recourse if Mexico lowers its law either.

There are three ways to address this issue:

i) Standing in Mexican courts -- providing some right of action to injured US parties in Mexican courts. Failing that avenue, raise tariffs on the products involved or block at the US border. That route raises many issues of monitoring both in Canada, Mexico and the United States. This would be a very contentious issue and would be difficult to negotiate.

It is difficult to develop a way to provide US interests standing in Mexican courts. Gephardt has suggested buying a share of stock (derivative right of action). Another key issue is whether we can or should become the watchdogs of Mexican industry. For instance, it is difficult to trace whether a product was made with child labor.

ii) Commission -- Set up a tri-party commission. NRDC, the National Wildlife Federation, the Environmental Defense Fund and World Wildlife Foundation have been discussing this option. The NWF put forward a specific proposal to address avoiding the creation of a pollution haven or undue advantage in trade. The Commission would issue reports on the compliance in each country and use public pressure to bring about compliance.

While there is currently not discussion of providing any

"stick" to this commission, one possibility is to negotiate the right of the commission to put tariffs or stop products at the border found to be in violation. This step would require renegotiation of the treaty.

iii) Expand NAFTA Commission -- NAFTA sets up a trade commission that deals with disputes but the frame of reference does not include labor or environment. It involves a two-tiered enforcement for intellectual property rights and enforcement at borders. An injured party can invoke section 337 of the 1974 Trade Act and empower a panel to review. If a finding of injury is made, the offender's products may be stopped at the border. The commission sets forth a solution to the situation which is binding.

Environmental and labor issues were not included because it is the position of the negotiators that such issues are not trade issues and should not be dealt with in this context. Rather, such issues should only be discussed through "consultations with a view toward eliminating practice." in same chapter as strong protections for investment. same as if they lower laws.

Labor argues, as would some of the environmental groups, that we should expand this section to include violations of labor and environmental laws. They want to ensure an interested party can start a proceeding in the US to stop the good at the border.

(They site the tuna case in which GATT said that process can't be taken into account -- ie. the Mexicans can make goods any way they want.)

This step would require renegotiating the treaty.

NOTE: NAFTA weakens existing remedies under 301 of the 1974 Trade Act by limiting instances where it can be used.

(other ways to enforce?)

NOTE: Generally, Mexican laws are OK. 1/20 labor costs. Labor would like to see Mexican wages go up, possibly by requiring US companies pay higher wages in Mexico while Mexican companies do what they are doing now.

Mexican workers in the US -- labor raises several issues regarding provisions of the agreement. First, Mexican truckers could come to the US but would not have to comply with US standards of safety and wages. Also, "professional workers" such as nurses and economists would have entry to the US -- labor is concerned with strike breakers. Could require safety checks at the border for Mexican truckers and pass a US law against strike breakers.

B) Safeguards/Action against surges -- if a country is hurt by a substantive surge of imports, the current agreement provides only weak avenues of recourse.

There are two avenues of recourse available to a President who chooses to use them in areas of serious injury regarding surges in imports:

a) Bilateral disputes: NAFTA provides for a one time action in areas where injury occurs. During the 10 year transition period, an injured party can revert to the tariff that existed prior to NAFTA once per product during the transition period. The old MFN tariff could be reinstated for three years.

b) Globan safeguards: Section 201 of the 1974 Trade Act gives the President discretion to take action against serious injury by permitting domestic industries to appeal to the International Trade Commission. NAFTA narrows the conditions in a non-binding fashion by setting guidelines for the use of section 201. The imports should "contribute importantly to serious injury to domestic industry" and should be among the top 5 suppliers to the United States (ie. Mexico is # 3 in autos). (labor says binding??)

Under Reagan and Bush section 201 has become a dead letter as it was virtually never used. If we had a President that was willing to use these provisions, they could provide substantial avenues of recourse to injury.

Labor opposes the weakening of 201 and the narrowing of who has standing. 201 would only apply to industries hurt directly by NAFTA and precludes higher tariffs than exist now.

4. Apparel and textiles -- The textile industry will be hard hit by NAFTA and NAFTA will be an issue with labor. Generally, the owners support, workers do not. They want quotas on textiles and apparel.

Labor argues that our domestic apparel industry is dependent on some trade protection. It suggests shifting quotas from other countries (ie. China) to Mexico. NAFTA would negate the multi fiber arrangement for these countries.

UNILATERAL STEPS

5. Worker Funding -- Bush has not provided adequate funding to help workers and communities adversely affected by its provisions. Need serious worker training, relocation assistance, other support for workers and communities. (\$1.2 billion over five years for worker adjustment is one figure put forward by the International Institute of Economics. Labor implies that is low and will get me figures.)

The Administration has proposed \$300 million over 5 years, out of a total of \$10 billion over 5 years. Labor wants basically an entitlement, including extended unemployment, health benefits and

a retraining component.

Gephardt has proposed funding through a cross border tax. Most oppose that route because it would in effect put tariff-like expenses back into the process. It is not clear what the best way to fund the program would be.

6. Environmental Funding -- Adequate funding from Bush has not been proposed, much less assured. (The Administration has proposed \$379 million over two years. Environmental groups talk in the range of \$5 billion.)
(Figures?)

7. Help to Farmers Some US farmers will be hurt by agreement. US should enforce US pesticide requirements on imported food, worker assistance for growers affected by Mexican competition and utilize existing programs to help farmers identify more competitive crops.

Options

1) Yes, and... Support the agreement and press for those provisions above that do not require renegotiation of the treaty.

Position would be coupled with a strong commitment to use the multilateral and NAFTA provisions for recourse.

Plus: Enables you to be for free trade and the agreement. Inoculates you against charges of being protectionist but also allows you to push Bush to follow through on his promises to provide adequate assistance to those affected.

Down side: It's leaves unaddressed serious deficiencies in the agreement. May get charged with trying to have it both ways if you call for too much, especially those that require renegotiation.

2) No, but... Reject the current agreement but say you would support it if Bush added some combination of the steps above.

Plus: A clear no would help inoculate you against waffle, slick, trying to have everything both ways. Would bring Congress along and probably push Bush to go back to table.

Down side: You will be accused of flip-flop since you have been perceived as being for the agreement. Regardless of the variations you make, you will be placed in the same camp as Gephardt since he has already come out for renegotiations.

Provisions included in a Yes strategy

Assuming a yes strategy cannot involve renegotiating the treaty (otherwise it becomes a no position), you could include the following steps if a yes position:

[Issues left untouched: transition periods for autos, rules of origin, right of standing in Mexican courts and a real stick for dispute resolution, tougher action against surges and protection for apparel and textiles.]

Enforcement of laws:

Press for a strong tri-partite commission to review complaints about failure by parties to enforce laws. Strong use of public pressure to bring about compliance. Would take strong presidential backing to be effective. (can't really press for tariff action without going back into the agreement).

Action against surges:

Actively use dispute resolution powers in NAFTA and international law. Can go a long way if have strong presidential leadership.

Worker funding:

Provide a virtual entitlement for workers affected by NAFTA. A set package for anyone who can establish harm and ensure funding. (Labor working on getting me exact figure).

Environmental funding:

Ensure adequate funding for environmental clean-up and infrastructure along the border to handle development and increased traffic.

Farmers:

Enforce US pesticide requirements on imported food, worker assistance for growers affected by Mexican competition and utilize existing programs to help farmers identify more competitive crops.

NOTE: Two points that must be emphasized:

--A strong President has a great deal of authority to protect American interests if power is used. Bush hasn't, you will.

--The best way to deal with transition to a free trade is to invest in America and make us competitive. This includes changing our own laws to promote, not discourage investment, retooling, retraining and education.



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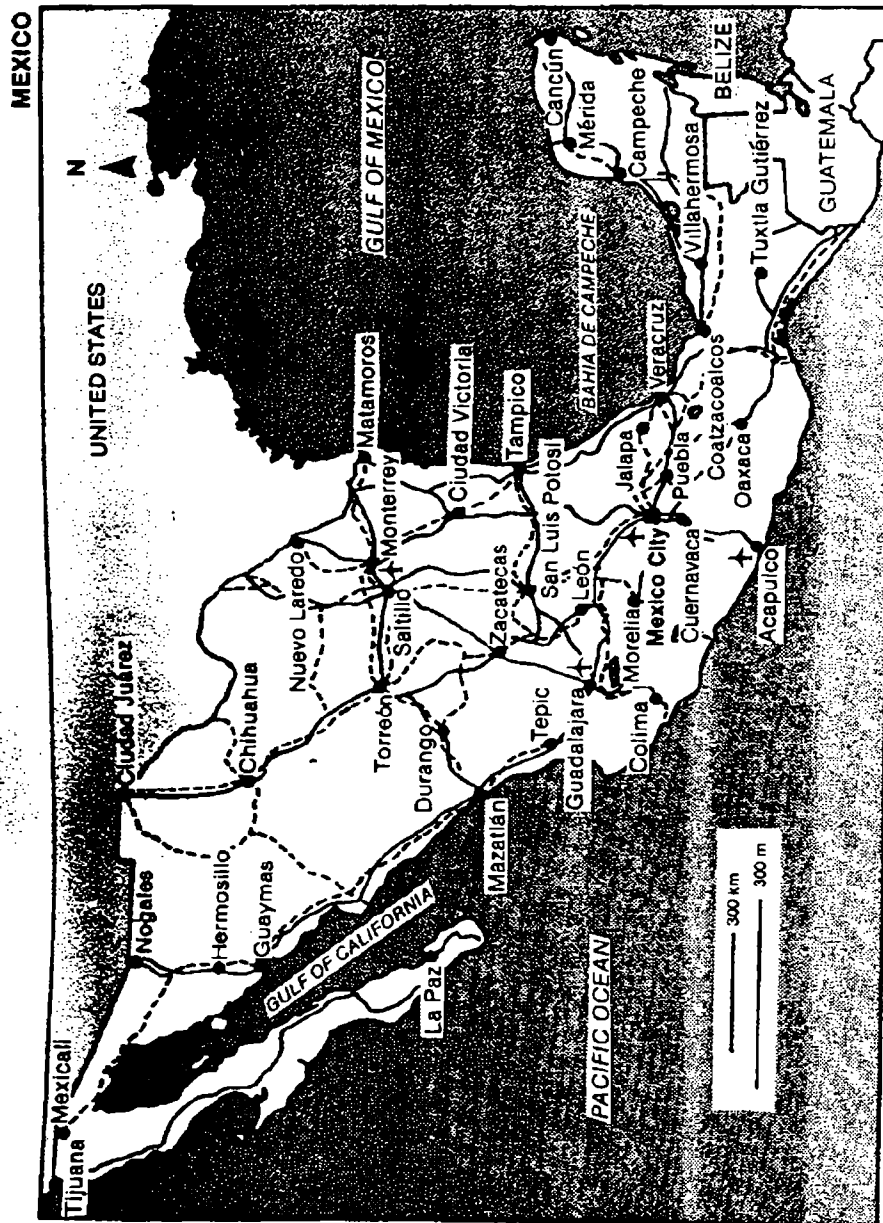
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GARY CLYDE HUFBAUER AND JEFFREY J. SCHOTT

North American Free Trade: Issues and Recommendations

Assisted by Lee L. Remick, Diana E. Clark, Rosa M. Moreira,
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INSTITUTE FOR INTERNATIONAL ECONOMICS
WASHINGTON, DC 1992

Development in the 1970s and since accepted by most economists. To be sure, difficult problems of measurement and administration remain (see Robertson 1991, 3). What is the appropriate standard for "tolerable" sulfur emissions? Should user fees be set at flat rates, or should pollution rights be auctioned and traded? It would take us well beyond the scope of this chapter to answer these important questions. We only insist on two key points: public environmental responsibilities should be met from general budget resources rather than earmarked taxes and tariffs; and private responsibilities should be addressed by progressive implementation of the polluter-pays principle.

Environmental Standards

Inevitably, federal and subfederal jurisdictions will set their own environmental standards, either as the conclusive answer to health and safety issues or as a component of enforcing the polluter-pays principle. The international issues raised by the application of environmental standards to private-sector activity can be grouped under two headings: preemption and harmonization. Preemption issues principally concern foodstuffs and consumer goods; harmonization issues mainly affect industrial production.

Preemption occurs when national standards (federal, state, provincial, or local) are overridden by the workings of an international accord. The possibility of a preemption clause in the NAFTA juxtaposes two deeply held but ultimately conflicting values. On the one hand, jurisdictions do not want to lower their environmental and public health standards for any reason; further, most environmental groups want their state and local governments to retain unfettered freedom to set standards. On the other hand, standards can be deliberately designed or can inadvertently work as nontariff barriers (NTBs), which most business firms and trade policy analysts regard as a harmful form of clutter in the path of world commerce.

In a sense, preemption is the inverse of the "environmental dumping" issue. Lax standards can be used as a means of subsidizing production, but overly rigid standards can be used as a device to protect the local market. For example, the United States and Canada ban or strictly limit the use of certain pesticides, such as DDT and heptachlor, and they test Mexican vegetables for minute traces of these chemicals. Mexican producers, noting that some scientists condone the use of these pesticides, might argue that the DDT and heptachlor restrictions act as NTBs.³¹

31. See the remarks of a representative of the Illinois Consumers for Safe Food, as quoted in *Journal of Commerce*, 14 May 1991, 10A. Mexico allows the use of DDT, which is banned in the United States and Canada, and allows about 20 times the dosage of heptachlor permitted by the United States.

Such disputes are not just a theoretical possibility. GATT Article XX allows countries to establish any measures deemed necessary to protect human, animal, and plant life as long as they do not constitute a "disguised restriction" on international trade.³² In the agricultural sector, the United States and Mexico, both GATT members, have already accused each other of using pesticide, safety, and sanitation regulations as GATT-inconsistent barriers to agricultural trade. In 1989, Mexico required that US swine be vaccinated for hog cholera 30 days before export, even though the United States has been free of hog cholera since 1978. Conversely, the United States requires that Persian limes grown in Mexico undergo a chlorine-based treatment before export because of citrus canker, which Mexican growers claim has been eradicated. Similarly, all Mexican avocados are banned by the United States because of the danger that some might carry the seed weevil (US General Accounting Office 1990, 14-15).

The EPA is responsible for establishing the levels of pesticide tolerance on domestic and imported food under the Federal Food, Drug and Cosmetic Act (FFDCA). Monitoring programs by the US Department of Agriculture and the Food and Drug Administration (FDA) enforce the tolerance levels. The Agriculture Department pesticide data program involves regular monitoring of contamination on 600 different food samples (*Journal of Commerce*, 27 September 1991, 1A).³³ The Bush administration has said—and Mexico and Canada have agreed—that established tolerance levels and enforcement functions will not change under a NAFTA but will only be changed on the basis of scientific review (USTR 1991).

In the United States, individual states and even localities can set environmental standards that are stricter than federal standards.³⁴ Likewise, under Mexico's 1988 General Law, states and local governments can devise their own standards in some areas, and the Canadian provinces enjoy similar powers. Thus the

32. For an authoritative analysis of the intersection between trade law and environmental law, see Charnovitz (1991). Twenty years ago, the GATT created a working group on trade and the environment, but the group never met until recent environmental issues prompted its revival in October 1991 (*Financial Times*, 9 October 1991, 3).

33. The FDA reports that food imports from Mexico have gradually improved their compliance levels over the years (USTR 1991, 183).

34. For example, California has more stringent air emissions and toxic waste standards than apply either at the federal level or within most other states. In *Wisconsin Public Intervenor v. Mortier* (case no. 90-1905), the US Supreme Court upheld the power of localities to impose pesticide regulations more stringent than federal standards. This decision leaves open the door for continued litigation between states and localities as to proper pesticide use. The State of California has already been at odds with towns in the Los Angeles metropolitan area that have tried to block state-mandated spraying against the Mediterranean fruit fly (*New York Times*, 22 June 1991, 9).

question, which was not addressed in the Canada-US FTA,³⁵ will almost certainly arise, given the foreseeable thicket of state, provincial, and local standards. Federal environmental standards adopted in the three NAFTA countries will also be subject to challenge, for they too could act as NTBs.

In this looming debate, all parties concede that food safety standards higher than those set forth by the internationally accepted Codex Alimentarius Commission do not per se constitute an NTB.³⁶ The UN Codex standards have already been criticized in the United States for being less stringent as to pesticide residue on fruits and vegetables than US law. A precedent for extending the US position to the NAFTA has been set by the European Community, which allows member states to impose standards tougher than the Codex if the European Commission determines that they are not NTBs.

Beyond the proposition that international standards do not automatically settle the preemption question, much remains to be decided. US and Mexican states, and Canadian provinces, have asserted their own strong interest in environmental matters. Hence, we recommend a three-pronged approach that accords maximum deference to subfederal rules:³⁷

- Health, safety, and environmental standards that are enumerated by the Codex Alimentarius Commission and by other recognized international bodies may be enforced by each of the NAFTA countries on an even-handed basis that does not act as a "disguised restriction" on NAFTA commerce. That is to say, internationally recognized standards may be used to bar imports, or to require special sanitation measures, provided that goods produced locally are treated in a similar fashion. The new twist would be the use of NAFTA dispute settlement

35. In the Canada-US FTA, technical standards were not harmonized. Instead, both countries reaffirmed their obligations under the GATT Agreement on Technical Barriers to Trade and promised "to make their respective standards-related measures and procedures more compatible and thus reduce the obstacles to trade and the costs of exporting which arise from having to meet different standards." Mexico acceded to the GATT Standards Code in 1988 (Hart 1990, 112).

36. "[The] Codex, jointly administered by the UN Food and Agriculture Organization (FAO) and the World Health Organization, is a scientific body that sets regional and worldwide advisory pesticide regulations and provides technical assistance among other activities related to food safety" (Overseas Development Council and World Wildlife Fund 1991, 14).

37. An alternative proposal by Uimonen and Whalley (1991) would seek to solve disputes by linking international trade and environmental organizations. Initially, the "link agency" would arbitrate disputes, but eventually it would initiate efforts to modify trade and environmental regulations.

procedures to resolve complaints that internationally recognized standards are being applied in a discriminatory fashion.³⁸

- The existing federal standards of each party should be accepted in their current form.³⁹ However, when new federal standards are adopted by any one of the NAFTA members, other members should have a right of consultation. Once adopted, federal standards could only be challenged as NTBs if they acted as a "disguised restriction" on NAFTA commerce. The question for a NAFTA dispute settlement panel would be the presence or absence of discriminatory design or application, not whether the rationale for the standard is valid on its own terms. The challenger would need to show that the offending standard was designed or in fact acts as an impediment to NAFTA commerce. A party could defend against the challenge by showing that the standard is neither designed nor applied in a discriminatory fashion. In the event the standard cannot be defended, the other trade partner would be entitled to trade "compensation," in the GATT sense of permission to withdraw an equivalent trade concession.⁴⁰ The standard itself, however, would continue to have full force and effect unless withdrawn or modified.
- The existing subfederal standards of each party should also be accepted as is. Again, however, new state, provincial, and local standards that come into place after the NAFTA is approved, and that are more stringent than both the appropriate international standard and the federal standard, could also be challenged as to their discriminatory design or application. The dispute procedure and remedies would be the same as for new federal standards that come under challenge.
- The NAFTA parties would agree to use the NAFTA dispute settlement mechanisms exclusively to resolve disputes over new, post-NAFTA standards, but the parties would retain their right to take disputes over pre-NAFTA standards to the GATT.

The harmonization issue concerns two related questions. First, will standards be harmonized "up" or "down"? Second, when should differences in environmental and public health standards be regarded as an objectionable subsidy?

38. The GATT Standards Code contains a dispute settlement mechanism for issues such as food safety. However, not all GATT members have signed the code, and its effectiveness has been questioned by those that have signed (Smith 1991, 7).

39. For NAFTA purposes, the MMPA, which led to the tuna dispute, would thus be accepted as is. The tuna dispute would thus play out under GATT auspices, rather than be carried over into the NAFTA.

40. In the case of subfederal standards, the compensation would be exacted overall from the partner country, not necessarily from the state or province with the offending standard. This remedy parallels the US response to the EC ban on beef fed with hormones: a 100 percent tariff on \$100 million in food imports from the Community.

UNITED STATES SENATE
COMMITTEE ON FINANCE

SUBCOMMITTEE ON INTERNATIONAL TRADE

Hearing on the North American Free Trade Agreement
(NAFTA) Environmental Issues

Wednesday, September 16, 1992 -- 10:00 a.m.

Room SD-215 Dirksen Senate Office Building

WITNESS LIST

I. The Honorable William K. Reilly, Administrator, U.S.
Environmental Protection Agency; Washington, D.C.

II. A Panel Consisting of:

Ms. Kathryn S. Fuller, President, World Wildlife Fund;
Washington, D.C.

Mr. Stewart J. Hudson, Legislative Representative, National
Wildlife Federation; Washington, D.C.

missing -> Dr. Peter M. Emerson, Senior Economist, Environmental
Defense Fund; Austin, Texas

*can get copy if
need.* Mr. Justin Ward, Senior Resource Specialist, Natural
Resources Defense Council; Washington, D.C.

**STATEMENT OF
WILLIAM K. REILLY
ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL TRADE
OF THE
COMMITTEE ON FINANCE
UNITED STATES SENATE
SEPTEMBER 16, 1992**

Good Morning, Mr. Chairman and Members of the Committee. I am pleased to be able to discuss the North American Free Trade Agreement (NAFTA) and, in particular, the environmental provisions of the Agreement and complementary environmental efforts.

Recognition of the growing convergence of international trade and environmental protection issues has presented us with a significant opportunity -- bridging the gap between economic opportunity and environmental values. The challenge is to ensure that trade policies are environmentally sensitive and that environmental programs support free trade and sustainable growth. The completion of negotiations for the NAFTA represents an unprecedented degree of integration of economic growth and environmental protection -- and is, by any measure, the "greenest" trade agreement ever negotiated. NAFTA marks a watershed in the history of environmental protection demonstrating the role that environmental issues can -- and must -- play in the development of international economic and trade policies. I firmly believe that for some time to come, when other nations negotiate with their neighbors to open up markets, NAFTA will be

their model for dealing with related environmental issues. I would like to discuss the environmentally significant aspects of the Agreement.

NAFTA and EPA's Role in the Negotiation Process

As part of the President's May 1 commitment, the Administration undertook a nine month assessment of U.S.-Mexico environmental issues with particular emphasis on the possible environmental effects of the NAFTA.

Prior to starting work on the review, the Administration solicited public comment in a Federal Register notice on the proposed NAFTA, including its environmental effects, and held public hearings in six cities in August and September of 1991. Over 260 witnesses presented testimony on all aspects of the NAFTA and over 400 written submissions were received. Many of these provided valuable information on environmental issues which were subsequently examined in the environmental review itself.

An interagency task force led by the United States Trade Representative (USTR) and composed of 14 departments and agencies including the EPA, produced an analysis of the potential environmental effects of the NAFTA in a document entitled "Review of U.S.-Mexico Environmental Issues." Three thousand copies of a draft of the Review were distributed to Congress, State and local government officials and the public in October 1991. Comments were received

from both individuals and organizations and were carefully considered prior to release of the final Review in February of 1992. The results and recommendations informed U.S. negotiators and helped to set environmental goals and shape the U.S. negotiating position.

I might also note that USTR's outreach to EPA throughout the course of the negotiations was extraordinary. Specifically, the EPA negotiating team played a role in nine of the nineteen negotiating teams including Dispute Resolution, Investments, Government Procurement, Sanitary/Phytosanitary (SPS), Energy, Services, Land Transportation, Intellectual Property Rights, and Standards. We co-chaired two key sub-groups within the U.S. Standards negotiating team that sought to ensure that the ability of the U.S. to adopt, maintain and enforce environmental, human health, and product safety standards was protected.

I would make special mention of EPA's role in negotiating the Standards and Sanitary and Phytosanitary texts of the NAFTA. EPA worked closely with USTR to develop texts in the areas of standards related measures and SPS measures that reflected environmental sensitivities.

The "Green" Provisions in the NAFTA

As a result of the strong consideration given to environmental protection, a number of important and environmentally beneficial provisions have been woven

into the fabric of the NAFTA, which have come to be known as the "green" provisions, and I would like to briefly review ten of the most significant highlights.

(1) Sustainable Development: There is explicit recognition in the NAFTA of the need for economic development to take place in an environmentally sustainable manner. The NAFTA text states that a primary purpose of the Agreement is to:

"Contribute to the harmonious development and expansion of world trade. . . in a manner consistent with environmental protection and conservation; . . . **promote sustainable development**; . . . [and] strengthen the development and enforcement of environmental laws and regulations."

By promoting Mexican economic growth, NAFTA will create more resources which may be directed toward environmental protection in Mexico and along our common border. Independent studies show that as a country's national income reaches certain levels, certain per capita polluting emissions generally decrease.

(2) Environmental Standards: NAFTA maintains existing U.S. health, safety and environmental standards. It allows us to continue to prohibit the entry of goods that do not meet our standards and to set standards that are more stringent than those adopted by international bodies, including specifically approved levels of pesticide residues or the use of food additives in food products that may cross the border. The U.S. maintains the right to make its own determination regarding the level of protection it considers appropriate to protect human, animal, or plant life. The U.S. explicitly maintains the right to prohibit imports until the domestic

approval process is completed. When disputes arise concerning U.S. standards, the burden of proof is on the Party challenging the standard.

(3) Ability to Maintain Higher than International Standards Protected:

NAFTA allows the parties, including their political subdivisions (e.g. provinces, states, municipalities), to enact even tougher SPS measures than national or international standards.

(4) Sanitary and Phytosanitary Measures¹: The NAFTA also calls for the establishment of a body to facilitate enhancement of food safety and sanitary conditions. It will promote upward convergence of Sanitary and Phytosanitary measures. Technical cooperation and consultation on specific trilateral and bilateral issues will be pursued and time sensitive matters will be expedited. Again, each country has a right in the Agreement to set and enforce measures more stringent than internationally-adopted standards, and to decide upon the level of protection it finds appropriate.

(5) Enforcement of Standards: NAFTA encourages the Parties to work towards enhancing their standards to improve environmental and health protection. It explicitly provides that any efforts to make standards of the parties compatible

¹Those dealing with protecting human or animal life or health from contaminants in foods, and protecting animal or plant life or health from pests or disease.

shall be undertaken without reducing the level of safety or the protection of human, animal or plant life or health, the environment or consumers.

(6) International Environmental Agreements (IEAs): NAFTA protects the use of mandatory trade measures to achieve the goals of certain international environmental and conservation agreements. The United States, Mexico and Canada are signatories to the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on International Trade in Endangered Species of Wild Flora and Fauna, and the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal. In the event of any inconsistency between NAFTA and the mandatory trade provisions of these key IEAs, the IEA agreements will prevail. Also, whenever a responding party claims that its action relates to any such trade provision and the precedence of the NAFTA, the respondent may have the matter considered exclusively under the dispute resolution provisions of the NAFTA, rather than under those of the General Agreement on Tariffs and Trade (GATT).

(7) Investment: NAFTA enhances environmental protection through its investment provisions. These provisions specifically reinforce the rights of Parties to ensure that investment activity is undertaken in an environmentally sensitive manner. NAFTA Parties are permitted to impose stringent environmental standards on new investments, as long as they apply equally to domestic and foreign

investors. The Agreement also firmly renounces the lowering of environmental standards as a means to induce investment, thereby squarely addressing the so-called "pollution haven" issue. The U.S., Canada and Mexico have committed themselves not to compete for investment dollars by lowering or relaxing any environmental measures.

(8) Dispute Resolution: The NAFTA expressly provides that dispute settlement panels may call on scientific experts for advice in trade disputes in which issues of fact arise relating to environment, health, safety, and conservation. Reports prepared by such scientific panels must be taken into account before a dispute settlement panel can reach its final decision. The report itself must be released to the public at the time the Panel's final decision is publicly released.

As I discussed earlier, in previous trade agreements, countries complaining that environmental, health or safety measures violated those agreements could have those disputes decided exclusively by GATT panels. Under the NAFTA, whenever a dispute concerns a standards-related measure or sanitary or phytosanitary measures, adopted to protect the environment, and it raises factual issues concerning the environment or relates to the trade provisions of the IEA's I just mentioned, the country defending the measure can elect to have the dispute decided under the NAFTA with its more environmentally-sensitive provisions.

(9) Land Transportation: The land transportation provisions will lead to decreased border congestion by allowing trucks to transport cargoes directly to their destinations in both countries, cutting idling time and ending the need to switch trailers at the border and return them home empty. This will reduce air pollution and also reduce the risk of hazardous waste spillage in the environmentally stressed border area.

(10) Access for U.S. Environmental Companies: The NAFTA will also ensure access to the Mexican market for U.S. environmental engineering, hazardous and municipal waste management and treatment services, firms and professions. Mexico must provide treatment no less favorable than that provided its own nationals to such activities, including the right to establish businesses and conduct business affairs. In addition, NAFTA's temporary entry provisions will allow U.S. firms to send qualified U.S. scientists and environmental engineers to Mexico to provide services as part of a contract.

U.S. - Mexico Bilateral Cooperation

An extensive program of intensified U.S.-Mexico environmental cooperation undertaken as a parallel track to the NAFTA was launched last February with the release of the Integrated Environmental Plan for the U.S./Mexico Border Areas, the "Border Plan." Specific objectives of the Border Plan are to strengthen the enforcement of existing environmental laws; to work cooperatively to help reduce

pollution through joint initiatives in such areas as wastewater treatment, air pollution, chemical emergency response, hazardous waste management, and planning for the border region; to expand planning, training and education programs between the two countries, and to improve mutual understanding of environmental conditions along the border. The Border Plan was established pursuant to the 1983 Border Environment Agreement (the "La Paz Agreement"), which provides for bilateral cooperation in addressing environmental problems in the U.S.-Mexico border area, and establishes a mechanism for action.

Environmental Enforcement

Under the 1983 Border Environment Agreement, as discussed in the Border Plan, the U.S. and Mexico have initiated a Cooperative Enforcement Strategy Work Group to help expand both countries' environmental enforcement capacity through concentrated efforts to enhance enforcement cooperation. In the past several years, Mexico has significantly expanded its enforcement of environmental laws. In recent years, there has been a threefold increase in the number of inspectors throughout the country to more than 300, including 200 inspectors in the Mexican states along the U.S. border.

On June 3, 1992, U.S. and Mexican officials simultaneously announced separate clusters of enforcement actions taken by each government against violations of their respective environmental laws on either side of the border.

Mexico's actions involved 42 facility inspections, resulting in 7 temporary partial closings, one temporary total closing, 22 notices of infractions, and 4 forfeitures of surety bonds. The U.S. actions involved 17 state and Federal civil enforcement cases, seeking total penalties of over \$2 million, as well as two criminal cases. One of the criminal actions was the result of a tip from Mexican Customs officials, who had refused an alleged bribe to allow illegal importation of hazardous wastes into Mexico.

In March and June of 1992, EPA and the Secretariat of Social Development (SEDESOL) conducted two five-day "Multi-Media Inspector Training" courses in Tijuana and Ciudad Juarez for 95 SEDESOL environmental inspectors. Two more inspector training courses are scheduled in Matamoros and Mexicali to take place later this month. Additional cooperative bilateral training exercises are planned, and pending funding, will include training to assist SEDESOL in implementing its requirements that new private enterprises conduct environmental impact assessments, additional multi-media and media-specific inspector training, and training of Mexican officials in the broader policy issues associated with environmental enforcement.

In addition to efforts to expand cooperation in environmental enforcement covered earlier, other initiatives under the Border Plan include significantly increased support for the expansion of wastewater treatment facilities in the

border area, such as the international wastewater treatment facility at Nogales/Nogales, the new wastewater treatment system at Tijuana/San Diego, and the wastewater treatment plant at Nuevo Laredo. In another major effort, the U.S./Mexico Hazardous Waste Work Group is working with Mexico to develop a binational database, to be used in tracking hazardous wastes generated by the maquiladora industry, to help ensure that they are properly managed and disposed of in compliance with both Mexican and U.S. requirements.

Other major initiatives, among many, include programs to:

- protect drinking water supplies;
- improve the handling and disposal of solid waste and hazardous waste;
- improve air quality by improving traffic circulation throughout the border area and by increasing vehicle inspection and maintenance programs in Mexico; and
- assist state and local governments in developing and implementing plans and procedures for addressing chemical emergencies.

I am pleased to report that the Border Environmental Plan Public Advisory Committee, a 24 member committee of individuals from the border area with professional and personal qualifications and experience, met in June. This

committee provides the EPA with citizen input and recommendations aimed at strengthening implementation strategies under the Border Plan.

New U.S. - Mexico Environmental Cooperation Agreement

Another important aspect of the environmental "parallel track" to complement the NAFTA will be a new U.S.-Mexico Cooperation Agreement to deal with pollution and environmental initiatives. This Agreement will establish a Joint Committee for the Protection and Improvement of the Environment (the "Joint Committee"), consisting of representatives from relevant Federal agencies within each government, and will be led by a National Coordinator named by each Party. The U.S. National Coordinator will be the Administrator of the EPA. The Committee will meet regularly and on an emergency basis, if the Parties agree that matters of common concern require immediate attention. Moreover, EPA will serve as the primary implementing agency within the U.S. government for the Agreement and as the U.S. National Coordinator of the Joint Committee. The Joint Committee will establish work groups as it deems appropriate.

We anticipate that the Agreement will highlight the role of the public in the United States and Mexico in preventing and controlling environmental pollution. It will specifically commit the Parties to establish appropriate forms of public participation. The Joint Committee would be required, under the Agreement, to produce an annual report on the state of U.S.-Mexico environmental cooperation

under the Agreement, and to make it available to members of the public upon request.

This agreement and the activities that will be launched under it, along with the range of cooperative activities that is already underway with Mexico, will ensure that the environment will benefit from the NAFTA.

Funding

Perhaps most critical to all of the complementary environmental efforts to the NAFTA is that of funding. To support these programs and initiatives, funding is expected to come from a variety of sources.

The Mexican government has committed \$147 million this year and over \$460 million overall to be used primarily for infrastructure development projects including sewage systems, wastewater treatment systems, and solid waste projects.

While I don't wish to belabor the matter since others have spoken of it previously in hearings, I am concerned about how we keep our pledge to our neighbors and meet our commitments.

The U.S. support for Border Plan initiatives in FY 1993 is, unfortunately, in a precarious state. The President has requested \$241 million to fund projects to

build drinking water and wastewater treatment systems, track hazardous waste, facilitate emergency response, monitor environmental quality and inform and educate the public on a variety of environmental issues. The House of Representatives and the Senate have chosen to cut that request by as much as \$98 million and \$120 million respectively. These reductions will severely constrain our efforts to clean up the border and to support our proposed program of U.S.-Mexico environmental cooperation.

In addition, I have made two important reprogramming requests this year for badly needed resources for implementing the Border Plan. On both occasions these requests were not favorably considered. In January, EPA's \$5 million request for funding for wastewater treatment plants and other projects critical to public health in that area was not accepted. Finally, the Agency's most recent request of \$7.4 million for increases in such important programs as enforcement assistance, emergency response, and pesticide control is in doubt. Please recognize that these are simply requests to redirect funds, already appropriated, to where they are now needed the most.

Conclusion

As President Bush stated in his address to the nation on August 13th, this Agreement marks "the beginning of a new era" for North American economic cooperation that will "create jobs and generate growth in all three countries." It

will also provide Mexico with resources and tax revenues to fund environmental progress.

I believe the Administration has met its commitment to the Congress to make the NAFTA environmentally sensitive. For the first time, policymakers in the fields of trade and environment have recognized and addressed the concerns of one another. The conclusion of the NAFTA negotiations represents an historic and landmark effort toward trade liberalization and the enhancement of environmental protection. It deserves your support.



**STATEMENT OF
KATHRYN S. FULLER, PRESIDENT
WORLD WILDLIFE FUND
to the
SUBCOMMITTEE ON INTERNATIONAL TRADE, COMMITTEE ON FINANCE
UNITED STATES SENATE**

September 16, 1992

Good morning. I am Kathryn Fuller, President of World Wildlife Fund. With over 1.2 million members in the United States, and affiliated offices in over 40 countries that combine policy work and field projects in over 100 countries, World Wildlife Fund is the world's largest private organization dedicated to conservation of nature.

I appreciate the opportunity to give WWF's reactions to the proposed North American Free Trade Agreement. Let me state at the outset that WWF recognizes that trade liberalization in general promises to help developing countries improve their economies, thereby enabling them to devote more resources to conservation and environmental protection. For us the key question is whether steps toward trade liberalization incorporate adequate environmental safeguards—either within trade agreements themselves or in tandem.

We believe that while the NAFTA text before you includes important provisions aimed at enforcement of environmental laws and standards, it has not adequately addressed the broader environmental ramifications of liberalized trade—that is, the extent to which shifts in capital and competitive advantage will alter patterns of natural resource use throughout the NAFTA region. Of particular concern to us is the apparent absence of a mechanism for anticipating trade-driven changes in land use, and for mitigating the resultant impacts on biodiversity.



Thus, while WWF can endorse the NAFTA as a positive first step, we feel it essential that governments take a broader view of trade and environment, and commit to pursue additional needed environmental safeguards. Some of these issues can fairly be said to lie at a policy frontier, and could not have been settled by our negotiators. But it is equally certain that they must be addressed, if not in NAFTA itself then in a designated parallel process. Currently, however, we lack an adequate institution or forum to begin this important task, much less a clear expression by our governments of their intention to do so. Therefore, we urge:

1) The establishment of a North American Commission on Environment, involving all NAFTA parties, to provide a forum for addressing environmental issues, including those related to trade, and to promote sustainable development throughout the region;

2) That the Commission be charged with monitoring environmental impacts of liberalized trade in the NAFTA countries, with a mandate to prepare recommendations to the parties for mitigating adverse impacts where they appear; and

3) That the Commission be open to full participation by interested organizations, citizens, and expert bodies.

Mr. Chairman, the past two or three years have witnessed a growing, if somewhat belated, recognition that global trade policies and global environmental health are inextricably linked—a recognition that has led to an important rapprochement between trade specialists and environmental advocates, whose world views and even language are often vastly different. World Wildlife Fund's own work on trade issues is now several years old, and was strengthened last year when the U.S. Trade Representative's office invited our founder and current board chairman, Russell E. Train, to become a member of the Advisory Committee on Trade Policy and Negotiations.

From the earliest days of the NAFTA discussions, it has been said that Congressional acceptance of the agreement would depend in no small degree upon its environmental impact. We are greatly encouraged by this public Congressional recognition of the trade-environment linkage. Yet, as our World Resources Institute colleague Jessica Matthews wrote several months ago in the *Washington Post*, the connection between trade and environment is a tangled knot, whose strands go every

which way, and, indeed, often conflict. Because of this complex net of relationships, the truth is that, while predictions can be made about the NAFTA's effect on certain environmentally-sensitive sectors, its overall environmental consequence simply cannot be stated with confidence at this time.

As each of you is aware, there has already been substantial public discussion of such important environmental aspects of the NAFTA as its safeguards for U.S. sanitary and phytosanitary standards, the structure of its dispute resolution process, and the possibility that the NAFTA will cause increased pollution because of relatively weak enforcement of Mexican laws and regulations. I know that you, Chairman Baucus, have taken a strong interest in these issues, and I hope and expect that my colleagues will address these aspects here today. Yet, these concerns are only part of the complex trade/environment relationship NAFTA would affect. Today I want to direct my remarks to two other areas: 1) NAFTA's relationship to poverty and sustainable development; and 2) NAFTA's potential adverse impact on Mexico's tropical forests and biodiversity. I conclude with our recommendations for steps to ensure that a strong parallel process is established to deal with the important environmental issues NAFTA has not addressed.

I. Poverty, sustainable development, and the need to internalize environmental costs

Last year, I participated in a group of environment, business, and government leaders, including Senator Chafee, from twelve countries in our hemisphere organized under the auspices of the World Resources Institute to prepare a far-reaching policy document called *Compact for a New World*. As part of the process leading up to the *Compact's* policy recommendations, we studied the current economic reality in the Western Hemisphere. Let me quote briefly from our findings:

Poverty and hunger are growing throughout the hemisphere, forcing people to despoil the environment in their struggle to survive [T]here were at least 204 million poor people in Latin America and the Caribbean in 1990 ... The official figures for the United States and Canada add another 38 million ... Real per capita income for Latin America as a whole fell by almost 1 percent a year from 1981 through 1990 ... Wages have deteriorated badly, by 50 percent or more in some places. Income disparities in the hemisphere are among the world's highest, posing threats to political and social stability in some places... The most vulnerable groups, women and children, suffer the most from poverty throughout the hemisphere ... In Latin America and the Caribbean, 44 percent of the labor force is

unemployed or eking out a substandard living ... The quality of housing, health care, and education grows steadily worse ... Most of our countries are deeply in debt, and the need to service it keeps budget deficits high, fuels inflation, saps investor confidence, and ... distorts economies.

This scale of poverty in our hemisphere is simply not acceptable, and no responsible environmentalist or policymaker can ignore it. We must find economic resources to work jointly to eliminate debilitating poverty. To that end, our final *Compact* document made eight interrelated policy recommendations, including lowering trade barriers and lifting investment restrictions. We noted, however, that while trade liberalization is necessary, by itself it is insufficient, and must be accompanied by several kinds of complementary measures to ensure that the benefits of growth are equitably distributed and sustainable in the long run.

Trade liberalization in general and the NAFTA in particular are vital as means to bring additional resources to bear on the problems of devastating poverty in our hemisphere. However, the NAFTA is not in and of itself sufficient to assure that the benefits of economic development will be equitably distributed or that economic development will not destroy the natural resources which make development and all of life possible.

It is a positive step that the negotiators agreed to include a reference to sustainable development in the preamble of the NAFTA text. "Sustainable development" must be more than symbolic, however. All three governments—the United States, Mexico, and Canada—must develop concrete plans both to institute policy reforms and to provide the necessary financial resources to make sustainable development not a slogan but a reality.

By making economic opportunities more widely available, the North American Free Trade Agreement promises to help raise the standard of living of people in Mexico, in the United States, and throughout the hemisphere, particularly where conditions are the most desperate. If the agreement can achieve this without causing significant offsetting harm to the environment, it has much to recommend it.

In dealing with environment, the NAFTA negotiators focused their attention primarily on protection and enforcement of environmental standards. Among their accomplishments: provisions requiring

that strict standards be maintained and that signatories "harmonize upwards" so that equivalence is reached at the highest relative level of stringency. No signatory, moreover, may relax environmental standards to attract investment. And the parties are to cooperate to ensure effective and more uniform enforcement.

What these provisions and assurances have in common is a recognition that where a legal standard requires care and expense to protect the environment, a producer or manufacturer unanswerable to that standard, or that evades it, enjoys an unfair competitive advantage. Put another way, the ability to pass on "environmental costs" in reality operates as a hidden subsidy.

Much of the environmental damage in this hemisphere—and the rest of the world—comes from the fact that many environmental goods and services lie outside our current market system. They are so-called "public goods" that, however valuable to us they may be, do not carry a price. As a result, they are frequently over-utilized and under-protected, often with profound and adverse social consequences. For so-called "externalized" environmental values, the highly-touted miracle of the market place fails us. The need to find ways to bring environmental values into the market system is a matter of urgency both in the environmental community and for society in general.

Environmental externalities—hidden environmental costs not reflected in the market price of goods and services—are a trade distortion that NAFTA must work to eliminate. A trade regime that does otherwise in effect confers a competitive advantage on those who do the least to protect the environment, and risks becoming an instrument that works against sustainable development. I emphasize here that I am not speaking simply of pollution, the transborder area, practices in Mexico, or of the frequently expressed fears that countries to the south will evolve into pollution havens. What I am speaking of extends to agriculture, forestry, and the entire range of land-use and resource consumption patterns, throughout the NAFTA region. Let us consider for a moment the case of tropical forests.

II. Tropical Forests and Biodiversity

Policymakers increasingly acknowledge the importance of tropical forests to the future of our planet. What many do not recognize is that Mexico contains an incredible variety of habitats ranging from vast deserts and snow-covered mountain peaks to mangroves, coral reefs, and over

11.5 million hectares of lush tropical forest. Mexico's terrestrial vertebrates include more endemic species than any other country in the hemisphere, and its flora are among the world's most strikingly diverse. It ranks among the five largest national repositories of biological diversity on Earth.

As in many developing countries, however, these natural assets are rapidly disappearing or seriously threatened as a result of population expansion and inappropriate development schemes. If present land use trends continue, by the end of this century Mexico will have lost more than half of its 80 million hectares of natural ecosystems. While government policies under the Salinas administration are now beginning to address massive deforestation, reconciling the twin goals of economic growth with environmental protection is a slow process. The contrary financial incentives are powerful, especially where valuable natural resources are concerned.

The reduction or elimination of tariffs may well exacerbate these land conversion trends. Incipient community forestry industries seeking to maintain the forest cover while deriving economic benefits for local communities could be jeopardized by intrusion of cheaper wood products from the US or Canada. Such a boost for the timber industry in the southeast US should not be counted as a NAFTA benefit if as a consequence sustainable forestry in the Yucatan peninsula is replaced by orange groves and cattle farming.

Similarly, Mexico's apparent advantages in the production of citrus fruits and lean beef must not discount the cost of deforestation. A reduction in the price of frozen orange juice or hamburger beef in the American supermarket should not be regarded as a benefit derived from NAFTA if the production of those items is subsidized by loss of biodiversity and the local and global ecological services that tropical forests provide.

A careful examination of the production of timber, cattle, and citrus in North America underscores the risk that liberalized trade could accelerate destruction of Mexico's tropical forests. The NAFTA parties should commit themselves now to addressing this risk. In particular, they should seek ways to assure that the prices of all products traded accurately reflect their true environmental costs. The prices of beef, oranges, or old growth timber must reflect the costs of deforestation, so as markets open, sustainable forest management can compete on a more nearly level playing field.

Conclusion and Recommendations

Where businesses have undertaken extra expense and effort to protect the environment, as in the case of Mexico secondary forest management, it is essential that they not be put out of business by foreign enterprises that undertake no such measures. And where a change in tariff schedules carries with it the potential to precipitate major shifts in land use, it is essential that the costs to habitat, watersheds, and biodiversity be figured into the accounting.

For all its concentration on protection of environmental standards, the NAFTA text fails to tackle this most central task. Perhaps this is unsurprising. As a frontier in policy, finding ways to protect the environment through the market is an exceedingly complex, even daunting undertaking. There are and will be honest disagreements about how to go about it. But there is no question that we must begin.

Two good places for NAFTA to make a start would be to acknowledge more explicitly that patterns of international trade have profound implications for the environment and for sustainable development. NAFTA's preambular language resolving to reduce distortions to trade should expressly include environmentally linked distortions. And the goal of promoting sustainable development deserves a place in the treaty's objectives section.

More important than drafting placement and emphasis, however, is the need to provide some institutional framework for addressing these questions. WWF has long urged our negotiators to establish a tripartite Commission on Environment to begin looking at environmental issues. The Commission could play a valuable role monitoring the effects of liberalized trade on the environment, throughout the NAFTA region, and could develop policies and make recommendations to the parties on trade and other measures needed to minimize environmental impacts.

If the Commission conducts its work with full participation of the public, it could make a significant contribution to the environmental future of our hemisphere. We note with regret that the most that has currently been agreed to in this regard is a bilateral commission to look at pollution in the transborder area—without the Canadians at the table. Issues beyond pollution, particularly those having the greatest potential to impact biodiversity, will go unaddressed.

I hope my remarks today illustrate the need to go further.

In sum, Mr. Chairman, we do not believe that organizations concerned with global environmental protection must fear liberalized trade. Nonetheless, people and governments must realize that with the loosening of the bonds of political isolationism and economic protectionism comes the responsibility to tighten the bonds of international cooperation. We urge you and your colleagues in the Mexican and Canadian governments—and other governments throughout the world—to take this challenge seriously and to create new cooperative means to protect our natural heritage.

We take some encouragement in the fact that each of the countries involved in the NAFTA negotiations has pledged to protect tropical forests and biodiversity, through a variety of international agreements and arrangements. The United States, while not yet a party to the Convention on Biological Diversity, has put forward a potentially important initiative in this regard—the Forests for the Future Initiative. Congress, too, has an important role to play in this process by making sure that adequate funds are provided so these programs can meet their full potential.

In regard to the NAFTA specifically, we are prepared to offer our provisional endorsement with the recognition that the text is insufficient to the environmental protection tasks before us. We reiterate our concern that the NAFTA could encourage destructive patterns of land use, but we accept the commitment of President Salinas and his government to the aggressive preservation of biological diversity, and hope to continue working closely with them in this endeavor. We propose that a new institution be created in North America to cooperatively address environmental questions, and strongly encourage the members of this committee to encourage all three governments to do so.

Thank you.

Working for the Nature of Tomorrow.



NATIONAL WILDLIFE FEDERATION

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TESTIMONY OF

STEWART J. HUDSON

ON BEHALF OF

NATIONAL WILDLIFE FEDERATION

BEFORE

THE SUBCOMMITTEE ON INTERNATIONAL TRADE

OF

THE SENATE COMMITTEE ON FINANCE

SEPTEMBER 16, 1992

INTRODUCTION

Good morning, Mr. Chairman. I am Stewart J. Hudson, Legislative Representative for the International Programs Division of the National Wildlife Federation. The Federation is the nation's largest private conservation organization with over 5.3 million members and supporters, dedicated to the wise use and management of natural resources and protection of the global environment.

I appreciate the opportunity to testify today on environmental concerns related to the North American Free Trade Agreement (NAFTA). On behalf of the Federation, I also want to thank the Chairman for his sustained interest in this issue which has, I believe, resulted in an improved version of the NAFTA text.

The testimony that follows represents the Federation's views on the NAFTA text as it was made available to us less than two weeks ago. I must begin, however, by clarifying the inaccuracies contained in a New York Times article of Tuesday, September 15 1992, which seems to suggest that the Federation has now decided in favor of the NAFTA.

As we have expressed to Ambassador Hills, and in private conversations with Committee staff, the Federation has not taken a position on the NAFTA. We are encouraged by the progress that has been made in addressing environmental issues, but some areas of the text require greater clarification to assure that the agreement strengthens, rather than undermines, the adoption and maintenance of the toughest possible environmental standards in all three NAFTA countries. Moreover, with respect to the funding and enforcement of environmental protection measures, and also with respect to effective follow-through and monitoring of NAFTA-related environmental issues, further action on the part of the NAFTA Parties is required.

The testimony that follows will touch upon each of these areas in turn, suggesting where greater clarification is needed, and proposing alternatives where further action to protect the environment may be necessary.

Before preceding to the next section of the testimony, however, there are two caveats attached to my remarks.

First, it should be understood that the testimony is based on the September 4, 1992, NAFTA text and not the "notification text" that will be delivered to Congress. If the notification text is substantively different in the areas of concern to us, we will provide an amended version of my remarks to the Committee.

Second, we are all aware that when the next session of Congress votes on this agreement, the NAFTA implementing legislation is likely to be as important as the actual NAFTA text. The National Wildlife Federation intends to play an active role in examining the NAFTA implementing legislation and making our views known to the Congress and the Administration.

Though we might have amended Article XX (b) differently, the direct reference to environmental measures in the NAFTA text marks a significant improvement over the GATT, where the word "environment" never appears. The reformulated language of Article XX (g) also affords a wider protection to legitimate measures seeking to conserve natural resources.

One area which remains to be clarified has to do with the requirement in Article XX (b) of the GATT, and the current Article 2101 of the NAFTA, which permits exceptions only for those measures "necessary [emphasis added] to protect human, animal or plant life or health." This so-called necessary test seems innocuous, but is subject to a wide degree of interpretation and could encourage panels to rule against legitimate environmental standards. For example, a NAFTA panel might rule that a ban on the importation of tuna caught in a manner which kills dolphins is unnecessary, and that labelling a can of tuna as "dolphin safe" is a more appropriate remedy.

The "necessary test" shows up again and again in NAFTA provisions touching on the environment, and needs to be clarified in order to ensure that it will not be used to endanger legitimate environmental safeguards.

Standards

One of the most contentious issues in the NAFTA has been the proposed harmonization of sanitary and phytosanitary standards, as well as other technical standards designed to protect the environment.

The harmonization proposals contained in the NAFTA, and based largely on provisions negotiated in the Uruguay Round of GATT, derive from a concern that phony environmental standards are being used as a protectionist device to strengthen domestic industry. Environmentalists have expressed their concern that these provisions, particularly those negotiated as part of the Uruguay Round, could be used to undermine legitimate standards.

While the NAFTA provisions are a marked improvement on what has been negotiated in the GATT, some important questions on the current text still need to be resolved.

Attention to protecting legitimate environmental standards in the NAFTA can be seen in the following areas:

- Article 754 (1) makes explicit a country's right to adopt a sanitary or phytosanitary measure that is higher than an international standard. Other provisions, such as Article 755 (2), suggest that standards that are higher than these international floors are not, "for that reason alone...presumed to be inconsistent." Articles 904 and 905 afford similar protection for more generic environmental standards.

- In departing from international standards for sanitary and phytosanitary measures, countries must demonstrate that their standards are based on scientific principles, and that they

The first area relates to the definition of what is a necessary standard. In the chapter on Technical Standards, Article 904 (4) prohibits a Party from establishing measures "with a view to or with the effect of creating an unnecessary [emphasis added] obstacle to trade between the Parties." In this case, the possibility that the so-called "necessary test" may be used to challenge a standard is reduced by Article 904 (4)(a) which states that an unnecessary obstacle will not be presumed to be created if, "the demonstrable purpose of such measure is to achieve a legitimate objective."

In the definitions section at the end of the chapter, "legitimate objective" is defined as including:

- (a) safety;
- (b) protection of human, animal or plant life or health, the environment or consumers (including matters relating to quality and identifiability of goods or services); or
- (c) sustainable development

While this provision helps reduce the possibility that the "necessary test" will be used to undermine legitimate environmental standards, the provision is still subject to wide interpretation and should be clarified through appending an interpretive note to the NAFTA text. Furthermore, it would be useful to add this kind of protection to other areas of the NAFTA, such as the Sanitary and Phytosanitary Standards Chapter, where the "necessary" test will come into play.

Another area of concern related to standards is the lack of public accountability and public participation in the operations of the Committee on Sanitary and Phytosanitary Standards. The same concern also applies, to a lesser extent, to the Committee on Technical Standards which may include or consult with non-governmental organizations, but is in any event not required to do so.

The work of both Committees should be open to the public, and greater public participation in their deliberations should be a requirement, not an afterthought. This Committee should ask the negotiators why greater accessibility and accountability is not part of the NAFTA text in these areas.

International Environmental Agreements

While protection for international environmental agreements, at least those with trade-related provisions, is included in the NAFTA, the provisions contain new language which may undermine the stated intent of these provisions.

a transcript of the panel's hearing and a record of their deliberations be available to interested persons after a final decision has been rendered. Furthermore, while Article 2017 (4) suggests that the final report of a dispute resolution panel "shall be published 15 days after it is transmitted to the Commission" there is no guarantee that this will occur since it requires approval by the Commission itself. Release to the public of final reports should be automatic.

Investment

As we learned more about the proposed NAFTA in 1990, the environmental implications of its investment provisions, particularly in Mexico, became clear. Billions of dollars have been invested in the Mexican economy in anticipation of NAFTA approval, generating the hope that future development will occur, but at the same time raising fears that such development will come at the cost of environmental protection.

The Federation has followed negotiations on NAFTA investment quite closely and we are pleased with, and would like to credit the negotiators for, including two provisions designed to address environmental concerns.

The first provision, adopted as Article 1114 (1) of the NAFTA Investment Chapter, states:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure, otherwise consistent with this Chapter, that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

The language of this provision is clearly hortatory, and does not require any action to be taken by NAFTA Parties. Nevertheless, its significance should not be underestimated. The provision expressly protects a Party's right to undertake an environmental measure related to investment in a Chapter which, as a whole, reduces or eliminates most other conditions on new or existing investment.

The second environmental provision related to investment is even more important and seeks to prevent the creation of pollution havens in NAFTA countries. Article 1114 (2) states:

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of such an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

Certainly, environmental protection costs might be reduced by trade that promotes a more efficient allocation and use of resources between the three NAFTA countries, but even this depends on adequate enforcement of environmental laws.

It is also possible that the NAFTA will inspire economic growth in North America, and generate additional budgetary resources for the purpose of environmental protection, but there is no guarantee that increased budgetary resources will be targeted for this purpose. Moreover, a fatalistic belief that increased economic growth means greater protection for the environment ignores the environmental wear and tear that is inevitably associated with liberalized trade and increased economic activity.

Clearly, it is the responsibility of the NAFTA Parties to explore unconventional sources of financing for environmental protection necessitated by increased trade. While mainstream economists tell us that taxes are the most effective means of paying for environmental protection, politicians in the U.S., with a few exceptions, are loathe to endorse the concept.

Proposals to raise funds for environmental protection through public bond offerings, represent another more unconventional approach, but are given short shrift due to the budgetary implications inherent in such proposals.

One thing is for certain. Before the next session of Congress votes on the NAFTA, they should ask themselves whether the price tag for environmental protection has been fully demonstrated, and whether adequate funding sources are in place to assure that the environmental benefits of free trade are realized. Again, despite what was inaccurately reported in Monday's New York Times, the Federation believes that freer trade does lead to environmental deterioration unless adequate funding mechanisms and environmental safeguards are in place. Congress should be aware of the environmental price tag of this agreement before signing on the dotted line.

North American Commission on the Environment

The gravest shortcoming of what has been accomplished by NAFTA negotiators to date is the failure to establish a mechanism for follow-through on NAFTA-related environmental issues. This failure underscores the concerns that many environmentalists have expressed with regard to the enforcement of environmental laws and regulations once the NAFTA is approved, and it suggests one of the reasons that non-governmental environmental organizations in Canada, Mexico, and the United States have called for the creation of a North American Commission on the Environment.

The North American Commission on the Environment would serve as an inquiry point on NAFTA-related environmental issues, and would receive and investigate complaints from private citizens, non-governmental organizations, as well as governments, with regard to the failure of any Party to adhere to NAFTA environmental provisions. The Commission would help facilitate the resolution of environmental disputes arising under the NAFTA, and issue reports on the NAFTA Parties' adoption and enforcement of environmental laws and regulations.



NATIONAL WILDLIFE FEDERATION

1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

NORTH AMERICAN COMMISSION ON ENVIRONMENT

To assure that the North American Free Trade Agreement (NAFTA) will promote sustainable development, and to enhance cooperative approaches to environmental problems faced by all three NAFTA countries, conservation organizations in Canada, Mexico, and the United States renew their call for the creation of a North American Commission on the Environment. The Commission, which is essential to the successful implementation of the NAFTA, must be in place prior to final approval of the NAFTA itself, and must include Canada as well as Mexico and the United States.

Background

Economic integration among nations, as the experience of the European Community has shown, can cause environmental problems not always envisioned by trade negotiators. Therefore, it is imperative to include in international economic and trade agreements specific provisions to promote socially equitable and environmentally sustainable development. In addition, it is essential to establish the actual mechanisms that would respond to these concerns on an on-going basis. The North American Commission on the Environment would serve this purpose and would also provide a focal point for trilateral environmental protection efforts.

The Role of the Commission

Resolution of Environmental Disputes--To assist in the resolution of environmental disputes under the NAFTA, and the effective implementation of NAFTA environmental provisions, the Commission would:

- Be granted specific authority to gather and disseminate information relevant to environmental disputes, and serve as the inquiry point on trade-related environmental matters. The Commission would provide expertise to dispute resolution panels, and oversee the implementation of NAFTA environmental provisions.
- Receive and investigate complaints from government agencies, non-governmental organizations, and private citizens concerning the failure of any Party to enforce NAFTA environmental provisions.
- Develop mechanisms to assure effective participation of private citizens, and non-governmental organizations in its deliberations.
- Issue reports on the NAFTA parties' adoption and enforcement of domestic environmental laws and regulations. Implementation of the respective party's obligations under international environmental agreements would also be covered by these annual reports. The reports would make recommendations to the parties to help avoid the creation of pollution havens or undue advantage in trade between the three countries.

Cooperative Problem Solving--Of course another important category of activities of the North American Environmental Commission would be to support, encourage, and coordinate cooperative approaches to environmental problems that affect or are common to the three countries. The Commission's mandate in this regard would include:

- Target environmental concerns that can best be dealt with on a trinational or binational basis and bring the parties together to develop and undertake a plan of action to address such concerns.
- Coordinate programs for sharing technical expertise necessary to deal with environmental problems that are of interest to NAFTA countries.

Contact: Stewart Hudson 797-6602, Rodrigo Prudencio 797-6603

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NAFTA —

BY TELECOPIER No. 202-224-1933

TO: Rick Adcock
 FROM: Joel P. Trachtman
 DATE: September 8, 1992
 SUBJ: NAFTA Environment Provisions

As you requested, I have taken a cursory look at the portions of the NAFTA text that you telecopied to me today. I have not had an opportunity to reflect at length, or to examine other materials to inform the following assessment, and so it must be regarded as preliminary. I also am focussing on environmental issues, and on those worthy of political attention. Subject to these limitations, I have the following observations.

1. Art. 104. This provision states that in the event of a conflict with the listed environmental and conservation agreements, the latter will prevail.
2. Art. 301. This provision incorporates by reference the national treatment obligations contained in Art. III of GATT. Recall that in the GATT Tuna panel report, this obligation applied to say that "like products" must be treated alike, and therefore that foreign tuna could not be subjected to discriminatory treatment on the basis of the means of production. The GATT panel found that Art. III calls for a comparison of the regulation of imported tuna as a product with the regulation of domestic tuna as a product. The panel reasoned that "[r]egulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product." It went on to state that Art. III:4 "obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels." (Para. 5.15 of GATT panel decision.) Exceptions to this national treatment obligation are set out in Annex 301.3, which was not available to me.

3. Art. 309. This provision incorporates by reference the

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prohibition of quantitative restrictions (NTBs) contained in Art. XI of GATT. Exceptions referenced are (i) as otherwise specified in the agreement, (ii) the measures listed in Annex 301.3 (which was not available to me), (iii) certain automotive goods, and (iv) certain textile goods. Recall that this was a basis for the condemnation of the MMPA in the GATT Tuna panel report.

4. Art. 2101. This provision incorporates by reference the exceptions under Art. XX of GATT. Recall that one of the questions addressed by the Tuna panel was whether Art. XX provided an exception that could protect the MMPA. The panel in that case found that neither Art. XX(b) (human, animal or plant health) nor Art. XX(g) (exhaustible natural resources) were intended to be used to protect these values outside the importing country's territory. Otherwise, each country would sit in judgment of the internal regulation of each other country.

The second section of Art. 2101 states that nothing in Part Two (trade in goods) or Part Three (technical barriers to trade) should be construed to prevent any party from adopting or enforcing any measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this agreement. While proponents will argue that this gives the U.S. wide latitude to protect its environment and enforce its laws, it does not overcome the problem identified in the Tuna case: that the U.S. may not under Arts. III, XI and XX seek to influence Mexican environmental regulation through U.S. trade restrictions.

My conclusion based on this and the provisions referenced above is that NAFTA does not improve on GATT from the standpoint of environmental protection. Perhaps this is the best criticism of the administration's efforts: it is on notice that GATT is deficient in this area and is trying to slip by with the same deficiency in NAFTA. This criticism could be countered by the observation that it is very difficult to remedy the deficiency, and we should not hold up NAFTA to do so.

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5. Art. 754. This provision makes clear that each party reserves the right to take sanitary or phytosanitary measures to protect human, animal or plant life or health in its own territory, thus legislating the Tuna panel's interpretation of Art. XX of GATT. By negative implication, the U.S. gives up the right to protect these things outside of its territory by such measures.

6. Art. 757. This is part of subchapter B, dealing with sanitary and phytosanitary (S&P) measures. These provisions are extremely interesting. First, they safeguard the right to take S&P measures, while imposing the disciplines that

these measures must be based on scientific principles and risk assessments, and applied on a non-discriminatory basis. This right is safeguarded to the extent that it is used to "establish [the party's] appropriate level of protection in accordance with Art. 757." "Appropriate level of regulation" is meant to take into account the differences in preferences among the parties, i.e., Mexico might accept some environmental degradation to obtain some economic growth, to a greater degree than the U.S. or Canada would. The definition of "appropriate level of protection" must be developed taking into account economic factors such as loss of production and cost effectiveness. This would in effect require U.S. environmental regulation to consider these factors. While I may believe they should be considered, I am not sure that Congress or the Democratic candidates would accept this as a restriction. This provision might be criticized as restricting U.S. S&P regulation to that which can be justified on economic grounds, as opposed to moral, aesthetic or other grounds. This criticism could backfire, leading to accusations that Senator Gore would protect the environment where it does not make economic sense, trading jobs for owls.

cost-effective
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Rick, I hope the above is useful. Please call me at 617-332-5750 after 8 p.m. to discuss. Best regards.

charged the Bush Administration to conceal "blunders" in its invasion of Kuwait. [D1.]

ra by 7 percent, Italy's prime minister's economic policy. [D6.]

sla \$1.15 billion in loan guarantee for grain and livestock feed. [A6.]

d French voters a deal: it will eaty on European union. [A10.]

ally active role in the Presidential campaign to work in the campaigns. health. [D2.]

more attention on Wall Street are responsible for millions of Market Place. [D8.]

vision, Home Box Office and marketing campaign to reverse advertising. [D19.]

arket Place	D8
utual Funds	D18
asdaq National List	D7
asdaq National Market	D14
asdaq Supplemental	D16
ew York Stock Exchange	D9
ptions Trading	D15
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ituaries	D22,D23
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es Deal to Sell Mellon Bank

services, from overseeing personal investments to managing cash for corporations and handling data processing for smaller banks, supplement the more traditional revenue that banks receive from interest payments on loans.

For Mellon, "this was a rare if not unique opportunity to solidify their position in these fee businesses," said haddeus W. Paluszek, a vice president and banking analyst at Kidder Peabody & Company.

Worth the Price, Analyst Says

"The type of price they are paying for this transaction is hefty," Mr. Paluszek said, "but when all is said and done, Mellon will be better positioned in what we perceive as a difficult banking business through the 90s."

For all of 1991, Mellon's service businesses accounted for about 40 percent of the bank's record profits. With the acquisition of the Boston

Continued on Page D20

Environment Rift Emerges In Trade Pact

By KEITH SCHNEIDER

Special to The New York Times

WASHINGTON, Sept. 14 — On the eve of Congressional hearings on one of the most contentious aspects of the North American Free Trade Agreement, a split has emerged among environmental groups on the conservation aspects of the accord. And the Bush Administration is likely to exploit that rift to try to gain passage of the trade pact.

The accord is opposed by the Sierra Club and various other groups, which predict that it will lead to less stringent environmental safeguards. But the National Wildlife Federation, the nation's largest conservation group, is leaning toward issuing a public statement in support of the agreement, said Stewart J. Hudson, a trade expert with the group. And at the World Wildlife Fund, the chairman, Russell E. Train, is waging a campaign to persuade the group's president, Kathryn S. Fuller, to endorse the trade agreement. Both organizations helped draft parts of the pact.

At issue is whether reducing barriers to trading industrial and agricultural goods among the United States, Mexico and Canada helps or hurts the environment. The agreement is fast becoming an important issue in the Presidential campaign, with President Bush calling for its passage and attacking Gov. Bill Clinton for "waffling" because the Democratic challenger has not decided whether to support or oppose it.

Ties to E.P.A.

The National Wildlife Federation and the World Wildlife Fund have close ties to William K. Reilly, the Administrator of the Environmental Protection Agency, who is to testify in the House on Tuesday and the Senate on Wednesday in support of the measure. Mr. Reilly was the president of the World Wildlife Fund before joining the Bush Administration, and Jay D. Hair, the president of the National Wildlife Federation is, perhaps, his closest political ally in the national environmental movement.

Those opposing the trade agreement besides the Sierra Club are the Natural Resources Defense Council, the National Toxics Campaign, Greenpeace, Public Citizen and several other national environmental groups.

The Environmental Defense Fund,

Continued on Page D20



Pat Morgan, left, senior vice president of Neiman Marcus, Bernie Feiwus, president of the mail order division, Carolyn Cobb, director of public relations

for the right, offered

Getting Attention With

By STEPHANIE STROM

Neiman Marcus put more than three million Christmas cards in the mail yesterday in the form of a mail-order catalogue that has come to herald the holiday season.

The items range from the practical, a \$19 pony-print apron, for instance, to the absolutely unnecessary, like the \$100,000 fully operative, solid-gold miniature train carrying rubies, diamonds, sapphires and emeralds around a 41-foot track. All this is the cull of a band of mail-order merchants who scour the earth, skies and sea for the 484 gifts offered on the catalogue's pages.

This makes the Neiman Marcus Christmas Book a textbook example, retail experts say, of how to use direct mail to reinforce image, enhance mystique and build excitement.

"It's not our most profitable book," said Bernie Feiwus, president of the mail order division, "but with this particular catalogue, focusing on

Neiman mails its holiday catalogue full of mystique-enhancing gifts.

profits is like missing the top of the trees."

Part of Identity

Patrick M. Dunne, a professor of retailing at Texas Tech University, said the catalogue "has become a part of their identity as men who sell sizzle that even if you're in Idaho, you know Neiman Marcus. What it stands for just because you've heard about the catalogue."

The special gifts are key. Lock and key until the catalogue is mailed out, with suppliers, photographers, printers and anyone else

NEW YORK TIMES 15 SEPTEMBER 1992

An Environmentalists' Rift Emerges on Free Trade Pact

Continued From First Business Page

a national group based in New York, is still evaluating the agreement and has not decided its position, said Scott A. Hajost, the group's international counsel.

The text of the agreement was made public by the Bush Administration last week, and trade experts for the national environmental groups have been poring over the details since.

In breaking with its sister organizations in the national environmental movement, the National Wildlife Federation said today that freer trade was not likely to cause environmental deterioration. Mr. Hudson said the trade agreement now included provisions that would prevent local officials from weakening environmental rules to attract new plants, which was one of the federation's principal concerns before the agreement was negotiated.

'Encouraged' by Negotiations

Mr. Hudson also said his group was encouraged by the Administration's response to the pressure the environmental movement had exerted on the White House and said the agreement was far stronger on conservation than when it was originally proposed.

"We're encouraged by what has been negotiated," Mr. Hudson said. "They made a great deal of progress in the environmental standards section."

Mr. Reilly and other members of the Bush Administration are expected to seize on such support to counter the wave of opponents in the environmental and agricultural communities who are trying to block Congressional passage of the legislation that would put the agreement into effect.

That legislation will be drafted by whoever is President early next year, in consultation with Congress, and the lawmakers will have 90 working days to approve or reject it. Under the so-

called fast-track procedures approved last year, no changes will be permitted in committee or on the floor.

Last week, Representative Richard A. Gephardt, Democrat of Missouri and the House majority leader, cited weaknesses in the environmental provisions as reasons for his opposition to the trade agreement. Today, Representative Ron Wyden, a Democrat of Oregon, called for the agreement's environmental provisions to be strengthened.

List of Objections

Other national environmental groups today urged Congress to reject the agreement. John J. Audley, the trade analyst for the Sierra Club in Washington, said his group had compiled a list of 30 provisions that could harm the environment.

Freer trading in beef, for instance, could lead to much wider slashing and burning of the Mexican rain forest for cattle pastures, he said.

The Sierra Club and other national groups say that the Bush Administration and the Mexican Government have not set aside enough money to clean up industrial pollution along the 2,000-mile United States-Mexican border, where American companies have built new plants, many of them without modern sewage and waste treatment systems.

Mr. Audley said the Sierra Club was concerned that even if environmental rules in the three countries were comparable, enforcement of the rules would not be uniform. Moreover, he said, the Sierra Club and other groups were concerned about the composition of the international panels to decide disputes. Environmental advocates may be prevented from being members of such panels, he said.

"We have an abundant bundle of evidence that shows this particular agreement will be bad," Mr. Audley said.

Shearson to Sell Boston Co.

Continued From First Business Page

Company, annual revenue from such businesses will increase to more than \$1 billion, Mr. Cahouet said at a news conference in Boston yesterday.

Mellon's news was not well received on Wall Street yesterday, as the price of its shares fell by \$1.25, to \$40.25 on the New York Stock Exchange. American Express stock rose by \$0.875, to \$22.625 a share.

Founded in 1865, the Boston Company was bought by Shearson for \$50 million in 1981. The company provides a range of administrative, custodial and trust services for more

than \$300 billion worth of assets.

Bankers familiar with the Boston Company's balance sheet say the company is projecting pretax earnings of \$130 million for the current calendar year.

Value of Non-Loan Businesses

"It seems to me there is no question that the problem banks will face in this decade is a shortage of loans," said Lawrence W. Cohn, a banking analyst at Paine Webber Group Inc. "If you can develop a very strong presence in these areas..."

Table with multiple columns containing stock market data, including symbols, prices, and volume. The table is organized into sections with headers like 'n & Sink', 'Calls-Last', and 'Puts-Last'.

FAX to Leon
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[Handwritten signature]

Wesley
Kyle
George
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Draft 2.8.92/Sept. 16

Possible Statement on NAFTA

From the outset of this campaign, I have stated that I will support a free trade agreement that opens markets for U.S. exports to Canada and Mexico so long as it provides adequate protection for workers, farmers, and the environment on both sides of the border. I have also stated that we must have strong transition strategies that ensure that workers benefit from a more open world trading system.

We now have a part of the proposed NAFTA arrangement represented in the unsigned document that the three countries have reached. The Bush Administration finally released a draft of it on September 8.

Let me be clear. I'm for a good agreement. However, based on my initial review of the proposed agreement, this is not a good agreement. George Bush did not do the job. I call on Bush to fix the arrangement. If he does not, I will move quickly to do so so if elected President.

More needs to be done--and must be done--to help workers and farmers and to protect the environment. Among the major problems with the proposed agreement are the following:

ENVIRONMENT

1. Dispute

There should be an enhanced NAFTA dispute resolution process for enforcement of national environmental and health laws. For example, the proposed agreement does not allow a country to use the formal, binding NAFTA process now if another country lowers its environmental standards to entice investment. The sole NAFTA remedy is government-to-government consultation.

There should be public participation in this NAFTA dispute resolution process. The dispute provisions are secretive, and provide no mechanism for public participation in defending challenges to U.S. laws, or in bringing challenges to the practices of the other NAFTA parties.

3. The success of a good NAFTA arrangement requires adequate dedicated funding for environmental clean-up and for the necessary infrastructure along the border to handle the development and increased traffic. A funding commitment by the Bush Administration is still lacking.¹ Better yet, there should be a funding commitment by all

¹ One caveat. In February 1992, Bush announced a plan to clean up pollution along the U.S.-Mexico border. The plan called for \$379 million in U.S. funds over the next two years and some Mexican support. However, these amounts are inadequate and some U.S. funds would have been reprogrammed or reallocated from funds intended for other purposes.

X 4 '93 budget has border plan
House & Senate cut the request.

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three NAFTA partners.

4. A Commission on the Environment should be created, at least between the United States and Mexico. This should not be a study commission or simply a framework for occasional meetings, but it should have substantial powers and resources to clean up and prevent border pollution and to encourage the enforcement of the countries' own environmental laws.

5. NAFTA limits the ability of a country to implement international environmental agreements. Greater deference should be given to a country's choice of how to implement international environmental agreements, such as those to prevent ozone depletion. Acts in a reasonable manner.

6. A good NAFTA also requires adequate dedicated funding to help U.S. workers and communities who are adversely affected. Worker training, relocation assistance, and other necessary support should be viewed as an entitlement for workers. The recent proposals of the Bush Administration do not provide the necessary assurances. Given the 12-year history of efforts by the Reagan and Bush Administrations to eliminate the Trade Adjustment Assistance Act, press releases by the Bush Administration are hardly enough.

7. Enforcement of Mexican laws in the areas of the environment and worker standards (such as health and safety and child labor laws) is essentially ignored by the proposed agreement.² In contrast, the proposed agreement allows for enforcement in Mexico of intellectual property laws, through law suits, damages, and injunctive relief. Similar enforcement provisions should be developed in the area of environment and worker standards.

8. The provisions for the automobile industry have different transition periods for the United States and Mexico, with an apparent uneven tilt in favor of Mexico. This should be carefully reviewed and revised as appropriate.

9. If the automobile transition measures are not changed, then a super safeguard mechanism should be provided. It would provide that if trade during the transition period does not expand on a roughly balanced basis in the industry, then the country who is hurt can ask the other to accelerate its liberalization measures. If the other country does not agree, then the first country can adjust the pace of its own liberalization. This will help protect against unexpected developments during the transition period. This super-safeguard approach should also be considered for other industries.

-such as cleanup of the Chesapeake Bay! It looks as if Congress will cut these funds substantially.

² There are limits on importing goods into the United States that are dangerous to the consumer's health, but this is a fairly narrow sanction.

3. Job plan - sets aside \$1.4 bn for NAFTA. Y2.

whole region (Hollyhocks)

Side

Make clear, design panels

\$2000 cap.

*Pesticides
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traders trading in
Mexican courts*

*Content
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Agreement

Agreement

10. All "cultural industries," which includes audiovisuals (movies and cable), publishing, and sound recordings, will be exempt in Canada from the free trade rules established by NAFTA, as they were from the U.S.-Canada Free Trade Agreement of President Reagan. This is a big loophole in coverage and it hurts some of our most competitive industries. I want a review of this loophole, with a goal of a transition to more open trade in this area. (4)

11/10. The proposed agreement can also cause unnecessary harm to some farmers, unless help is provided them. Besides enactment of my general farm program, for U.S. farmers adversely affected by NAFTA, U.S. programs should help in at least three ways: (a) strict application of U.S. pesticide requirements to imported food; (b) establish that growers who lose out to Mexican competition are eligible for worker assistance; (c) utilize more the existing agricultural programs to help growers identify alternative crops where they would be more competitive.

Many of these problems can be overcome by new U.S. programs, such as on worker training, and by new supplementary agreements between the United States and Mexico, or between the United States and Mexico and Canada. Some of these problems might well cause the negotiators to go back to the proposed agreement, which is still unsigned.

We should recall the negotiating history of NAFTA's predecessor, the U.S.-Canada Free Trade Agreement (FTA). There were several changes in the agreement between the time that an document of about 40 pages was agreed to and initialled on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of about 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

My commitment to a good NAFTA agreement is strong. If I am elected President, it will have a high priority. To reassure our NAFTA partners, I will make a meeting with Prime Minister Mulroney and President Salinas one of the first items on my calendar for the transition period.

I will strive for and sign a pro-growth, pro-jobs agreement with Canada and Mexico that does not sell out our people or our environment. If I am President, that is exactly the kind of arrangement we will have.

ENVIRONMENTAL PROVISIONS IN THE NAFTA AGREEMENT

1. PRODUCT STANDARDS

Taxonomy: this includes two separate chapters: Sanitary and Phytosanitary Measures (chapter 7, part B) and Standards-Related Measures (chapter 9). The former covers agricultural standards, while the latter covers industrial standards. The comments below apply to both types of standards.

Examples: allowable pesticide residues in imported food, product safety standards for chainsaws, cars, etc.

Concern: US national, state, or local standards that are higher than Mexico's may be challenged as a nontariff trade barrier, resulting in lower standards and less consumer and public health protection.

Important Provisions:

1. countries are encouraged to adopt international standards.
2. countries can adopt standards that are higher than international standards if they are justified by legitimate scientific evidence and different risk preferences (not a disguised trade barrier).
3. For product standard disputes, the NAFTA agreement changes the burden of proof from the country maintaining the higher standard (the current rules for GATT) to the complaining country. This is stated for phytosanitary standards on page 7-47 and for technical standards on page 9-14.
4. For product standard disputes regarding a country's standards, the responding country (one with the standard being challenged) may choose to have the dispute submitted to NAFTA dispute settlement procedures rather than under the procedures of GATT. This is not in the standards chapters, but it is stated on page 20-4. [This option is also available for disputes concerning trade measures taken under specified international environmental agreements. See page 20-4]
5. The Committees for Phytosanitary Standards and for Technical Barriers to Trade (and their subcommittees and working groups) may call on environmental experts to provide advice on factual questions relating to environmental issues. [The panels are not required to call on environmental experts.] See page 20-11.

GAO -
order is
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Technical

Assessment:

1. The explicit placement of the burden of proof on the country that is challenging a product standard as a nontariff trade barrier is a significant improvement over the GATT.

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2. In standard disputes, the ability of the country with the higher standard to choose whether a NAFTA panel or a GATT panel will hear the case may be an advantage. However, it depends on the makeup of the NAFTA panels and on more important issues such as who bears the burden of proof.

3. The phrase on page 7-35 on the Right to Take Sanitary and Phytosanitary Measures, is different from its counterpart in Article XX. [However, see Comment 4 below***.]

NAFTA: "Each party may, in accordance with this Subchapter, adopt, maintain, or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation.

GATT, ARTICLE XX, GENERAL EXCEPTIONS: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;"

The explicit limitation in the NAFTA article to one's own territory is important because some analysts maintain that Article XX (b) [or XX (g) on exhaustible natural resources] already allows a country to restrict trade if necessary to protect the global commons. An example is an article by Steve Charnovitz, "Exploring the Environmental Exceptions in GATT Article XX," Journal of World Trade, Vol. 25, No. 5, October, 1991. The legitimate application of article XX (b) is not a settled issue. The NAFTA article is ruling this out even as a possibility.

Global
commons

Note that the issue here is the use of import restrictions to protect the global commons. It is not the same as the issue of whether to use import restrictions on a country that has 'low' environmental regulations (process standards). The latter issue is more of an economic competitiveness issue of unfair advantage.

Does this relate to trans-dolphin?

→ product standard → we tried this but some
was then some.

→ global commons →

we argued →
mea. to protect life in the global commons.
→ we look at this ground.

4. Chapter 21, Exceptions, Article 2101, states that GATT Article XX (b) and Article XX (g) both are incorporated into the NAFTA agreement for Parts Two and Three, which cover sanitary and phytosanitary standards and Technical Barriers to Trade. However, Article 752 (page 7-35) states that "provisions of Article XX(b) of the GATT as incorporated into Article 2101(1), do not apply to any sanitary or phytosanitary measure."

This may mean that the phrase in its territory in the Phytosanitary Code is just an oversight, or it may be significant that Article XX applies to Technical Barriers to Trade, but not to the phytosanitary measures. This requires further checking.

II. PROCESS STANDARDS (ENVIRONMENTAL REGULATIONS)

Examples: allowable emission levels for air and water discharges by industrial producers, conventional pollutants and toxic wastes.

Concern: The US and Mexican laws on paper for process standards are now virtually the same according to the EPA. However, Mexico has not fully developed all of their technical specification for different water pollutants, etc. Of more importance, Mexican enforcement up to now has been far below the US. The concern is that the effective Mexican process rules (the enforced level) may be far lower than US rules and lower than Mexico's own professed goals. This may result in competitive pressure for US firms to either move to Mexico or to lobby to their state environmental agencies that they will have to move if US rules or enforcement are not made more lenient.

Important Provisions:

1. The agreement (p. 11-4, investment) states that countries may require investors to meet specific environmental regulations if it is done according to national treatment and most favored nation treatment. This is not a big issue because the problem is not putting onerous environmental standards on investors. (see #3 below)

2. In regard to disputes over investor rights, the Arbitration Tribunal, at the request of a disputing party, or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on environmental matters raised by a disputing Party in a proceeding (p.11-20). I do not think this has great importance.

3. Chapter 21 (p. 21-2) allows countries to require investors to adopt environmental measures as long as they are not a disguised restriction on international trade or investment (i.e., performance requirements). This is significant because Mexico may use 'green domestic environmental rules' to gain competitive advantage. (this would not hurt environment, but it is a

legitimate issue)

*Tribunal
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4. The core of the process rules appears to be on page 11-10 in the investment chapter. It states that "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures....If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement."

Assessment:

1. It requires information on Mexican environmental rules and particularly their enforcement rates to determine if investment is being encouraged by lax environmental regulation. Are there any provisions for information exchange similar to those for conformity assessment procedures for product standards? [For example, the Committee on Standards-Related Measures monitors the implementation of the NAFTA Standards Code, enhances cooperation on development, application, and enforcement of standards-related measures, and reports annually to the Commission on the implementation of the Code, pp. 9-11, 9-12.] If there are no such provisions, then this provision is very weak in trying to deter the use of lax environmental standards to attract investment.

2. Does a Party have to be using low environmental regulations to attract investment, or are low environmental regulations (below the country's own standards since US and Mexican 'on paper' standards are similar) themselves justification for consultation? The former is almost impossible to prove, while the latter is much easier to prove. If it is the former, then this provision offers little protection.

3. What does consultation mean? Does it mean entry into the formal dispute settlement process? I do not think it can because there is no 'Code for Process Rules' in the NAFTA, just these few statements. If consultation does not mean some type of concrete dispute settlement (even if outside the NAFTA dispute settlement) including enforcement provisions, then this provision is useless for attempting to deter the use of lax environmental standards.

4. If the consultation is just a referral to some blue ribbon committee with no power, then why don't we also use that for all of the disputes regarding investment rules and product standards?

*part to
your notes?*

*see
my
note #3
on p. 5*

*dispute settlement procedure - C.T.D. - but
Involves Code - tough?
& fruitless
Sovereignty → ex. D.R.
? if " but is it economically important??
p. 11-3 - that cross*

III. INTERNATIONAL ENVIRONMENTAL ISSUES

1. Article 104, the Relation of NAFTA to Environmental and Conservation Agreements (p. 1-2) states that the environmental obligations prevail in the event of inconsistencies with CITES, Basel Convention, and Montreal Protocol. However, it does not mention the tuna-dolphin issue. This is problematic because it also explicitly states that a country can have higher product standards to protect the environment in its own territory. This appears to indicate that a country cannot have higher product standards (i.e., import restrictions) to protect the global commons. Hence it stops a potential way to allow embargoes on products caught using production methods that destroy global fish resources.

IV. DISPUTE SETTLEMENT IN REGARD TO ENVIRONMENTAL MATTERS

1. For product standards (either Sanitary and Phytosanitary Measures or Standards-Related Measures), a Party whose standard is challenged as too high may choose to have dispute settlement proceedings heard under a NAFTA panel rather than a GATT panel as mentioned above (page 20-4).

2. For disputes regarding Article 104 (Relation to Environmental and Conservation Agreements), number 1 also applies. However, the environmental agreements do not presently include the tuna/dolphin problem.

3. Article 2006 (Consultations) states that "any Party may request in writing consultations with any other Party regarding any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement". Does this apply to disputes regarding process rules? This is critical to whether there will be any bilateral enforcement for a nation using low process standards for competitive advantage. [It also requires monitoring and information exchange as noted above.]

4. Article 2012 (Rules of Procedure) states that "the panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential." This will anger many of the environmental groups, but I am not sure what level of confidentiality is needed. It probably bears on legal points. However, to the extent possible, it would appear that the best practice is to expose arguments to publicity.

5. Article 201 (Scientific Review Boards) states that Parties may request a written report of a scientific review board on environmental issues in disputes. The panel itself may request such a report unless the disputing Parties disapprove (p. 20-11).

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6. The Dispute settlement process has integrated dispute settlement similar to what is proposed in the Uruguay Round. If a Party wins a dispute and the other Party will not stop the offending practice, then the winning Party may first suspend benefits in the same sector as that affected by the disputed measure (agriculture for agriculture). If it is not practical or effective to do that, the winning Party may suspend benefits in other sectors (suspend benefits in automotive trade due to an agricultural dispute).

Intellectual prop.

MEMO

To: Katie
From: George Foy
Re: Article 754 of NAFTA Agreement
Date: September 10, 1992

George Foy - Call me if you have questions.

Article 754, Right to Take Sanitary and Phytosanitary Measures:
"Each Party may, in accordance with this Subchapter, adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation."

Analysis:

1. Use of Product Standard to Protect Domestic Health:

This allows the US to impose import restrictions on imports (products) not meeting our public health or environmental standards. Here, the product standard must be used because the imported product itself is deemed unsafe and would hurt the health of US citizens on US soil.

2. Use of Product Standard to Protect 'Health of Global Commons':

In this case, the original problem is not an unsafe product entering US territory and harming its citizens. Rather, the problem is that the import (e.g., driftnet fishing, etc) was produced in a manner that harmed the global commons. Thus the process standards were 'too low' in terms of some criterion such as fish stock sustainability. Here, the product standard is being used to discourage the use of process standards that harm the global environment. The product standard is just the best enforcement mechanism because it denies the market to those producers with 'low process standards'.

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Article 754 does not give the US the right to apply sanitary measures necessary for the protection of human, animal or plant life or health outside of our territory. This is significant because the US admitted in the GATT tuna-dolphin proceedings that our regulation on tuna imports was necessary to protect dolphins. It was a product standard used to discourage 'unsustainable' use of the global commons. The latter can only occur if process standards are 'too low'.

3. Use of Product Standard to Protect Domestic Producers:

This refers to the use of import restrictions (or tariffs) to protect domestic producers from competition based on 'lax' environmental regulation. This problem can only occur if the foreign producer has 'low' enforced process standards by some

criterion such as their own laws. This issue is like number 2 above in that it uses a product standard (import restriction or tariff) to remedy a problem caused by 'low' process standards abroad. This is because the import restriction is seen as the best way to enforce the rule. In both cases 2 and 3, the original problem is not an unsafe product entering US territory and harming its citizens.

This case differs from number 2 above in that the primary concern here is not to protect the environment of the country with the low standards. Rather, the primary concern in case 3 is to protect US producers and jobs from losing in a standards lowering competition. We do not want to lose sales or to have to lower our standards to zero to become 'internationally competitive'. This is a competitiveness issue which is parallel to the use of import restrictions or tariffs on imports that used 'trade distorting' subsidies such as the European Airbus, etc. A country that is not enforcing environmental laws is giving their producers an implicit subsidy which will distort international trade and place pressure on other producers to become competitive through externalization of costs.

There are overlaps between cases 2 and 3 above. For example, import restrictions to protect the global commons have elements of competitiveness concerns (our fisherman using the global commons have higher costs if higher regulations). Similarly, import restrictions to protect our US industries from producers elsewhere not obeying their own environmental laws have elements of concern for the other country's environment and the global commons in some cases. However, the primary concerns (reasons for the use of the import restrictions) are distinct in issues 2 and 3 above.

Relation to NAFTA Agreement: In regard to NAFTA, these 3 issues can be categorized as follows.

Issue number one: Article 754 allows us to use import restrictions, subject to their not being disguised trade barriers, etc.

Issue number two: Article 754 does not allow us to use import restrictions to protect the environment outside of our territory.

Issue number three: Article 754 does not allow us to use import restrictions due to 'low' process standards in Mexico. The Bush administration may argue that their use in this case is to protect the Mexican environment, which is none of our business. However, as noted above, that is not the reason for the import restrictions in this case. Although such restrictions may improve Mexico's environment, the main point is competitiveness (and indirectly protecting our environment from being hurt by standards lowering international economic competition).

the product standards are a potential enforcement mechanism for 'tax envr regulations' if admin plan has any enforcement.

the admin. partially addresses this issue in the Investment chapter

THE NORTH AMERICAN FREE TRADE AGREEMENT:
A PROMISE FULFILLED

TESTIMONY OF
AMBASSADOR CARLA A. HILLS
UNITED STATES TRADE REPRESENTATIVE
BEFORE THE
COMMITTEE ON FINANCE
UNITED STATES SENATE
TUESDAY, SEPTEMBER 8, 1992
[As Prepared for Delivery]

INTRODUCTION

Thank you, Mr. Chairman, for the invitation to appear before this committee to discuss the landmark North American Free Trade Agreement, or NAFTA.

When the President launched the NAFTA negotiations 14 months ago, he promised an agreement that was in the best interest of the American worker and farmer, consumer and exporter. He has delivered on that promise, and more.

The agreement reached after more than a year of intense negotiations, and close consultation with Congress and the private sector, will mean:

- More jobs for auto workers in Michigan, Ohio, and Pennsylvania;
- More work for the New Jersey telecommunications worker;
- More markets for the Texas petrochemical equipment maker;
- More sales for the Illinois and Iowa corn farmer;
- More opportunities for the Connecticut insurance broker;
- More business for the Montana rancher;
- More protection against piracy for the Silicon Valley software designer;
- A more vigorous economy and a higher living standard for all Americans.

This is an historic agreement and Americans in every state and in every occupation can claim and share in its benefits. It is an agreement for both blue collar and white collar workers; for factory and office workers; and, for store clerks and farm hands.

Here is why:

- This agreement makes America more globally competitive. It links the United States to our first- and third-largest trading partners, Canada and Mexico, to create one of the largest, richest market in the world, with 360 million producers and consumers and \$6 trillion in annual output. NAFTA will give U.S. companies the same competitive edge that regional trade ties give European and Japanese firms.
- This agreement will generate new, higher-paying jobs for Americans. More than 600,000 Americans now owe their jobs to our exports to Mexico. This number is expected to swell to over 1 million by 1995 with NAFTA. Over 1.5 million Americans already owe their jobs to our exports to Canada. This agreement will not only create more jobs, but better jobs, for we know that workers in export-related jobs earn 17 percent more per hour than the average American wage.
- This agreement will help Mexico grow, which has a high payback for us: 70 cents of each Mexican import dollar - - and 15 cents of each additional dollar of Mexican income -- is spent on U.S. goods and services. Economic growth will not only make Mexico a better customer, but also a stronger and more stable neighbor, easing pressures for illegal immigration. The lesson of history is clear: if opportunities do not go to the people, people will go to the opportunities.
- This agreement will be of particular benefit to small and medium-sized companies that are experiencing the fastest export growth. Unlike big companies, small and mid-sized firms often do not have the resources to locate around high trade barriers. With trade barriers removed, U.S. firms need not move to Mexico to sell to Mexico.
- This agreement does more to improve the environment than any other agreement in history. It maintains U.S. environmental, safety, and health standards; allows us to enact even tougher standards; and encourages our partners to strengthen their standards.
- Finally, it safeguards U.S. workers by ensuring a smooth transition to free trade over 15 years.

Never before has a trade agreement offered such a balance of economic growth, opportunity, worker benefits, and environmental sensitivity. NAFTA will contribute to a higher standard of living, and a better quality of life for Americans.

I would like this afternoon to review briefly for the Committee the benefits free trade with Canada and Mexico will bring

to the American people.

NAFTA: LOWER BARRIERS, MORE GROWTH, BETTER JOBS.

Mr. Chairman, I do not need to tell you, a long-time proponent of free trade, about the advantages this country can reap from more open foreign markets -- especially markets on our borders. You wrote in Roll Call in July that, "The United States has much to gain from a more open and more prosperous Latin America. The average Mexican already buys more from us than his much richer Western European counterpart." Indeed:

- Mexico is now our fastest growing major export market, our second largest market for manufactured goods, and our third largest market for agricultural products.
- U.S. exports to Mexico will top \$40 billion this year -- nearly four times what they were in 1986 -- yielding a projected surplus of \$6 billion to \$7 billion, more than three times higher than last year.

By tearing down Mexico's remaining barriers, NAFTA will increase U.S. exports and jobs.

Let me highlight just some of what it will achieve:

- **First, tariff elimination makes U.S. products more competitive.** Approximately 65 percent of U.S. industrial and agricultural exports to Mexico will be eligible for duty-free treatment either immediately or within five years.
- **Second, U.S. vehicles and parts will enjoy greater access to Mexico which has the fastest growing major auto market in the world.** The phase-out of tariffs, import restrictions, and local-content requirements on motor vehicles and parts expands opportunities for our auto industry. U.S. autos and light trucks will enjoy greater access to Mexico. With NAFTA, Mexican tariffs will immediately be removed on light trucks and cut in half on passenger cars. Within 5 years, duties on three-quarters of U.S. parts exports to Mexico will be eliminated. Mexican "trade balancing" and "local content requirements," which have effectively kept out U.S. exports of vehicles and parts, will be entirely eliminated in 10 years.
- **Third, strict rules of origin restrict benefits of NAFTA to North American-made products.** For autos, for example, only vehicles with substantial North American parts and labor content will benefit from tariff cuts. NAFTA will require that autos contain 62.5 percent North American content, considerably more than the 50 percent required

by the U.S.-Canada Free Trade Agreement, to obtain preferential treatment. NAFTA contains tracing requirements so that individual parts can be identified to determine the North American content of major components and sub-assemblies, such as engines.

- Fourth, NAFTA opens Mexico's \$6 billion market for telecommunications equipment and services. For equipment, Mexico has agreed to streamline its testing and certification procedures and immediately eliminate tariffs on over 80 percent of current U.S. telecommunications exports to Mexico. It gives U.S. providers of voice mail or packet-switched services non-discriminatory access to the Mexican public telephone network and eliminates all investment restrictions by July 1995.
- Fifth, elimination of barriers enhance opportunities in the textile and apparel sectors. Barriers to trade on \$250 million (over 20 percent) of U.S. exports of textiles and apparel to Mexico will be eliminated immediately, with another \$700 million freed from restrictions within 6 years. All North American trade restrictions will be eliminated within 10 years and tough rules of origin will ensure that benefits of trade liberalization accrue to North American-made products.
- Sixth, open markets for our agricultural goods will increase farm exports. Mexico imported \$3 billion worth of U.S. agricultural goods last year, making it our third-largest market. NAFTA will immediately eliminate Mexican import licenses, which cover 25 percent of U.S. agricultural exports, and will phase out most remaining Mexican tariffs within 10 years, and the remaining few within 15 years.
- Seventh, for the first time in 50 years, Mexico's closed financial services markets will be opened. U.S. banks, securities firms, and other financial firms will be allowed to establish wholly owned subsidiaries and be treated the same as local firms. Transitional restrictions will be phased out by January 1, 2000.
- Eighth, U.S. insurance firms will gain new opportunities in the Mexican market. Firms with existing joint ventures will be permitted to obtain 100 percent ownership by 1996, and new entrants to the market can obtain a majority stake in Mexican firms by 1998. By the year 2000, all equity and market-share restrictions will be eliminated, opening up completely what is now a \$3.5 billion market.

- Ninth, NAFTA will create new horizons for our land transportation industry. More than 90 percent of U.S. trade with Mexico is shipped by land, but U.S. truckers currently are denied the right to carry cargo or set up subsidiaries in Mexico, forcing them to "hand off" trailers to Mexican drivers and return home empty. NAFTA will permit U.S. trucking companies to carry international cargo to the Mexican states contiguous to the United States by 1995, and gives them cross-border access to all of Mexico by the end of 1999. U.S. railroads will be able to transport goods and passengers in Mexico, and U.S. companies can invest in and operate land-side port services. The combination of truck, rail, and port breakthroughs will help create an efficient, intermodal North American transport system. It also will help reduce congestion in border cities.
- Tenth, NAFTA will provide a higher level of protection for intellectual property rights than has been achieved in any other bilateral or multilateral agreement. U.S. high technology, entertainment, and consumer goods producers that rely heavily on protection for their patents, copyrights, and trademarks will realize substantial gains under NAFTA. The agreement will also limit compulsory licensing, resolving an important concern with Canada.
- Eleventh, the agreement creates greater market access in energy and petrochemicals. NAFTA allows U.S. producers to invest and compete in virtually all petrochemicals, and it enhances the access of U.S. energy firms to Mexico's electricity, gas, energy services and equipment markets.
- Finally, NAFTA offers better investment rules. NAFTA ensures that U.S. investors in Mexico are accorded equal treatment, and eliminates "domestic content" rules and export requirements, permitting increased sourcing of U.S. inputs.

NEW RULES GUARANTEE BENEFITS

Having negotiated these remarkable new opportunities, we also made sure to negotiate rules and procedures to guarantee that we reap the benefits of free trade.

- NAFTA contains rapid and effective dispute settlement procedures. A new trilateral trade commission will regularly review trade relations and discuss specific problems. Dispute resolution panels will take no longer than 8 months from start to finish. Countries that win a dispute may demand trade compensation if the losing country does not comply with the panel ruling, and may

retaliate if the compensation is inadequate.

- NAFTA does not change U.S. trade laws that protect American industry from unfairly dumped or subsidized imports. But it substantially improves the ability of U.S. firms to challenge Mexican decisions involving allegations of dumping or subsidized sales in the Mexican market.

U.S. JOBS AND ADJUSTMENT

These extensive and dramatic market-opening provisions, and the rules designed to support them, will generate new export opportunities for our entrepreneurs and new jobs for our workers. As a result, we believe that adjustment pressures on the U.S. economy will be minimal.

First, while some have raised fears that NAFTA will result in U.S. firms relocating en masse to Mexico to take advantage of lower-wage labor, the fact is that labor rates are only one determinant of plant location. If wages were the only factor, many less-developed countries would be economic superpowers. Businesses base investment decisions on a range of factors including productivity, availability of capital, interest rates, quality of infrastructure, and education of the work force. Based on all factors, on average, U.S. workers remain at least 5 times more productive than their Mexican counterparts.

Second, while many have asked how we can compete against Mexican labor, the fact is we already are competing -- and successfully so. As Mexico has unilaterally lowered its trade barriers, our trade balance has swung from an almost \$6 billion deficit in 1987 to a projected \$6 billion to \$7 billion surplus this year.

Moreover, imports from Mexico account for less than 1/2 of 1 percent of U.S. GDP, and over half of those imports today are eligible for duty-free treatment. By tearing down Mexico's remaining tariffs, which are two-and-a-half times as high as our own, NAFTA will level the playing field, not flood it.

Adjustment Provisions

However, to further assure a smooth transition for sensitive U.S. industries, NAFTA includes an elaborate adjustment regime, as the President committed it would, including:

- Lengthy transition periods of up to 15 years for the lowering of U.S. tariffs in our most sensitive sectors;
- Safeguards to protect U.S. workers and farmers against injury -- or the threat of injury -- from imports; and
- Tough rules of origin to ensure that only North American-

made products obtain the benefits of free trade.

- An elimination of Mexico's duty drawback program and export performance requirements that will prevent Mexico from becoming an export platform, or "pass through" for products from non-NAFTA countries.

Worker Adjustment Assistance

In addition to these adjustment provisions within the NAFTA, the President is committed to providing worker adjustment assistance. Last month, he announced a new, comprehensive worker adjustment program -- Advancing Skills through Education and Training, or ASETS -- a \$10 billion, 5-year commitment.

The President's plan -- which is based upon information obtained from Congressional, business, and labor consultations -- nearly triples the current level of expenditures for worker training. Of the \$2 billion per year, \$670 million is available for workers affected by this agreement, and \$1.33 billion is allocated to states without regard to the cause of worker dislocation.

For the first time, a trade agreement will be accompanied by a program tailored to train workers to take advantage of the new opportunities it creates. The President's proposal features:

- Universal coverage of all workers whose jobs may be at risk, or who have lost their jobs, or who are on notice of job loss;
- Continuity of program funding through a capped entitlement thereby eliminating year-to-year funding uncertainties;
- Rapid response services and access to a wide range of support services and labor market information to ensure that intervention starts early, when it is most effective;
- "Skill grants" for retraining so workers can choose the most appropriate training programs and providers; and
- Income support payments to workers in training who have exhausted their unemployment insurance benefits and who need such support to complete their training.

Bilateral Cooperation on Labor Issues

Mexico and the United States are committed to the maintenance and enforcement of fair labor standards, the promotion of safety and health in the workplace, and worker rights. Economic growth in Mexico resulting from NAFTA will provide increased economic resources to address labor issues. At the same time, U.S.-Mexico

labor cooperation has provided an opportunity for Mexico to accelerate benefits accruing to workers, through U.S. technical assistance and training.

In 1991, U.S. Secretary of Labor Martin and her Mexican counterpart signed a Memorandum of Understanding (MOU), which established a framework for U.S.-Mexico cooperation on key labor issues. As a result, over the past year, the U.S. and Mexican Departments of Labor have undertaken a series of joint initiatives relating to workplace safety, occupational hygiene, child labor, and comparative labor-management relations.

We expect shortly to sign a new bilateral agreement that will intensify this cooperation, enabling us to focus on issues such as industrial hygiene and workplace safety standards, and training to improve enforcement of those standards.

ENVIRONMENT

Just as NAFTA has focused constructive attention on labor issues, so, too, has it focused constructive attention on the environment. At first, many saw NAFTA as a threat to the environment; the creation of a pollution haven.

That's just wrong. Mexico's 1988 environmental law is patterned after ours, and is stricter in some cases. President Salinas has made enforcement a priority, shutting down over 1,000 polluting firms in the past few years. And the NAFTA itself, and our parallel cooperative activities will help ease congestion at the border and generate new resources to clean up the environment.

Now, I believe, most view NAFTA as an opportunity. The Administration certainly views it as such, and we have seized it.

Indeed, NAFTA goes further than any other previous trade agreement in addressing environmental concerns, and in actively promoting environmental protection.

Specifically, it embraces the notion of "sustainable development," and explicitly:

- Maintains our right to enforce existing U.S. health, safety, and environmental standards;
- Allows the parties, including states and cities, to enact even tougher standards -- there will be no preemption.
- Encourages the NAFTA parties to strengthen standards by "harmonizing upwards"; and
- Preserves our right to enforce our international treaty obligations to limit trade in controlled products, such as endangered species.

*any prevention
of harmonizing
downwards?*

In addition, NAFTA's investment provisions support our environmental goals by:

- Discouraging countries from lowering environmental standards to attract investment;
- Permitting parties to impose stringent environmental requirements on new investment, so long as they are not discriminatory; and
- Permitting the parties to require environmental impact statements on new investments.

The NAFTA agreement contains several other provisions that are designed to promote environmental protection, including dispute settlement provisions that encourage input from scientific experts on disputes involving environmental and health issues and place on the party challenging an environmental or health standard the burden of proving that it is inconsistent with the agreement. Moreover, when environmental standards are challenged, the respondent can choose to have the matter heard by a NAFTA panel, rather than a GATT panel.

Extensive Cooperative Activities

These environmentally sensitive provisions in the NAFTA -- and there are others -- are complemented by an extensive program of bilateral cooperation with Mexico, including an integrated Border Plan, developed pursuant to the President's May 1 commitment. As momentum has built behind NAFTA, this cooperation has intensified.

Indeed, the United States and Mexico will shortly sign a new bilateral environmental agreement establishing a "Joint Committee for the Protection and Improvement of the Environment." The scope of this agreement will extend beyond the border region, and will strengthen our cooperative efforts to combat pollution and improve enforcement of environmental regulations.

To enhance environmental protection efforts, President Salinas has increased his enforcement budget from less than \$7 million to \$77 million, and allocated \$460 million over 3 years to the Border Plan.

In turn, President Bush's FY 93 budget includes \$241 million for border cleanup, 70 percent greater than the 1992 amount. Unfortunately, Congress has not only failed to pass these funds, it has cut them drastically: by \$98 million in the House, and by \$120 million in the Senate.

At the same time Congress was cutting the President's budget request for border cleanup, some have suggested that we levy a tax on cross-border trade to raise funds for environmental improvement. We are opposed to this idea. It is unsound trade policy, since the

why would a
dispute under
the agreement go
to GATT?

purpose of the NAFTA is to lower barriers, not to raise taxes. To do so would defeat the very purpose of agreement: to generate growth and jobs.

CONCLUSION

The successful conclusion of the NAFTA is an historic achievement for U.S. trade policy, which, over the past four years, has contributed significantly to our nation's economic growth. Far more foreign markets are open today to U.S. firms than 45 months ago. As a result, last year the United States became the world's Number 1 exporter with a record \$422 billion in exports.

Export gains have meant more business opportunity and more jobs across all sectors. Since 1988, all 50 states have expanded exports to the world, on average by 72 percent. The surge in exporting has generated almost \$120 billion in added output for America's companies and farms, and has supported 1 million new jobs. In short, the President's trade strategy is paying off.

The history-making negotiations for free trade in North America are emblematic of this Administration's bipartisan trade strategy. Since I have been USTR, we have worked with you, Mr. Chairman, the members of this Committee, and with other Congressional leaders to establish clear trade objectives, and then to engage in tough international negotiations and to use the trade tools at our disposal to achieve those objectives.

Never before has a trade negotiation involved such an extensive process of Congressional and private sector consultations as has the NAFTA. The number of Congressional and private sector briefings that we have held since the talks began over a year ago, amount to more than three per day.

We want -- we intend -- to continue to work just as closely with you and the Members of this Committee in drafting the implementing legislation for the North American Free Trade Agreement. Our goal is to make this continental growth package a reality as soon as possible for all Americans.

###

M E M O R A N D U M

DATE: 9-23-92

TO:

FROM: Katie

SUBJECT: NAFTA memo

I will list my comments in accord with the presentation in the memo:

1. In outline of two basic options, you note in b that there is no guarantee that changes can be won. This is equally true of the side agreements and the particulars of the implementing legislation you mention in (a).

2. Under "Timing", third paragraph, it is noted that "Congress votes up or down on the agreement". Actually, Congress votes only on the implementing legislation. This is an executive agreement -- not a treaty -- so there is no vote on the body of the agreement per se. As to your question in that same paragraph with regard to fast track, the vote would be under fast track procedures assuming there had been signature of the agreement prior to May 31.

3. On page 2, first full paragraph, reference should be to the "agreement", not to the "treaty".

4. On page 2, under "Policy Implications", you note that there are "serious shortcomings" in the agreement. There are also significant advances made in the document. In the interest of placing the shortcomings in perspective it may be useful to take note of some of those here. On the environmental front, for example, the agreement breaks new ground by shifting the burden of proof to the challenger of a health and safety (i.e. sanitary and phytosanitary and technical) standard to prove that it does not have a scientific basis. This reverses current GATT practice and, since it puts the challenger in the position of proving a negative, it is a significant shield against successful attack on stringent safeguards. In addition, the agreement expressly recognizes that the parties are free to make standards as protective as they wish -- as long as there is some scientific basis and the standard is not a disguised barrier to trade. Contrary to what had been feared, preemption of stringent state or local standards is expressly precluded. Finally, for at least three international environmental agreements, NAFTA makes clear a question that remains unresolved in the GATT -- namely, that

the trade provisions of the i.e.a.'s take precedence over NAFTA. Other i.e.a.'s can be added to the list.

5. At end of page 2 you note that "At best, that goal will take a generation to meet ...". That may be a bit pessimistic. We have seen that -- when international and domestic pressure was brought to bear -- the Mexicans took swift action on some severe environmental problems, and not only penalized the offending industries but actually shut them down.

6. On page 3, point 3, the reference from the previous memo to the unavailability of dispute resolution procedures for the violation of "current standards of environment, labor and health" remains. As I indicated previously I do not understand what is meant here. In fact, dispute resolution is available if such a standard is challenged (and in fact, as I noted above, the procedures are an improvement over the GATT in that the burden of proof is switched). Moreover, in the event that there is a violation of a health and safety standard and, for example, Mexico is attempting to export to us products contaminated with unsafe levels of pesticide, we have full authority (chapter 7) to completely prohibit their importation. The only area in which there is only recourse to consultation -- and no recourse to the full dispute resolution mechanisms detailed in chapter 20 -- is in the event of failure to enforce process-related regulations such as clean air and water regs or child labor regs, etc. (This is by no means a minor omission -- but it is the only omission).

7. Under 3 (A) you note that "There is no recourse if Mexico lowers its law". There is no recourse to full dispute resolution, but there is recourse here to consultation.

8. Under the discussion of ways to address this issue, point (ii), it should be noted here that the Administration seems to be responding to the enviros suggestions here and indicated in the September 17th meeting of the three environment and trade ministers that the Commission will have environmental enforcement within its purview.

You note here that the "Commission would issue reports on the compliance in each country". It is not clear to me what you are referring to here -- compliance with what? I believe what is intended is that the Commission could assess and make findings with regard to the enforcement efforts of each of the parties and the adequacy of their domestic laws.

You mention on the top of page 4 a possible "right of the commission to put tariffs or stop products at the border". I believe that, while the commission might be given a fact finding function, the authority to actually

1

would trade sanctions would probably be retained by the parties themselves.

With regard to whether the right to use trade sanctions would necessitate a renegotiation of the treaty, it would be possible to provide for this in a separate document. BUT -- I think your point is essentially right. This would go so much to the heart of what has already been agreed (and, frankly, it is such a long-shot that Mexico would actually agree to this) that it really would amount to a renegotiation to provide for it. There is one question that remains here, though. Although trilateral agreement to use trade sanctions would require renegotiation, our ability unilaterally to invoke section 301 sanctions arguably would remain (USTR says it does remain; some language in the NAFTA appears to be to the contrary, however). This goes against at least the spirit -- if not the letter of NAFTA -- however our use of 301 also goes against the GATT yet we retain the authority anyway....

Even if trade sanctions are not expressly recognized as being part of the purview of this Commission, there are other potentially effective functions the Commission could be given:

- Parties would be required to submit reports detailing their efforts to enact and enforce environmental (and labor) legislation.

- Parties would assess the general state of environmental (labor) conditions in their respective territories

- Parties would agree to inspections by the other parties; reports on these inspections would be submitted to the Commission

- The Commission would also have the right of inspection

- The Commission would be required to do its own assessment of enforcement efforts and their effectiveness

- The Commission would be given fact-finding authority and the mandate to detail where improvements in performance are required

- The Commission would be open to receive citizen complaints and to conduct investigations/fact-finding missions as necessary

--All reports, proceedings, etc. would be open and available to the public (except where necessary to ensure national security or confidential business information).

--In addition, it might be suggested that there would be agreement among the Parties that the Commission would be charged with assessing the state of environmental enforcement in each country at the outset of the agreement and outlining a phased-in schedule for improved performance up to the level specified in each party's respective legislation that the parties agree up front to complying with. The Commission would update that schedule as necessary and monitor and assess each of the Parties' efforts at meeting it. Even if it is not feasible to believe that we could negotiate a trade sanction hammer, we do ultimately retain the right to withdraw from the agreement -- this is drastic, but maybe it is the kind of threat that Clinton would have to sound in order to make his sincerity in addressing this serious shortcoming in the agreement absolutely clear -- if the Commission were to find a consistent pattern of failure to enforce regulations, Clinton could say that he would find that of sufficient moment to withdraw from the agreement.

MEMO:

To: Katie
From: George
Date: September 14, 1992
Re: Summary of GAO Report International Food Safety:
Comparison of U.S. and Codex Pesticide Standards
[GAO/PEMD-91-22]

Concern: The NAFTA recommends that countries use international sanitary and phytosanitary standards, including those used by Codex (page 7-49). If Codex standards are higher (less safe), then harmonization by the US may mean greater public health risks. *allow more.*

Summary and Implications for NAFTA: Two types of pesticide standards can be compared: ADI (acceptable daily intake) and MRL (maximum residue limit on a specific commodity). For ADI standards, US is lower than Codex for 66 percent of the GAO sample, US is equal for 18 percent, and US is higher for 16 percent. US ADI standards are lower (more safe) than Codex for 66 percent of the cases. For MRL standards, US is lower than Codex for 19 percent, US is equal for 47 percent, and US is higher for 34 percent. US MRL standards have no clear trend versus Codex standards.

There are significant differences between US and Codex pesticide standards. Hence the key environmental issue is whether the NAFTA has adequate safeguards to protect US standards that are higher than Codex from being struck down as nontariff trade barriers. Although the NAFTA does require scientific evidence and risk assessment for higher standards, the shift of the burden of proof to the complaining party should provide a significant degree of protection for legitimate standards. The major defect in terms of protection of legitimate standards is the secrecy of the NAFTA dispute Panels.

1. What is Codex? The Codex Alimentarius Commission (Codex) was established in 1962 under the auspices of the United Nations to facilitate fair trade in food, protect the health of consumers, and promote the coordination of international food standards.

2. Definition of Product Standards: Two types of product standards for pesticides are used by both Codex and US agencies.

(a) acceptable daily intake (ADI): represents the total amount of a pesticide that can be ingested daily over a lifetime without any appreciable health risk.

(b) maximum residue limit (MRL): represents the maximum concentration of residue allowed in a food commodity according to accepted pesticide uses. The establishment of an MRL is contingent upon the setting of an ADI level, which demonstrates that there is an accepted pesticide level where no appreciable health risk exists.

* 3. Sample of this GAO Study: In order to aid comparison, this study was limited to US standards that correspond to a standard in the Codex system. This data base excludes a significant number of other cases where the US has established tolerances for pesticides or commodities that are not covered in the Codex system. [The Codex system includes about 170 pesticides and, when commodity groupings are converted to individual commodities, over 3,300 pesticide-by-commodity MRLs as compared to over 400 pesticides and 8,500 pesticide-by commodity tolerances (MRLs) in the US system.]

4. Comparison of US and Codex ADIs: For the 78 pesticides that have both US and Codex ADIs, the comparison was as follows:

US standard is lower than Codex:	66 percent of the cases
US standard equal to Codex:	18 percent of the cases
US standard is higher than Codex:	16 percent of the cases

Thus the majority of the US ADI standards are lower than the Codex standards.

5. Comparability of US and Codex MRLs: The majority (62 percent) of US and Codex MRLs cannot be compared.

Comparability	Percentage	Reason
Not comparable:	31 percent	no MRL assigned by US
No U.S. MRL:	31 percent	different definitions of pesticide or commodity
U.S. and Codex MRL:	38 percent	---

Is imported
40 review?

6. Why is no MRL assigned by the US? Either (1) a pesticide has never been used in the US, and therefore no tolerance was ever established through the US regulatory system, or in the case of imports, no import tolerance was ever sought. (2) a pesticide may have been used previously in the US, but tolerances were revoked based on health or environmental concerns.

7. Why are there different definitions of pesticides? Total pesticide residues on commodities can include the parent compound of the pesticide chemical plus components of the pesticide, which may be metabolized or degraded into other chemicals. Codex pesticide evaluation uses a major indicator compound such as the parent compound or a major metabolite. The US tends to base tolerances on the total residues of the parent compound plus significant metabolites.

8. Why are there different definitions of commodities? An MRL may be set on only a portion of a commodity such as the edible part (shelled peanuts) or on the entire commodity (peanuts including the shell). This difference was much less important than different definitions of pesticides in explaining noncomparability of US and Codex MRLs.

9. Comparison of US and Codex MRLs: In cases where the US and Codex both have an MRL, the breakdown is as follows:

US standard is lower than Codex:	19 percent of the cases
US standard equal to Codex:	47 percent of the cases
US standard is higher than Codex:	34 percent of the cases

Unlike the ADI standards where a clear majority of US standards are lower than Codex, the MRL differences do not show a definite pattern.

To: Leon
From: Katie
Re: NAFTA draft
9-17-92

--my comments specific to the enviro points that have been raised:

- o in point one (a) -- i would delete reference to "NAFTA" dispute res process. this implies to me that the agreement would have to be opened up to provide for such a process but i think that we could possibly handle this issue by creating a north american commission on the environment that would be given this type of authority.

- o point one (b) -- same as above -- delete first reference to NAFTA. also i would qualify the public participation point with language that would subject it to need to safeguard confidential business info and national security. i would add an additional point here -- nafta is unclear as to whether lax enforcement of enviro laws is sufficient to justify a complaint or if -- in addition -- an intent to attract investment by lowering those laws has to be shown. that would, of course be near impossible to show. therefore, should be made clear that it is sufficient to demonstrate the failure to enforce.

- o point three (would be point two if renumbered) -- funds should be available for infrastructure and cleanup -- period -- not just for problems along the border. moreover, charge that there has been no commitment from Bush admin is risky here since Bush did propose funds in fy 93 budget and house and senate cut. given that fact, a charge of lack of commitment here must mean that clinton supports some designated fund. if so, he should be prepared to define one and how it should work. if he is not so prepared, the charge against bush is unfair.

- o point four -- if clinton were to back the idea of a commission along the lines described in my first comment, the commission recommended here would be redundant. if this commission is to be recommended, however, its purview should not be limited to "border" pollution (note that hills noted in her testimony that the commission the admin would announce with mexico -- today, i believe -- would not be so limited).

- o point five -- the only limit i know of on a party's ability to implement international agreements that are recognized under NAFTA is that -- if they have a choice -- they choose a means that is least inconsistent with NAFTA. i don't know that that is something i would want to take issue with. otherwise, the nafta seems pretty strong on this point -- recall that it specifically provides that -- where an iea that is recognized under NAFTA and NAFTA conflict -- the iea prevails. HOWEVER -- i would add an additional point that is not recognized here. the nafta currently states that additional iea's (in

addition to the 3 that are mentioned and recognized currently in the text) may be added to it. nafta says that this may be done by the parties in writing. the agreement does not, however, specify the procedures by which this is to happen. in particular, it does not specify whether there would have to be consensus among the parties to add an additional iea. if that is the case, it is a problem and will be an ever larger problem if additional countries are added to the agreement. i would recommend here an additional point that would say that procedures need to be specified for how additional iea's are to be added. my inclination would be to say that consensus should not be required but i am not confident that i have thought that all the way thru to firmly make that recommendation at this point.

to your question re: enforcement provisions when aimed against the united states:

i do not think that that is something that the enviros would resist. recall that product standards disputes (e.x. pesticide residues, etc. standards) are subject to the full dispute settlement procedures in the text.

the question arises with respect to the process standards and whether those standards either (1) are not on the books or (2) are not being enforced in order to attract investment. as currently written, nafta would only call for consultation. the commission would be set up better to ensure a meaningful result of the dispute.

to take an example here, mexico could claim that bush was letting quayle undermine the clean air act regs in order to attract investment here in the us. currently, nafta would only say that -- if asked by mexico -- the us would have to consult with mexico about it. if a dispute process were set up, however, presumably it would produce some binding result -- like, if the us were found guilty -- that bush would have to cut that sh*t out. i think that would make the enviros pretty happy....

MEMORANDUM

TO: KATIE
FROM: GEORGE
DATE: SEPTEMBER 14, 1992
RE: CRITIQUE OF ENVIRONMENTAL PROVISIONS IN THE NAFTA

EXECUTIVE SUMMARY: For disputes over national product standards (allowable pesticide residues in imported food, etc.), the NAFTA shifts the burden of proof from the country maintaining the higher standard (the current rules for GATT) to the complaining country. This makes it much harder for an environmental product standard to be successfully challenged as a nontariff trade barrier. The country maintaining the higher standard may also choose to have the dispute submitted to a NAFTA Panel rather than a GATT Panel. This may provide greater ability to maintain higher standards, but it is less important than changes in Panel procedures such as placement of the burden of proof.

For process standards (environmental regulations on agricultural and industrial pollutant emissions), the NAFTA states that countries should not use lax environmental regulation to attract investment, and that if a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement. There are no requirements for exchange of information on domestic environmental monitoring and enforcement rates, no formal dispute settlement mechanism, and no enforcement mechanisms. The NAFTA provides no protection for US producers and workers from the use of lax environmental regulation in Mexico as a competitive advantage.

For international environmental issues, the Agreement states that CITES, the Basel Convention Treaty, and the Montreal Protocol overrule NAFTA in the event of conflicts. This is an improvement over the GATT where the priority in conflicts between GATT articles and environmental treaties is uncertain. Other environmental treaties can be added, but the procedures for adding them are not clear. The potential conflicts between NAFTA and US environmental laws such as the Marine Mammal Protection Act (which may require US import restrictions to protect the global commons) are not addressed. In disputes over any of the 3 international environmental agreements above, the responding Party can choose a NAFTA Panel in lieu of a GATT Panel (as is the case for challenges to product standards).

For dispute resolution procedures, the NAFTA follows the GATT in requiring that all deliberations, written submissions, and communications with NAFTA Panels be secret. This institutionalizes in an international agreement the absence of public accountability now practiced domestically by the Council on Competitiveness. The NAFTA also excludes failure to enforce domestic environmental regulations from the dispute resolution mechanism.

CRITIQUE OF ENVIRONMENTAL PROVISIONS IN THE NAFTA (9/6/92 DRAFT)

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I. PRODUCT STANDARDS (SANITARY AND PHYTOSANITARY MEASURES)

Example: allowable pesticide residues in imported food

Concern: US national, state, or local standards that are higher than Mexico's may be successfully challenged as a nontariff trade barrier, resulting in lower standards and less public health protection.

Important Provisions:

1. Countries are encouraged to adopt international standards.
2. Countries can adopt higher standards than international guidelines if it is "necessary for the protection of human, animal or plant life or health in its territory." [Article 754]
3. National product standards that are higher than international standards must be based on scientific principles and risk assessment (page 7-36).
4. In determining risk of the introduction of a pest or disease through imports, the Party must take into account economic factors including: loss of production due to the pest or disease, cost of control or eradication of the pest or disease in the importing country, the relative cost effectiveness of alternative approaches to limiting risk.
5. For product standard disputes, the NAFTA agreement changes the burden of proof from the country maintaining the higher standard (the current rules for GATT) to the complaining country. [Page 7-47].
6. For product standard disputes, the country maintaining the higher standard may choose to have the dispute submitted to a NAFTA Panel rather than a GATT Panel. [Page 20-4].
7. The NAFTA Committee for Phytosanitary Standards may call on environmental experts to provide advice on factual questions relating to environmental issues.

Assessment:

1. The guidelines for setting standards (use of scientific evidence and conduct of risk assessment) are very similar to the GATT Phytosanitary Standards Code. In one respect, the NAFTA Guidelines are more 'environmentally friendly'. The GATT Code states that, in developing guidelines for risk assessment, the GATT Committee on Sanitary and Phytosanitary Measures "shall take into account, all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves." (page L.38, 20 December 1991 Draft). This provision, which is not in the NAFTA Draft, would encourage higher (more risky) sanitary standards.

2. The placement of the burden of proof on the country that is challenging a product standard as a nontariff trade barrier makes it considerably more difficult to overturn the product standard. This is the most significant difference between the GATT and NAFTA Sanitary and Phytosanitary rules.

3. In standard disputes, the ability of the country with the higher standard to choose whether a NAFTA panel or a GATT panel will hear the case may be an advantage. It depends on more important issues such as who bears the burden of proof and whether public participation is allowed.

4. In the GATT, the permission to allow sanitary or phytosanitary standards that restrict trade is granted by Article XX (b), which states that:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect human, animal or plant life or health."

Article XX (b) does not explicitly mention whether it applies to just the nation's territory or not. Consequently, there is an ongoing dispute over whether Article XX (b) allows a nation to unilaterally impose import restrictions in order to protect the global commons. The limitation of Article 754 in the NAFTA Sanitary and Phytosanitary Measures chapter to protection of human, animal or plant life or health in its territory rules out its use to protect the global commons.

This raises questions about whether a NAFTA challenge would overrule US laws such as the Pelly Amendment which calls for import restrictions on countries using fishing practices that disobey any international fishery conservation program.

II. PRODUCT STANDARDS (STANDARDS-RELATED MEASURES)

Example: product safety standards for automobiles.

Concern: US national, state, or local standards that are higher than Mexico's may be successfully challenged as a nontariff trade barrier, resulting in lower standards and less public health protection.

Important Provisions:

1. Countries are encouraged to adopt international standards.
2. Countries can adopt product standards that are higher than international guidelines. This permission is granted by the incorporation of GATT Article XX (b) into the NAFTA for Standards-Related Measures (NAFTA Article 2101).
3. National product standards that are higher than international standards should not create unnecessary obstacles to trade. An unnecessary obstacle is not created if:
 - (a) the demonstrable purpose of such measure is to achieve a legitimate objective (which includes human health and environmental protection), and
 - (b) such measure does not operate to exclude goods of another Party that meet that legitimate objective.
4. In pursuing its legitimate objectives, a Party may conduct risk assessment.
5. For product standard disputes, the NAFTA agreement changes the burden of proof from the country maintaining the higher standard (the current rules for GATT) to the complaining country. [Page 9-14].
6. For product standard disputes, the country maintaining the higher standard may choose to have the dispute submitted to a NAFTA Panel rather than a GATT Panel. [Page 20-4].
7. The NAFTA Committee for Technical Barriers to Trade may call on environmental experts to provide advice on factual questions relating to environmental issues.

Assessment:

1. The NAFTA guidelines for setting standards are more lenient than the GATT Code on Technical Barriers to Trade. The NAFTA guidelines basically do not prohibit any action except blatant discrimination against goods from Parties that do meet the product standard. The GATT guidelines state that "technical regulations shall not be maintained if their objectives can be met in a less trade-restrictive manner" (page G.3, 20 December 1991 Draft). Since there are many possible interpretations of this condition, it makes it much harder to justify a product standard.

2. The placement of the burden of proof on the country that is challenging a product standard as a nontariff trade barrier makes it considerably more difficult to overturn the product standard. This is the most significant difference between the GATT and NAFTA rules for Standards-Related Measures.

3. In standard disputes, the ability of the country with the higher standard to choose whether a NAFTA panel or a GATT panel will hear the case may be an advantage. It depends on more important issues such as who bears the burden of proof and whether public participation is allowed.

4. The NAFTA Code for Standards-Related Measures just uses GATT Article XX (b) to grant permission to use higher standards. As noted earlier, Article XX (b) does not explicitly mention whether it applies to just the nation's territory or not. This means that, in theory, the NAFTA Code for Standards-Related Measures could be used to protect human health or plant or animal life outside the nation's territory. However, this is not a significant practical issue for Standards-Related Measures because they do not encompass most global commons issues.

[These conflicts are far more likely to arise in the implementation of the Code for Sanitary and Phytosanitary Measures. As noted earlier, Article 754 in the NAFTA Sanitary and Phytosanitary Measures chapter limits a nations' use of product standards to protection of human, animal or plant life or health in its territory].

III. PROCESS STANDARDS (ENVIRONMENTAL REGULATIONS)

Examples: allowable emission levels for air and water discharges by industrial producers, conventional pollutants and toxic wastes, agricultural emission regulations not included in the Sanitary and Phytosanitary Measures Code.

[Some agricultural process rules have to be included in the product standard code because parts of the process (e.g., pesticides) may remain in the product. Hence a pesticide that is declared illegal cannot be used on the product at all. This is unlike the case for most industrial process rules where the pollutants do not become part of the product].

Concern: The US and Mexican laws on paper for process standards are now virtually the same according to the EPA. However, Mexican enforcement up to now has been far below the US. The concern is that the effective Mexican process rules (the enforced level) may be far lower than US rules and lower than Mexico's own professed goals. This may result in competitive pressure for US firms to either move to Mexico or to lobby to their state environmental agencies that they will have to move if US rules or enforcement are not made more lenient.

Important Provisions:

1. The Agreement allows countries to require investors to adopt environmental measures as long as they are not a disguised restriction on international trade or investment (i.e., performance requirements). This is significant because Mexico may use 'green domestic environmental rules' to make US firms in Mexico buy locally made equipment, etc. [Pages 11-4, 21-2]. This provision is meant to stop such abuses in the name of environmental protection.

2. The Agreement states that "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures....If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement." [Page 11-20].

Assessment:

1. It requires information on Mexican environmental rules and particularly their enforcement rates to determine if investment is being encouraged by lax environmental regulation. There appear to be no formal procedures for information exchange on enforcement rates and environmental laws. Without such procedures, no country can determine if the other nations are keeping their environmental promises.

2. The wording of the promise to uphold environmental regulations is vague. It may mean that a Party has to be actively using low environmental regulations to attract investment. This would be almost impossible to prove. Assuming that there is trilateral information exchange and monitoring, the evidence of violation of the promise to uphold environmental regulations should be the existence of a 'low enforcement level' of environmental regulations (below the country's own standards since US and Mexican 'on paper' standards are very similar).

3. The wording of the critically important 'consultation' promise is vague. What does consultation mean? It appears to mean that the Parties may talk about it. If consultation does not mean entry into a formal dispute settlement process with enforcement provisions, then the promise to not relax domestic environmental laws does not mean anything. It is like a 'promise' by Mexico not to maintain performance requirements on investments as opposed to a specific rule in the investment chapter forbidding performance requirements (page 11-3) backed up by dispute settlement if arbitration fails (page 11-22).

4. The bottom line for any issue in the Agreement is what happens if a promise is not kept. For environmental regulation, the answer is nothing. This contrasts to many other provisions such as US investor rights in Mexico, intellectual property standards in Mexico, and national product standards used as trade barriers. Anything that is actually considered to be economically important is monitored and enforced. As the Bush administration stated in the 1992 Economic Report of the President, "An essential element of any effective trade agreement is the threat of retaliation, or other penalty, if a country does not live up to its end of the agreement. The enforcement mechanism is typically contained in the dispute settlement procedures of the agreement. Without a workable enforcement mechanism, international trade agreements, like any other agreement, would become meaningless" (page 219).

Using the Bush administration's criterion, the provisions for environmental regulation (process rules) in the NAFTA are meaningless.

IV. INTERNATIONAL ENVIRONMENTAL ISSUES

Important Provisions:

1. Article 104, the Relation of NAFTA to Environmental and Conservation Agreements states that the environmental obligations prevail in the event of inconsistencies with CITES, Basel Convention, and Montreal Protocol.
2. The countries can also add other environmental treaties to Article 104, thereby assuring they prevail over NAFTA if there is an inconsistency.

Assessment:

1. Article 104 is an improvement over the current GATT in which there is uncertainty over whether GATT obligations or environmental obligations (such as the trade measures in the Montreal Protocol) prevail when they conflict.
2. The procedures for the addition of a new environmental agreements in Annex 104 are not spelled out. For example, does it require the unanimous consent of Canada, Mexico, and the US? These procedures need to be determined.
3. Article 104 does not include several controversial US laws such as the Pelly Amendment which calls for US import restrictions on fish products from countries that conduct fishing operations so as to hurt the effectiveness of an international fishery conservation program. This exclusion combined with the limitation of the Sanitary and Phytosanitary Measures Exception Clause to in the territory of the nation would appear to indicate that NAFTA would disallow laws such as the Pelly Amendment if challenged.

Note: The potential conflict between the current NAFTA Agreement and several US laws which allow import restrictions to protect ocean life cannot be resolved only by a different provision in this Agreement. This is because the European Community is trying to get the GATT Council to adopt the Panel Report on the tuna-dolphin case which the US lost. If the US does not block this, it would result in either the US changing its laws or the US paying concessions to other countries equal to the damage they incur from the US import restriction.

V. DISPUTE SETTLEMENT IN REGARD TO ENVIRONMENTAL MATTERS

Important Provisions:

1. For disputes over product standards (either Sanitary and Phytosanitary Measures or Standards-Related Measures), a Party whose standard is challenged may choose to have dispute settlement proceedings heard under a NAFTA panel rather than a GATT panel as mentioned above (page 20-4).
2. For disputes regarding Article 104 (Relation to Environmental and Conservation Agreements), number 1 also applies.
3. Article 2012 (Rules of Procedure) states that "the panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential."
4. Article 201 (Scientific Review Boards) states that Parties may request a written report of a scientific review board on environmental issues in disputes. The panel itself may request such a report unless the disputing Parties disapprove (p. 20-11).
5. The Dispute settlement process has integrated dispute settlement similar to what is proposed in the Uruguay Round. If a Party wins a dispute and the other Party will not stop the offending practice, then the winning Party may first suspend benefits in the same sector as that affected by the disputed measure (agriculture for agriculture). If it is not practical or effective to do that, the winning Party may suspend benefits in other sectors (suspend benefits in automotive trade due to an agricultural dispute). [There is an exception to the integrated dispute settlement procedures in regard to financial services. See page 14-11].

Assessment:

1. There does not appear to be any reason why all of the Panel's hearings, deliberations, initial report, and written submissions to the panel hold be kept secret. While confidential business information should be safeguarded, there is scope for increasing public access to the process.

An example of where the NAFTA itself allows some public access is the proceedings on Emergency Action. This refers to circumstances under which the US could temporarily reinstate tariffs because of substantial injury, or threat of injury, to a domestic industry from rapid Mexican import increases (page 8-1).

Annex 803 outlines the Administration of Emergency Action Proceedings. It states that "Petitions or complaints, except to the extent they contain confidential business information, shall promptly be made available for public inspection upon being filed (page 8-9)." Annex 803 also requires (page 8-10) a Public Hearing on the request for Emergency Action, and requires that all interested parties be allowing to testify, including associations who represent the interests of consumers in the territory of the Party that wants Emergency Action.

It appears that one reason for requiring the Public Hearings on Emergency Action proceedings is that the industry requesting the tariff increases may actually just want higher profits and higher prices for domestic consumers. This possibility will be minimized if the public has access to information on the particular case. The same reasoning holds for Disputes regarding environmental matters and NAFTA. An industry challenging a public health standard may just want to avoid the extra costs of limiting pesticide use or putting in safety equipment in a product. This possibility will be minimized if the public has access to the main arguments of the case. [If there is no reasonable basis for a given product standard (it is a nontariff trade barrier), then a public proceeding should be able to determine that as well as a secret proceeding].

Furthermore, the requirement for consumer representation in the Emergency Action could be used to justify an analogous requirement for nongovernmental environmental group representation in hearings on challenges to product standards in their territory. Lastly, Annex 803 shows that the need for public access can be balanced with the need for some information to remain confidential.

2. Disputes over environmental regulation (process rules) appear to have no place in this dispute settlement process, or in a 'parallel' process that had monitoring, information exchange, dispute resolution procedures, and enforcement. This means that there is no safeguard in NAFTA to stop firms in Mexico from routinely violating environmental regulations. [The problems in the maquiladoras indicate that this is a very real possibility.] This will result in pressure in all 3 NAFTA countries to reduce enforcement of environmental regulations, and discourage the development and adoption of pollution prevention methods.

VI. ANSWERS TO OBJECTIONS TO THE INCLUSION OF PROCESS RULES (ENVIRONMENTAL REGULATION) IN THE NAFTA AGREEMENT

Preliminary Note: Effective environmental regulation would require trinational monitoring, information exchange, dispute settlement, and enforcement. This does not necessarily have to be in the Agreement itself.

1. Pollution control costs are a small percentage of total industrial costs. Thus it simply is not economic for firms to go to Mexico to avoid environmental regulation.

Answer: First, pollution haven investment has occurred in some cases such as the Los Angeles area furniture manufacturers moving to Mexico (GAO study). Second, even if the economics do not justify it, a firm which uses relocation due to environmental costs as a threat may succeed in getting lower environmental regulations if there are nearby states or countries without any effective regulation.

There are at least two examples that show this to be a problem at the state level. In one GAO study on toxic water pollution [GAO/RCED-91-154], state and local agencies stated fear of industrial relocation as one reason why they did not adopt pollution prevention strategies. In another GAO study on why environmental penalties often do not recover the economic benefits gained by violators [GAO/RCED-91-166], local officials said that such penalties might place factories in their state at a competitive disadvantage relative to businesses in other areas that did not have a similar penalty policy. This problem would be greatly exacerbated if Mexico has no effective environmental enforcement policy.

Hence ineffective environmental regulation in Mexico will harm environmental enforcement in the US, even if there is no pollution haven investment. An economic competition between producers in the US and in Mexico without sound environmental 'rules of the game' on both sides of the border will result in externalization of environmental costs.

2. Economic growth will solve the problem of ineffective enforcement in Mexico by providing Mexico with more resources.

Answer: First, sustainable economic growth requires sound environmental rules. Prevention is much cheaper than trying to cure environmental problems. Hence the inclusion of environmental rules in the NAFTA should not reduce economic growth; it should increase it. Second, this objection defines the problem as one of resources rather than an attempt to gain competitive advantage. Mexico can gain some investment in the short run at least by not enforcing environmental rules. This is just an example of the adverse consequences of any economic

competition without rules. It creates institutional incentives to externalize costs. Third, Mexico is poor and will have trouble financing programs to protect intellectual property and investor rights as well as environmental regulation. There is an equity argument for helping Mexico with technical and/or financial assistance in any of these areas. However, that does not imply that we abandon rules. If it did, the Bush administration would just say that Mexico will enforce intellectual property protection and investors rights once it becomes rich enough.

3. The inclusion of formal procedures to monitor and enforce environmental regulations violates Mexico's national sovereignty.

Answer: This is true but irrelevant. Any international trade agreement involves a compromise between national sovereignty and the benefits from mutual adherence to a set of rules. For example, performance requirements have been a major part of Mexico's industrial strategy. The NAFTA prohibits performance requirements. Sound environmental regulation would be worth the loss in sovereignty for the US, Canada, and Mexico to assure the economic benefits of sustainable development. Furthermore, we are talking about something like the Committees and dispute settlement boards for investment or product standards, not an invasion.

4. We should emphasize environmental cooperation with Mexico, not coercion and conflict.

Answer: This objection posits an unrealistic dichotomy between cooperation and the need for formal procedures for conflict resolution and enforcement. Other parts of the NAFTA which have dispute settlement provisions also have cooperative provisions. For example, technical cooperation on phytosanitary standards (page 7-45), technical cooperation on Standards-Related Measures (page 9-10), and cooperation and technical assistance for intellectual property (page 17-26). The fact that dispute settlement is also a part of all of these issues indicates that cooperation is not enough.

5. It is not feasible to develop environmental rules, and they could be abused by protectionist firms.

Answer: This is a legitimate concern, but it does not imply that we should not have formal procedures for monitoring, dispute settlement, and enforcement of environmental regulations. There are very close parallels in this regard between such an environmental framework and the institutional measures needed for Subsidies and Countervailing Duties. The latter involves difficult measurement issues in determining if the government was subsidizing an export, and if so, by how much. This is similar to the problem of lax environmental regulation. Also, there can

be abuse in both cases by firms contending that they were injured. However, this implies the need to design institutions to minimize potential abuses rather than to just ignore the problem.

Similar points could be made regarding other difficult issues in the Agreement such as the chapters on product standards. For example, the Committee on Standards-Related Measures has a very complex task. It is charged with monitoring the implementation of the NAFTA Standards Code and enhancing cooperation on development, application, and enforcement of standards-related measures. It also reports annually to the Commission on the implementation of the Code, pp. 9-11, 9-12. It certainly appears feasible to develop some type of framework for environmental regulation, given that it can be done for other issues such as Subsidies and Countervailing Duties, Sanitary and Phytosanitary Measures, and Standards-Related Measures.

Example of Proposal for Environmental Regulations in NAFTA:

The Institute for International Economics has proposed a method of including environmental regulations in NAFTA that would be much more effective than the current text. Rather than apply the countervailing duty statutes to environmental regulation (treat lax environmental regulation as an export subsidy by the government), they recommend the following plan.

Stage 1: From 1992 to 1995, all NAFTA parties would commit themselves to strict enforcement of their own standards, and trinational reports would be submitted annually on enforcement practices in each country.

Stage 2: After 1995, each Party could put on notice those standards that it wanted the others to elevate within their own jurisdiction. These standards would then become the subject of NAFTA negotiations. When one party could establish, to the satisfaction of a trinational panel, that it was losing an ~~industry~~ ^{whole} to its NAFTA partners as a result of its higher standards, the first resort under NAFTA would be an upward harmonization of standards. If this could not be accomplished in a reasonable period of time, the high standard country could enact a 'compensating duty'.

They also recommend that the failure of a country to enforce either its own minimum standards or agreed NAFTA standards would be subject to dispute settlement and trade compensation, using NAFTA mechanisms.

whole
industry
has to
be in
agreement?

• Add IBA's - Clarify that
Consensus NOT required.
Katie

Working
Draft

September 21, 1992

MEMO TO:

RE: Options for NAFTA

There is no easy decision -- or exactly right or wrong decision -- on NAFTA. Whichever way you end up going, there are serious pluses and minuses. This memo is an attempt to lay out your options and the positives and negatives of each possibility.

The general sense in the campaign is that you should make a decision fairly soon -- you want to be seen as leading on this issue and the Republicans are having an effect in charging that you are straddling the issue.

Timing

The Administration sent its the "almost final" text of its NAFTA agreement to Congress on September 18th, thereby starting the 90 day clock ticking. The President cannot sign the agreement before December 17th. He is not obligated to sign the agreement by any date but must do so by May 31, 1993 if he wants to keep the fast track authority Congress voted him last year.

The purpose of these 90 days is to give Congress the chance to press the Administration to review and possibly press for changes in the agreement.

Once the final agreement is signed, Congress has 90 days to either reject it or accept it without changes. ??

Congressional hearings are scheduled to continue through the end of the month. Congress will probably not take any action on the Agreement but rather meet privately with the Administration to push for additional measures either within the treaty or as part of a comprehensive package. ??

Congress

Gephardt has come out against the treaty and called for renegotiation. Bensten and Rostenkowski are likely to wait but eventually support. In the end, the outcome of the treaty may simply depend on who is President at the time of the vote in Congress. Best guesses are that the House would vote against if Bush were President, that the Senate would probably support regardless of who is in the White House. ??

The treaty does not take effect until both Houses of Congress pass legislation implementing the treaty.

Policy Implications

From a policy standpoint, there are serious shortcomings to the agreement Bush negotiated which must be addressed. Had you

been President, you would have negotiated an agreement that included key provisions on the environment, labor, and farmers.

However, the question is whether to send the negotiators back to the table or to take Bush's agreement and do the best you can with it.

Renegotiating NAFTA is no easy proposal and should not be done lightly. In considering this option, it is important to keep in mind that every one of your foreign policy and economic advisors urge you not to call for renegotiation but rather for fixing the agreement though side agreements or unilateral US action.

The best policy position to take is to support the agreement overall but to call for several additional steps to be taken before Bush signs the agreement. That is exactly what the 90 day period was designed to accommodate. And given how eager the Mexicans are for a NAFTA, we have strong leverage with them at this point.

Renegotiating the treaty opens the entire text up for debate and may seriously delay the process. It enables each interest to press once again for its own agenda. (Other reasons??)

Other policy issues to keep in mind are that free trade with Mexico is happening. US companies are moving south ^{different} now. The big "3" auto companies have already made the decision to move. NAFTA regulates this flow in a positive fashion. Without it, US entities are even more at a disadvantage.

Finally, while we can clearly push the Mexicans a bit further in some key areas, it is unrealistic to expect Mexico to meet our own standards within the near future. At best, that goal will take a generation to meet and free trade will help to move Mexico faster toward that goal.

Key Problems

There are generally 9 areas in which the agreement falls short of the mark. Some of these would require renegotiating the text of the treaty, others could be done in either side agreements between the US and Mexico or unilaterally by the US government.

RENEGOTIATIONS

Requires renegotiating text -- there are two basic areas that cannot be adequately addressed without changing the text of the treaty:

1. A) Transition periods for autos -- the agreement eliminates its substantial barriers to auto trade (20% tariff, 36% domestic content) over ten years. Mexico also eliminates 2 for 1 Mexico/US auto sale ration. US would eliminate its 2.5% tariff immediately. Both phase out light trucks over 5 years. In addition, domestic content will be raised to 62.5% (up from 50% now with Canada.

What's now with Mexico?).

Problems are that truck clause is too quick (US 25% now). domestic content too low (65% or 80%?) transition period of ten years not long enough. What do we want?

2. B) Rules of origin??

SUPPLEMENTAL AGREEMENT

Requires supplementary agreement -- these areas can be addressed in supplementary agreements. Critics will charge that they can only be addressed in renegotiating.

3. A) Dispute resolution -- agreement does not allow a country to use the formal, binding NAFTA process if another country violates current standards of environment and health. The current agreement only provides for government-to-government consultation.

no
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enforce or
has lost
labor environment
law on the
books in
order to
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investment

In addition, there should be greater public participation.

You would propose: Negotiating a side agreement with Mexico and Canada which would provide for the right to seek action if labor and health standards are violated. The actions would be to provide standing in Mexican and Canadian courts as a first recourse. If that fails, then the right to raise tariffs on goods imported from violator or bar their entry into the US. The proceedings would be open to the public?

not being properly enforced or are so lax
a proceeding - public means

When in the books are so lax
have they
possible
a complete
disadvantage

4. B) Enforcement of Laws -- Mexico often violates its own laws on health, safety and child labor laws yet the NAFTA provides no recourse to US interests in this event -- despite the fact that the agreement does allow for improved enforcement of intellectual property and investment issues through Mexican laws and US import laws -- with law suits, damages, and injunctive relief.

You would propose: Propose recourse to injury to industry for violations by giving US standing in courts. If that fails, allow tariff action.

5. C) Action against surges -- if a country is hurt by a substantive surge of imports, the current agreement provides no avenue of recourse. (autos only?)

You would propose: a super safeguard mechanism to allow an industry [autos] to adjust the pace of liberalization (ie. raise tariffs).

UNILATERAL STEPS

6. D) Worker Funding -- Bush has not provided adequate funding to help workers and communities adversely affected by its provisions.

You would propose: Worker training, relocation assistance,

?
emergency
Action
provisions??

other support for workers and communities. (\$\$?)

7. E) Environmental Funding -- Adequate funding from Bush has not been proposed, much less assured. (\$379 million over two years.)

You would propose: Ensure adequate funding for environmental clean-up and infrastructure along border to handle development and increased traffic.

8. Help to Farmers Some US farmers will be hurt by agreement. US should enforce US pesticide requirements to imported food, worker assistance for growers affected by Mexican competition and utilize existing programs to help farmers identify more competitive crops.

Options

1) Yes, ^{and} but... Support the agreement and call for the eight steps above (or some combination).

Plus: Enables you to be for free trade and the agreement. Inoculates you against charges of being protectionist but also allows you to beat up on Bush for falling short of the mark. Would push the Administration to do the right thing: go back and get these provisions taken care of.

Down side: It's not a clear cut yes or now. More waffle, slick and trying to have it both ways.

Also, if Bush doesn't do what you ask, would you have to be against agreement? How can you say Bush must do these things but then you'd support it even if he didn't? Isn't that really a no position?

2) No, and... Reject the current agreement and say you would support it if Bush added the eight steps above.

Plus: Clear no, would help inoculate you against waffle, slick, trying to have everything both ways. Would bring Congress along and probably push Bush to go back to table.

Down side: You will be accused of flip-flop since you have been perceived as being for the agreement. Regardless of the variations you make, you will be placed in the same camp as Gephardt since he has already come out for renegotiations.

Variations of 8 steps:

You can alter the politics of supporting or rejecting the agreement by altering which of the 8 steps you might call for. The majority of them do not call for renegotiating the agreement and can be handled either unilaterally by the US or in side agreements with Mexico and Canada. Limiting your support to these areas

NOT just
UP to
Bush

enables you to improve the agreement without having to open it up for renegotiation.

The tough call is how to handle the auto provisions (rules of origin? and transition period.) It is hard to say you are for the agreement and press for these areas because it clearly calls for renegotiating the treaty.

~~top 3~~

enforcement of laws / dispute resolution.
→ one were both ~~??~~

To: Al, Leon, Charlotte
From: Katie
Re: Provisions of NAFTA relating to the environment
Date: 9-9-92

BOTTOM LINE:

There are deficiencies in the environmental provisions of the agreement. At this point however, I have not uncovered anything that looks like a fatal flaw. And I think there is the opportunity for Clinton/Gore to identify some of these weaknesses and suggest improvements.

DISCLAIMER:

I am still working through the intricacies of the text and need to further cross reference with the GATT and the Dunkell proposed revisions to the GATT. So -- conclusions here not written in stone....

Moreover there are other concerns that I will not discuss here. For instance -- how will environmental protection efforts be funded?

Finally -- just want to mention briefly here the "parallel agreements". So far I haven't seen much of significant substance here. There are initiatives -- the Border pollution plan, for example -- but they all depend on funding and serious enforcement to be worth anything. Too early to judge them on either of those fronts.

Finally, Finally -- on September 17th, there will be a meeting of the environment and trade ministers of the three countries. I understand that a bilateral (US-Mexico) "Joint Committee for the Protection and Improvement of the Environment" will be announced. This could amount to something -- its scope will extend beyond the border area and it supposedly will work to "improve enforcement of environmental regulations."

ANALYSIS:

There are three broad areas that I will comment on in detail:

- o **PRODUCT STANDARDS.** This encompasses Sanitary and Phytosanitary Standards as well as Technical Standards. Examples of the former are pesticide residue standards and the European Bovine Somatotropin standards; examples of the latter are equipment and auto safety standards. The major thrust of concern here is that US standards will be attacked for being too high.

o PROCESS STANDARDS. This deals with the environmental rules and regulations businesses will be required to operate under -- clean air and water regs, for example. It also encompasses the provisions of NAFTA dealing with investment. The major thrust of concern here is that Mexico's standards are too low -- businesses will rush in and create pollution havens.

o INTERNATIONAL ENVIRONMENTAL ISSUES. The questions here are (1) can a country act unilaterally to protect natural resources within the sovereign region of another country?; (2) can a country act unilaterally to protect the global commons?; (3) what is the effect of NAFTA on currently existing and future international environmental agreements?

I. PRODUCT STANDARDS

CONCERNS:

o NAFTA will require that regulations be based on "sound science", and this requirement will be broadly construed to require an "indubitable" scientific basis. The Delaney clause is cited as a prime example of a standard that would be vulnerable.

o NAFTA will require that standards be "harmonized", and this will lead to a weakening of US standards.

ANALYSIS:

o SCIENTIFIC BASIS:

The agreement requires sanitary and phytosanitary measures to be "based on scientific principles"; "not maintained where there is no longer a scientific basis for it"; and "based on a risk assessment."

It is impossible to determine with any precision exactly how terms will be applied in individual cases (particularly because detailed definitions for many of these terms are not given in the text). However, it is my understanding that these terms were chosen in response to the concerns raised by enviros. The alternative language -- drawn from the current Dunkell GATT draft -- was considered to be much more restrictive. For example, rather than just being "based" on science, the Dunkell draft apparently calls for a scientific "justification" of the standards. In addition, the Dunkell draft would require that a standard be abandoned if "available" scientific evidence did not support it -- the NAFTA, by contrast, seems to allow the maintenance of the standard as long as there still remains some scientific basis for it. And it has been suggested to me (though it is not clear to me) that the Dunkell draft requirement that a standard be crafted to operate in the least trade restrictive manner necessary to achieve its objective is more onerous than the provision in the NAFTA that states that Parties shall ensure that any

standard is "applied only to the extent necessary to achieve its appropriate level of protection."

So, the language chosen does seem to be less threatening to our standards. This point of course could be debated -- no two lawyers ever read the same sentence the same way.

HOWEVER, I believe there is another provision of the NAFTA that is novel and that could be of much greater significance in addressing this concern:

UNLIKE THE GATT, THE NAFTA PLACES THE BURDEN OF PROOF ON THE PARTY CHALLENGING A STANDARD. THAT MEANS THAT THE STANDARD IS "INNOCENT" UNTIL PROVEN BY THE CHALLENGER TO BE GUILTY OF RUNNING AFOUL OF NAFTA. UNDER THESE RULES, THE CHALLENGER WOULD BE PUT IN THE POSITION OF HAVING TO PROVE A NEGATIVE -- FOR EXAMPLE, THAT A GIVEN STANDARD IS NOT "BASED ON SCIENTIFIC PRINCIPLES" -- A BURDEN THAT IS VERY DIFFICULT TO CARRY.

That having been said, it should be noted that the party whose regulation is being challenged has the option under NAFTA to move the proceedings to a GATT forum (rather than have it heard by a NAFTA panel). Since it is being assumed at this point that the NAFTA panel -- borne of this first environmentally sensitive trade agreement -- will be better on enviro issues, this option could be seen as dangerous. It WOULD indeed be dangerous if the selection of the GATT forum would mean that all of GATT's rules would apply to the deliberations. This is not spelled out, but I assume that it would be the case. This would be dangerous if the exercise of the full panoply of the GATT rules meant that the BURDEN OF PROOF also swung back to the challeng-ee. I cannot believe that this would be so -- but I ain't seen the fine print that says it is not so, and I am just jaundiced enough to believe that an Administration that would like to get one or more troublesome enviro monkeys off its back would provide for this kind of scenario.

If this (admittedly) wild possibility is not in the cards, I think the option to move the proceedings to the GATT might be somewhat of a wash. This is because I don't see anything concrete to back up the assumption that NAFTA panels will be better on these issues than GATT panels are. For example, while the NAFTA, unlike the GATT, expressly mentions environmental experts among the specialists that may be consulted in decision - making, consultation with experts is still only an option. Moreover, it seems that the proceedings, like those under the GATT, will be closed-door.

IN THIS REGARD, IT SEEMS TO ME THAT A CALL FOR PUBLIC PROCEEDINGS (WITH DUE REGARD FOR NATIONAL SECURITY AND CONFIDENTIAL BUSINESS INFORMATION CONCERNS) WOULD BE ONE POTENTIALLY SIGNIFICANT IMPORVEMENT TO THE TEXT THAT COULD BE SUGGESTED BY CLINTON?GORE.

o HARMONIZATION:

Countries are encouraged to adopt international standards. However, the right of the parties to set more stringent standards is expressly reserved. Moreover, it is not clear that harmonization necessarily means weakened standards. I understand, for example, that GAO has recently issued a report that concludes that the Codex Alimentarius is more stringent in most regards than US standards. (Note however that I have not seen nor had a chance to review that study.)

Another issue arises here with regard to federalism and preemption of state and local laws. Ambassador Hills testified that NAFTA "Allows the parties, including states and cities, to enact even tougher standards -- there will be no preemption." This phraseology strikes me as a bit odd -- states and cities are not "parties" to this agreement. However, I have not seen or had cited to me (yet) anything that would expressly contradict her statement.

o EXTRATERRITORIAL APPLICATION

There is one other issue here that bears noting. NAFTA, unlike the GATT, expressly limits the parties' right to impose sanitary and phytosanitary standards to those measures that are necessary to protect human, animal or plant life or health "in its territory."

I understand that this territorial limitation language derives from the Mexican reaction to our Supreme Court decision re: kidnapping of Mexicans by US officials operating in Mexico. Regardless of the origin of the language, however, it can be read as a codification of the GATT panel decision on tuna-dolphin. In that case, the United States argued in part that the ban on dolphin-unsafe tuna was a measure necessary to protect life (in this case dolphin life). The panel rejected that reasoning, and implicitly (if not explicitly) limited the reach of the enforcement of product standards to protection of life/resources within one's own territory.

For those environmental groups who strongly opposed this ruling by the GATT panel, I suspect this language will be very objectionable. For other groups who had not conclusively denounced the GATT decision, but who might have hoped that the NAFTA could have attempted some better solution (than simply foreclosing unilateral bans) this codification of the GATT ruling -- the failure here to move forward toward some better middle ground -- may ignite a fire. This may particularly be true because of this agreement's significance as one between developed and a developing country and the potential of NAFTA to be seen as a template for how we will work to achieve (force countries toward?) sustainable development. I do not know of any group that was expecting NAFTA to answer the tuna-dolphin question by expressly sanctioning unilateral measures, and I have not yet heard

any reaction to this provision, so I cannot gauge at this point what the reaction will be.

The question, however, is whether this should be denounced by Clinton/Gore. And this question boils down to whether Clinton/Gore should take the position that importing countries should be allowed -- unilaterally -- to erect barriers to trade in order to foster (force?) sustainable development of resources in an exporting country or sustainable use of the global commons.

I believe that the answer to that question is no. As we have previously discussed, this possibility sounds quite attractive when the weapon is in our hands. Many scenarios can be imagined, however, when we would be -- quite unpleasantly -- on the receiving end of such measures. Possible chaos.

There are two alternatives that are still available to achieving the objective that the trade barrier (i.e. the ban) would have achieved: First, the concerned country could mount a public education campaign that would lead informed consumers voluntarily to reject the goods (note on this front that I believe the GATT panel gave the ok to labelling requirements). Second, the concerned country could call for the negotiation of an international agreement on the matter that could be enforced through trade measures.

The limitations of these alternatives are obvious -- neither offers the opportunity for the kind of surgical strike a trade ban offers. However, I believe the potential downsides of this kind of unilateral, precipitous action outweigh the cumbersomeness of the alternatives -- even given the very real possibility that action will come too late and life/resources will be destroyed forever.

There is another consideration here. Even if it is unfortunate that the NAFTA chose to "clarify" the GATT in this way, (and given that C/G should not espouse the use of unilateral bans), I don't see how C/G could condemn the language without being able to define the silver bullet middle ground. If the choices are unilateral ban or doing nothing, then I think the middle ground resembles that which I described in the preceeding paragraph. If the spectrum is defined by unilateral bans on one extreme and multilateral treaty processes on the other, however, then I do not have an alternative -- safe but efficacious -- middle ground to suggest. Haven't heard one, have you?

II. PROCESS STANDARDS

CONCERN:

The US and Mexico have laws on the books that are of comparable stringency. However, Mexico has failed to develop technical specifications so that the laws can be implemented. Moreover, even where regs are in place, enforcement has been lacking. The concern

then is that since the effective Mexican process rules (i.e. the enforced level) are significantly less exacting than the US laws, there will be a competitive pressure on US firms to either move to Mexico or to threaten to do so and thereby force state and/or federal relaxation of standards.

ANALYSIS:

The agreement deals with this situation in the provisions pertaining to INVESTMENT:

First, the agreement provides that countries may require investors to meet specific environmental regulations. As explained by Hills in her testimony, the agreement permits parties "to impose stringent environmental requirements on new investment, so long as they are not discriminatory" and "to require environmental impact statements on new investments."

Second, the agreement discourages countries from lowering environmental standards to attract investment.

Some of the weaknesses of these safeguards are apparant -- they are hortatory and advisory, but they are not binding.

There is another and perhaps more significant weakness here, however. These provisions are divorced from the dispute resolution procedures, and a suspected infraction only leads to "consultation" between the parties:

"The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environemtnal measures....If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement."

Leaving aside for a moment whether or not these disputes should be subject to the full dispute resolution procedures and focusing instead on the adequacy of the option that is offered -- consultation -- several problems arise:

First, who will be able to demand a request for consultation here. Clearly, consultation can only be had between Parties. But -- will the governments only act on the complaint of a business, for example, who complains of an unfair competitive disadvantage because his Mexican competitor pays nothing to control air and water pollution? Or, will concerned citizens have standing to urge their governments to undertake such consultation?

Second, what will the complaining Party have to show. Will they have to demonstrate a motive to attract investment or will the laxity of the standards themselves (or of their enforcement) suffice?

Third, how will a complaining Party show that this problem is occurring? Under other provisions of the NAFTA, there will be reporting and data gathering (for example, the Committee on Standards-Related Measures will monitor and report annually on the implementation of the NAFTA Standards Code). There is no such mechanism under these provisions.

Fourth, what is the impact of the consultative process if it is not tied into a dispute resolution process with some kind of enforcement provisions? This could be particularly problematic if the consultations will be confidential -- no public access to the proceedings; no requirement for a written report of the consultations; no requirement for some resolution of the matter -- this does not seem to add up to much. Seems to be little or nothing to prevent the proceedings from being a sham.

I am not prepared to argue that these provisions need to be subject to the full force and effect of the dispute resolution procedures. However, I do believe at this point that some strengthening is necessary.

A possibly interesting possibility here would be to suggest that the Commission on Environment and Trade that the National Wildlife Federation has proposed be created in order to do the kind of monitoring, data gathering that would be useful here and possibly to hear concerns directly from the public.

Gephardt also suggests this type of body. His proposal differs, however in at least two significant respects. On the one hand I think it falls short because it seems to focus only on problems that would arise in the border area. Granted that may be the hotbed of initial activity, but a goal of the agreement -- and therefore the proper assumption here -- is that development will be fostered throughout Mexico. The Commission's purview should not therefore be so limited.

On the other hand, however, Gephardt seems to envision giving the Commission full adjudicatory powers. I am not convinced that this is necessarily objectionable, but it certainly needs to be thoroughly thought out before being embraced. The concern here is that the upshot of a judicial proceeding -- assuming the complaining party was found to be in the right -- would be in effect (if not in fact) to require a country to put on its books and enforce a more stringent process standard -- a more stringent clean air act, for example.

This is clearly a major stepping on sovereign toes. But, I am not certain that that should end the discussion. Don't we do the same thing, for example, with respect to intellectual property protections? One country complains that it is suffering economic damages because another country's standards and/or enforcement are too weak. If the complaining party is successful, the other either cleans up its act or faces some retaliatory trade sanctions.

Anyway, this all requires further discussion. But I do think there are serious weaknesses here -- as well as opportunity for some creative suggestion of fixes.

III. INTERNATIONAL ENVIRONMENTAL ISSUES

CONCERN:

Parties will not be able to invoke the trade enforcement mechanisms of international environmental agreements against other Parties.

ANALYSIS:

Because challenge has not been brought, the issue of whether international environmental agreements that rely on trade enforcement mechanisms run afoul of GATT has not been decided. As indicated above, the suggestion in the GATT panel decision was that action pursuant to such agreements would not be a violation. The NAFTA seems to make this clear:

Article 104 identifies three agreements -- CITES; Montreal Protocol; and the Basel Convention -- and states that, to the extent that there are any inconsistencies between the trade enforcement provisions of these agreements and the NAFTA, the environmental agreements would prevail. In addition, NAFTA provides that the Parties "may agree in writing" to add "any other environmental or conservation agreement." This seems pretty solid. I would raise several questions here, however. For example, do all three Parties need to agree to add another treaty? If so, would that render the provision ineffectual -- in the Montreal Protocol for instance, trade sanctions can be taken against non-signatories in order to prevent a free-rider problem. If in this case one of the NAFTA parties were not party to the Montreal Protocol, it is unlikely that they would be very anxious to have it added to the list of agreements that can be enforced without running afoul of the NAFTA. This is not spelled out, but I believe it should be.

To: Governor Bill Clinton
Fr: Gene Sperling
Re: NAFTA Meeting
Dt: September 19, 1992

We have a meeting scheduled today on NAFTA. We want this to be a substantive meeting that examines the agreement and the political context you will face in responding. In addition to your staff, we have invited three experts to meeting: Barry Carter, a Georgetown Law Professor who has been coordinating information gathering on this issue for us; Mike Wessel, Dick Gephardt's trade expert -- and one of our top overall Congressional advisors; and Bob Kyle, Senator Bentsen's trade expert. Kyle was at the international economics briefing with you in Washington, and authored with Bentsen the recent memo sent to you analyzing NAFTA.

Purpose: The agenda for the meeting is three-fold:

One, to examine the strengths and weaknesses of the agreement. In particular, we need to examine environmental protections, labor practices, worker training, the impact on automobiles and other industries, and overall enforcement mechanisms.

Two, to examine what the avenues for redress are for things we find sub-par. What things can be done only through reopening the treaty and what could be done through implementing legislation or parallel agreements. Furthermore, are there opportunities for limited negotiations i.e., maritime provisions in U.S.-Canada FTA.

Three, in light of these substantive determinations, what is the best political option. Some believe that which ever you decide, you must be come out clear one way or another. In other words, you should be able to answer the question "are you for or against NAFTA" with a "yes" or "no" answer. Others feel you can take a position that lays out your general support for NAFTA, but makes your support conditional. The three overall main options are as follows:

"Yes, and..." Declare that you believe the agreement should be signed, but that there are things that you would do later to strengthen it. This would be the "yes and" position, because you are saying yes to the agreement but saying that there are additional things you would call for. This position would be interpreted by editorial boards (favorably) and labor (unfavorably) as a clear yes.

"Yes, but only if..." In this option, you would state your support for the agreement, but condition your support on the completion of a few aspects that you believe could be changed with implementing legislation or limited negotiations relating to workers and the

environment. The advantages of this position -- yes, if we satisfy labor and environmental standards -- is that it is perhaps the most popular position with the public. If you hit this with force, you will be able to express both your support for free trade and workers and the environment. The theme would be "I support this if the President will make the following changes, but if he won't do it now, I'll do it later." The "con" to this answer, is that Republicans will try to portray it as you waffling and trying to be all things to all people. Others, may simply see it as a "no" in less than clear language.

"No...and here is why" Under this option, you would come out clearly against the agreement and give the exact reasons why. Again, here you would also express your strong support for free trade and the concept of NAFTA but clearly state that the President has negotiated a bad agreement and that you will negotiate a strong one. The advantage of this is that it will be a clear and decisive answer and it will be popular with many workers particularly in Michigan and Ohio. This "con" is that this will be portrayed by Republicans as a flip-flop and pander to unions. Yet, they will have a harder time doing so if Congressional Democrats in general are coming out in this direction and if Lynn Martin keeps telling people 150,000 jobs will be lost.

Everyone agrees that whatever position you take, you do so in the context of a major speech that lays out your philosophy on trade.

Attached are two pieces:

1. Summary of Agreement: The first four pages is a brief summary and analysis of the main issues from the Senate Finance Committee, (Bob Kyle, Eric Biel, Marcia Miller and Debbie Lamb)
2. Overview of Options: Barry Carter prepared three attachments: Attachment A discusses specific problems with the agreement and how they might be handled. Attachment B lists the coming of the events and Attachment C provides background information.

SUMMARY OF NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

Wednesday, August 12, 1992

A. Overview

The NAFTA announced today between the United States, Mexico, and Canada largely includes Mexico in the free trade pact the U.S. and Canada entered in 1988. The agreement eliminates virtually all tariffs between the U.S. and Mexico and liberalizes trade in a variety of areas, including services trade, government procurement and investment. U.S. industries likely to benefit from the agreement include banking, energy, wheat and feed grains, electronics and a variety of other industries currently facing high Mexican barriers. Industries likely to be harmed include fruit and vegetable producers, apparel workers, and other low-wage manufacturers currently enjoying high tariff protection, such as glasswares and shoes. The Big 3 is likely to support the agreement, but the UAW and AFL-CIO are almost certain to oppose. The agreement addresses some environmental issues, but generally leaves resolution of most environmental and all worker retraining issues to the Congressional legislation implementing the agreement -- as the price Congress will demand to approve the agreement. Below is a description of key sections of the agreement.

B. Agriculture

Terms of the Agreement.--The agreement is likely to be a mixed bag for U.S. agriculture. It would benefit U.S. producers of competitive crops like corn, wheat and feedgrains, for which Mexico currently imposes quantity limitations and/or tariffs. In these areas, Mexico has agreed to phase out its restrictions over 0-15 years, depending on the import sensitivity of the product. On the other hand, U.S. fruit and vegetable producers, who are less competitive against low-wage Mexican production, are likely to oppose the agreement, even though they generally received 10-15 year transition periods during the most sensitive growing seasons. Other U.S. crops traditionally protected by quotas (sugar, cotton, peanuts) will also see their protections phased out over 10-15 years. In agriculture, the U.S. and Mexico essentially reached a bilateral agreement because Canada refused to eliminate all of its trade barriers.

Analysis.--It is not yet clear whether producers of corn, wheat and other "winner" crops will feel sufficiently enthusiastic about the agreement to offset the concerns of the fruits and vegetable producers and other farmers that might suffer. The response may vary by region. In the Great Plains and Upper Midwest, benefits to crops like corn and wheat may counterbalance some concerns about industrial job loss. In Texas and California, fruit and vegetable producers may vocally oppose the agreement, but could be placated by the long transition periods. (These states have substantial production of various "winner" crops as well). In Florida, citrus growers are more likely to be vocal in opposition, even though U.S. orange juice restrictions received a 15-year phase-out.

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C. Automobiles

Terms of the Agreement.--Generally, Mexico has agreed to eliminate its substantial barriers to auto trade (e.g., 20% auto tariffs, 16% domestic content requirement) over ten years. Over the same period, Mexico will also eliminate its trade balancing requirement that U.S. auto companies producing in Mexico export twice as many cars by value from Mexico as they import from the U.S., a provision ensuring that Mexico has an auto trade surplus. In return, the U.S. would eliminate its low 2.5% tariff on auto imports immediately. Both countries would phase-out their tariffs on light trucks over 5 years. This relatively quick transition could be controversial in the U.S., given that the U.S. now imposes a 25% tariff.

Another major issue for the UAW and the Big 3 concerned the percentage of North American content cars must contain to receive duty-free treatment within North America. The concern was that Japanese car makers, for example, would produce most of the car in Japan, conduct only assembly operations in Mexico, then ship the car duty-free into the U.S. The U.S. auto industry insisted on a 65% North American content requirement; Mexico and Canada favored 50%, the current level under the U.S.-Canada free trade agreement. The negotiators settled on 62.5%, which will be controversial.

Analysis.--By eliminating most Mexican auto barriers, the agreement does provide considerable benefits to U.S. auto producers. Although the Big 3 pressed for the 63% content requirement, they will probably be sufficiently satisfied with the rest of the agreement to support it. The UAW almost certainly will oppose the agreement due to fears that auto plants will relocate to Mexico.

D. Services

Terms of the Agreement.--The agreement liberalizes trade in a number of service areas, including banking, insurance, telecommunications and transportation. Most attention has focused on financial services, where U.S. ownership of Mexican banks is limited to a 34% share and U.S.-owned banks are essentially prohibited from operating in Mexico. U.S. ownership of Mexican insurance companies is limited to a 49% share. The agreement gradually gives U.S. banks a steadily increasing share of the Mexican market, starting at 8% and rising to 15% by the year 2000, after which the cap would be removed. The U.S. industry believes these caps are acceptable, as they are unlikely to reach them that quickly anyway. In the insurance sector, all U.S. firms will be able to hold majority ownership of Mexican insurance companies by 1998, with no market share cap.

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Analysis.--The U.S. financial services industry generally is very supportive of the agreement. The support of the industry is important to the Administration because the large firms (American Express, Citicorp, American International Group) have often provided much of the manpower and financial support necessary to sell trade agreements to Congress. That is likely to be the case when selling NAFTA as well.

E. Environmental Issues

Terms of the Agreement.--The agreement addresses some types of environmental concerns, but does not address others. The agreement does address the concern of environmentalists that harmonization of trade regulations would require the U.S. to reduce its environmental and health and safety standards on imported products (e.g., pesticides on vegetables, CFC standards on refrigerators) to Mexican levels. The agreement protects these standards against challenge -- even if they are tougher than those of Mexico -- as long as they satisfy two conditions: 1) the same standards apply to U.S.-made products and 2) the standards can be justified with a sound scientific basis. The negotiators are expected today to reach a separate, but related agreement establishing a U.S.-Mexico commission on the environment, which would oversee progress by the two countries (particularly Mexico) in enforcing their environmental laws. The agreement also provides that specified international environmental treaties shall take precedence over NAFTA.

Analysis.--Mainstream environmental groups are not likely to object strongly to what is in the agreement. The controversy is likely to center around what the Administration intends to do in areas not covered by the agreement, but related to the NAFTA. This includes demands to provide additional funding for pollution cleanup along both sides of the U.S.-Mexican border and improvements in the quality of environmental enforcement by the Mexican government, steps that do not necessarily need to be part of the trade agreement. Your continued emphasis on environmental issues is likely to resonate particularly strongly in such pro-NAFTA states as Texas and California, where support for the free trade agreement is coupled with a clear recognition of the pollution problems along the border. This is likely to be a major focus of Congressional concern as it begins to consider the agreement.

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F. Labor Issues

Terms of the Agreement.--The NAFTA agreement itself does not include provisions to help U.S. workers displaced because of increased NAFTA trade, other than to provide long transition periods for sensitive sectors. The heart of this controversy has always been the need to provide a worker retraining and adjustment program for U.S. workers displaced by NAFTA. In May, 1991, President Bush presented an "Action Plan" to Congress, committing to support a NAFTA worker adjustment program as part of the legislation implementing a NAFTA (which will be considered by Congress next year). In order to insulate itself from attacks in this area, the Administration today reaffirmed its willingness to work with Congress to structure such a program. On another subject, the agreement does not require any minimum worker rights or workplace standards for Mexican workers, a demand of the AFL-CIO, who want Mexican wages and working conditions to be improved.

Analysis.--The Administration's statement that it will work with Congress to structure a worker adjustment program should be taken with a grain of salt. The President committed to such a program in the first place only after Congress demanded it as the price necessary to give Bush authority to negotiate the NAFTA. Moreover, for the past ten years, the Reagan and Bush Administrations have tried to eliminate the Trade Adjustment Assistance program, the U.S. program that currently help workers dislocated by imports. That record provides little indication that the Administration is committed to worker retraining and adjustment.

Attachment A

Draft/Barry Carter/Sept. 18

Outline of a Possible Statement and Listing of Problems with the Proposed NAFTA Agreement[Introduction:]

From the outset of this campaign, I have stated that I will support a free trade agreement that opens markets for U.S. exports to Canada and Mexico so long as it provides adequate protection for workers, farmers, and the environment on both sides of the border. I have also stated that we must have strong transition strategies that ensure that workers benefit from a more open world trading system.

We now have a part of the proposed NAFTA arrangement represented in the unsigned document that the three countries have reached. The Bush Administration finally released a draft of it on September 8. President Bush just notified Congress [on September 18] of his intention to sign the proposed agreement. Under U.S. law the President must now wait for at least 90 days before signing the agreement in order to hear the views of Congress and others.

[Alternative 2: If Gov. Clinton supports the proposed agreement, but insists on more:]

Based on my initial review of the agreement, I wish more had been done to further U.S. interests in such areas as automobiles, energy, agricultural, and intellectual property. Nevertheless, because of the potential new jobs and others benefits to the United States through expanded exports and because of the state of the negotiations, I support this proposed agreement as far as it goes.

However, more needs to be done--and must be done--to help workers and farmers and to protect the environment. This can be done through U.S. programs and by negotiating with our NAFTA partners for additional agreements. I call on President Bush to finish the job. If he doesn't, I will move quickly to insist on these measures if I am elected President.

[Alternative 3: If Gov. Clinton does not support the agreement, but insists on changes:]

Let me be clear. I'm for a good agreement. However, based on my initial review of the proposed agreement, this is not a good agreement. George Bush did not do the job. I call on Bush to fix the arrangement. If he does not, I will move quickly to do so so if elected President.

More needs to be done--and must be done--to help workers and farmers and to protect the environment.

LISTING THE PROBLEMS:]

Among the major problems with the proposed agreement are the following:

[Items that do not require changes in the proposed agreement itself or even supplementary agreements with Mexico and Canada:]

1. A good NAFTA arrangement must be accompanied by adequate funding to help U.S. workers and communities who are adversely affected by its provisions. Worker training, relocation assistance, and other necessary support should be viewed as an entitlement for workers. The recent proposals of the Bush Administration do not provide the necessary assurances. Given the long history of efforts by the Reagan and Bush Administrations to eliminate the Trade Adjustment Assistance Act, press releases by the Bush Administration are hardly enough.

2. The success of a good NAFTA arrangement requires that the Administration ensure that there be adequate funding for environmental clean-up and for the necessary infrastructure along the border to handle the development and increased traffic. A funding commitment by the Bush Administration is still lacking.¹

3. The proposed agreement can also cause unnecessary harm to some farmers, unless help is provided them. Besides enactment of my general farm program, for U.S. farmers adversely affected by NAFTA, U.S. programs should help in at least three ways: (a) strict application of U.S. pesticide requirements to imported food; (b) establishing that growers who lose out to Mexican competition are eligible for worker assistance; (c) utilizing more the existing agricultural programs to help growers identify alternative crops where they would be more competitive.

[Items that could be accomplished through a supplementary side-table agreement, which could be signed simultaneously with the present proposed agreement:]

[2A. Adequate funding for environmental clean-up and for the necessary infrastructure along the border, noted in 2. above, could also be assured by a funding commitment by all three NAFTA partners.]

¹ One caveat. In February 1992, Bush announced a plan to clean up pollution along the U.S.-Mexico border. The plan called for \$379 million in U.S. funds over the next two years and some Mexican support. However, these amounts are inadequate and some U.S. funds would have been reprogrammed or reallocated from funds intended for other purposes --such as cleanup of the Chesapeake Bay! It looks as if Congress will cut these funds substantially.

4. The three countries have just announced [on Sept. 17] an agreement "in principle" to create a North American commission on environmental cooperation. However, the environmental ministers were not going to formalize this arrangement until they met again in early 1993! The environment should not be on the slow track. Moreover, there is no assurance that this commission will be much more than meetings without substance.

A commission, or authority, should be created promptly that has substantial powers and resources to clean up and prevent border pollution. It should also encourage the enforcement of the countries' own environmental laws through education, training, and commitments of resources.

[Some items arguably could be accomplished through a supplementary agreement, but critics might say that a renegotiation of the proposed agreement would be required.]

5. The NAFTA dispute resolution process is inadequate in the environmental and health area.

A. There should be an enhanced NAFTA dispute resolution process for enforcement of national environmental and health laws. For example, the proposed agreement does not allow a country to use the formal, binding NAFTA process now if another country lowers its environmental standards to entice investment. The sole NAFTA remedy is government-to-government consultation.

B. There should be greater public participation in this enhanced NAFTA dispute resolution process. The dispute provisions are often secretive, and provide no mechanism for public participation in defending challenges to U.S. laws, or in bringing challenges to the practices of the other NAFTA parties.

6. Enforcement of Mexican laws in the areas of the environment and worker standards (such as health and safety and child labor laws) is essentially ignored by the proposed agreement.¹ In contrast, the proposed agreement allows for improved enforcement of intellectual property and investment issues through Mexican laws and U.S. import laws--with law suits, damages, and injunctive relief. Similar enforcement provisions should be developed in the area of environment and worker standards.

7. A super safeguard mechanism for the automobile industry might be added. It would provide that if trade during the transition period does not expand on a roughly balanced basis in the industry, then the country which is hurt by a substantive adverse surge of imports can ask the other to accelerate its liberalization measures. If the other country does not agree to some relief, then the first country can adjust the pace of its own

¹ There are limits on importing goods into the United States that are dangerous to the consumer's health, but this is a fairly narrow sanction.

liberalization (possibly by a "snapback" to earlier tariff levels). This will help protect against unexpected developments during the transition period. [This mechanism would be either alone, or together with, the provisions in # 8 below for changing the transition measures for the automobile industry.]

This super-safeguard approach could also be considered for other industries.

[Provisions which would require renegotiation of key provisions of the proposed agreement:]

8. The provisions for the automobile industry have different transition periods for the United States and Mexico, with [in the view of U.S. workers] an uneven tilt in favor of Mexico. This should be carefully reviewed and revised.

9. [Criticisms can also be leveled against the agreement's provisions for other sectors. Two examples that Majority Leader Gephardt has highlighted are the rules of origin for computers and energy. Details can be provided.]

Many of these problems above can be overcome by new U.S. programs, such as on worker training, and by new supplementary agreements between the United States and Mexico, or between the United States and Mexico and Canada. [If going to include items 8 and 9] Some of these problems might well cause the negotiators to go back to the proposed agreement, which is still unsigned.

We should recall the negotiating history of NAFTA's predecessor, the U.S.-Canada Free Trade Agreement (FTA). There were several changes in the agreement between the time that an document of about 40 pages was agreed to and initialled on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of over 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

[Possible Concluding Language:]

My commitment to a good NAFTA agreement is strong. If I am elected President, it will have a high priority. To reassure our NAFTA partners, I will make a meeting with Prime Minister Mulroney and President Salinas one of the first items on my calendar for the transition period.

I will strive for and sign a pro-growth, pro-jobs agreement with Canada and Mexico that does not sell out our people or our environment. If I am President, that is exactly the kind of arrangement we will have.

B. Carter/Draft/Sept. 18**Attachment B****Pending Events in the NAFTA Process**

Sun., Sept. 20	France votes in referendum on the Maastricht Treaty for strengthening the European Community. (Though not on NAFTA, the vote will highlight regional economic groupings.)
Tues., Sept. 22	American Express Pres. Robinson and AFL-CIO Secretary Donohue testify before Senate Finance
Wed. Sept. 30	Senate Finance has hearings on agricultural and energy provisions
During Sept.	House committees, other than Ways and Means, also have hearings. E.g., Panetta's Budget Committee on the budgetary implications, Wyden's subcommittee on environmental issues.
During early Oct.	Some House committees or subcommittees might have field hearings
Late Nov.	Studies due from Office of Technology Assessment and the Congressional Reference Service.
Dec. 17	Earliest date that the President can sign the NAFTA agreement
Late Jan.	Impact study due from the International Trade Commission

B. Carter/Draft/Sept. 18

Attachment CBackground Information

Basic Overview. NAFTA covers all of North America, expanding upon and modifying the 1988 Free Trade Agreement between the United States and Canada. By including Mexico, the North American free trade area will encompass over 360 million people and over \$6 trillion in annual output.¹

NAFTA will phase out virtually all tariffs between the United States and Mexico over 0-15 years, with the most sensitive products receiving the longest transitions. But NAFTA extends beyond trade in goods--it reduces barriers to trade in services (such as insurance and banking), to investment, and to establishment of businesses. It also addresses many national regulatory controls. For Mexico, for example, it strengthens intellectual property protection and it limits the regulation of trucking.

Economic Impact. U.S. industries likely to benefit including banking, energy, wheat and feed grains, and electronics. Industries likely to be harmed include fruit and vegetable producers, apparel workers, and other low-wage manufacturers currently enjoying high tariff protection, such as glassware and shoes. The Big 3 auto producers will likely support the agreement, but the UAW will almost certainly oppose it.

Secretary of Labor Lynn Martin admitted that one study, which she did not identify, estimated that the job losses from the NAFTA agreement could be as much as 150,000. This was at the Senate Finance hearings on Thursday, Sept. 10.

In an authoritative study, economists Gary Hufbauer and Jeffrey Schott estimate that NAFTA will create about 325,000 jobs in the United States. It will also displace by 1995 about 150,000 jobs, primarily in unskilled and semi-skilled factory positions. Because the jobs created and those displaced will differ in skills and location, Hufbauer and Schott

	<u>Population</u>	<u>Gross Domestic Product</u>	<u>GDP, per capita</u>
Canada	27 million	\$ 570 billion	\$21,418
Mexico	86	238	2,490
U.S.	252	5,392	21,449

(Based on 1990 figures. From reputable sources cited in the New York Times, August 12, 1992, page 1. Other sources might vary slightly, however.) Even without NAFTA, U.S. trade with Mexico--which had a slight deficit in 1990--is expected to reach a surplus of \$7 billion during 1992.

recommend that the United States budget \$1.2 billion over five years to facilitate NAFTA-related job adjustment.

Economists Jeff Faux and Thea Lee of the labor-supported Economic Policy Institute criticize the Hufbauer-Schott estimates as too optimistic. They say that competition from Mexican workers will cause wages of low-skilled U.S. workers to decrease by as much as \$1,000 a worker. Further, they say that 550,000 fewer high-paying jobs will be created in the United States during the next 10 years because added investment will go to Mexico rather than the United States.

Attitudes in Mexico. NAFTA is widely supported in Mexico. Originally proposed by President Carlos Salinas de Gortari, it is the centerpiece of his bold effort to open up Mexico and to modernize it. Defeat of the NAFTA would be a massive setback for Salinas and would place in jeopardy his entire pro-U.S., pro-market strategy. It would also adversely affect Mexican cooperation on a host of common concerns, including drug trafficking and immigration.

Attitudes in Canada. NAFTA is controversial in Canada and its approval by the Parliament is not certain. The 1988 Free Trade Agreement (FTA) between the United States and Canada is unpopular because of a perception that it has hurt Canada economically. Prime Minister Brian Mulroney—who also was in power when the FTA was negotiated and who now has higher unfavorable than favorable ratings—hopes to argue that NAFTA is an improvement for Canada over the FTA. The Canadian leader, who will probably seek a third term, must call elections by the fall of 1993. Many analysts, however, expect a spring 1993 election.

Bush Promises in 1991. In May 1991, President Bush made a number of commitments to Congress when he was seeking "fast-track" authority in order to simplify the later passage of NAFTA (and of a possible GATT Uruguay Round agreement). In his "Action Plan," Bush committed himself "to achieving a balance [with economic growth] that recognizes the need to preserve the environment, protect worker safety, and facilitate adjustment." He also said that "my Administration is committed to working with Congress to ensure that there is adequate assistance and effective retraining for dislocated workers."

Bush has not yet lived up to his 1991 commitments. He has not taken adequate steps to protect the environment and he has failed to deal concretely with worker training and other adjustment measures. The arrangement is still incomplete.

Draft/September 18

TO: Governor Bill Clinton
Via Tony Lake, Nancy Soderberg, and Gene Sperling

FROM: Barry Carter 

RE: Next Steps on the North American Free Trade Agreement (NAFTA)

OVERVIEW

A good North American Free Trade Agreement (NAFTA) is in the U.S. interest, as well as Canada's and Mexico's. It means expanded jobs and other economic benefits for the three countries. It would strengthen the sometimes difficult relations the United States has had with its neighbors. It will be key to continuing and making more solid the truly impressive changes in Mexico that President Salinas is pursuing.

A good arrangement, however, must include adequate protection for the workers, farmers, and environment on both sides of the border. This includes transition strategies that ensure that U.S. workers will be able to benefit from a more open world trading system.

The proposed NAFTA agreement of the Bush Administration is a considerable achievement. The 1000 pages of text and another 1000 pages of supporting schedules address a wide range of matters. Nevertheless, the proposed agreement is full of important gaps and problems.

Briefly, the proposed agreement does not deal with adequate assistance for workers and communities who are adversely affected, rather it is a concern left for each country to handle. Moreover, the recently-announced Bush program for worker training lacks the necessary funding and has other problems. Other concerns, such as occupational safety and health requirements, and child labor laws, are also left untouched.

Many genuine environmental concerns have yet to be addressed. More can be done to encourage Mexico to enforce its laws. The provisions for dispute resolution on environmental questions are limited and the public can be more fully involved in this process.

The proposed agreement can also harm some U.S. farmers in ways that can be avoided with targeted programs.

In short, we are dealing with a commendable objective, but an inadequate agreement. This creates a grey area where there are several valid and defensible formulations that you can choose from. They really boil down to three principal alternatives:

(1) You can continue to say that you need to study the unsigned document¹ further, because the congressional hearings and other studies are still under way and because the parallel environmental negotiations are not yet concluded.

(2) You can support the proposed agreement grudgingly only if several gaps are filled in, through U.S. programs or additional agreements with Mexico and Canada. At present, the document is incomplete from the U.S. perspective. You can highlight where the gaps still exist. President Bush has not finished the job. Either he must finish it, or you will have to do so as the next President before you can go along with the arrangement.

(3) You can continue your support for a NAFTA good arrangement, but say that this agreement is not a good one and that you cannot support it in its present form. George Bush did not do the job. You can identify the problems and call on Bush to solve them before he signs the agreement. If he cannot or will not, you will do so if you are elected President.

Alternatives 2 and 3 are very similar analytically--#2 is saying the glass is half full and #3 is saying the glass is half empty. However, public perceptions will differ considerably depending on whether you support or do not support the agreement.

If you do move from your present posture of continuing to study NAFTA, you might explain your new position in the context of a general speech criticizing the international economic policies of the Bush Administration. This should help emphasize that you share the concerns of disaffected workers and others about jobs moving to Mexico and other countries with lower wage scales.

If you select alternative 3, I suggest you demonstrate your commitment to eventually obtaining a good NAFTA arrangement and improving hemispheric relations by promising to meet with Prime Minister Mulroney of Canada and President Salinas of Mexico early in the transition period. For a historical analogy, Dwight Eisenhower's 1952 promise to visit Korea was well-received by the voters.

These options should be viewed in the context that the proposed agreement is only part of a complete NAFTA arrangement. Everyone, even the Bush Administration, realizes that there are other pieces to the arrangement. For example, some matters are better treated through each country's own programs--such as worker training. And, there can be supplementary arrangements among the United States and Mexico and/or Canada. For

¹ The Bush Administration calls the document an agreement. However, it is still unsigned. (President Bush provided a draft on September 8. Then, when he notified Congress on September 18 of his intention to sign the agreement on or after December 17, he said he was providing a final version.) So, there seems little reason to give the document a greater status than it deserves. It is a "proposed agreement" or an "unsigned document."

example, the three countries just announced on September 17 that they have agreed "in principle" to create a North American commission on environmental cooperation, which will be formalized in another agreement in early 1993.

Also, the document is still an unsigned, proposed agreement. U.S. law requires that at least 90 days must pass between the time the President notifies Congress of his intention to sign the proposed agreement and his actual signing of the agreement. President Bush just notified Congress on September 18, so that the proposed agreement cannot be signed until at least December 17.

DISCUSSION

The following is a more detailed discussion of the alternatives. Accompanying this memo are Attachment A which provides the outline of a possible statement by you and a listing of problems with the proposed agreement; Attachment B which provides some key future dates in the NAFTA process; and Attachment C which provides some useful background information.

Alternative 1.

Continuing to study the matter (alternative 1) will increasingly wear thin. The "draft" version of the proposed agreement was made available on September 8 and a final version on September 18, much has already come out about the impact of the proposed agreement, and Majority Leader Gephardt has already taken a stance (for renegotiation).

You could still hold to this position for several weeks, and maybe even through the election, but at an increasing cost of appearing to straddle and look indecisive. President Bush is clearly committed to emphasizing NAFTA and your reaction to it.

Probably the strongest argument for this alternative is a political one--that it might be better to absorb the costs of continuing with a straddle, rather than taking a more definite stand under alternative 2 and alienating workers and others in some of the key battleground states (like Michigan). However, if your position under alternative 2 were carefully phrased, the costs with these groups might be minimized. (This is obviously an issue where the polling data and focus groups can be very helpful.)

If you choose to continue with this alternative, you can justify the need for continuing study of the overall NAFTA arrangement on the grounds that:

-- The parallel negotiations on environmental protection are still underway. As noted above, the Sept. 17 announcement by the three environmental ministers of the three countries that they agreed "in principle" on a North American commission on environmental protection indicated that they would not even meet to formalize the arrangement until early 1993!

-- The congressional hearings are still underway. They will continue through at least September 28, and House subcommittees might have some field hearings in early October. See Attachment B.

-- Various studies are being prepared on the impact of this very important proposed agreement, now that its terms are known. (See Appendix C for background information about the scope of the arrangement.) In response to congressional requests, the Congressional Reference Service and Office of Technology Assessment are in the midst of studies that will be completed in early to mid-November, and the International Trade Commission has an impact study that will not be completed until mid-January.

-- Present U.S. legislation provides for 90 calendar days for Congress and others to study a proposed agreement that the President notifies them about--a wise approach. Notification just occurred on September 18.

-- The important implementing legislation that the U.S. Congress must pass will not be available before at least mid-January.

Alternative 2.

This recommended alternative would have you grudgingly support the proposed agreement among the three countries, but only if several gaps are filled in. It is important to recognize that the proposed agreement is only a part of the necessary arrangement that promotes expanded trade while providing adequate protection for workers, farmers, and the environment.

Other parts of the arrangement are still missing or are inadequate. The key here, though, is not to open the proposed agreement to renegotiation (which can start a chain reaction of other calls for change), but to correct the weaknesses through separate side-table agreements between the United States and Mexico and/or Canada, or through U.S. laws (such as for worker training).

You can emphasize specific problems that track your oft-stated concerns for the workers, environment, and farmers. Rather than being exhaustive (and limiting your flexibility to add further criticisms), you should present an illustrative list of major problems with the agreement. Such a list is at Attachment A. However, it should only include items 1-7, since items 8 and 9 would involve renegotiation of the agreement.

Identifying gaps is not calling for renegotiation. You might avoid being specific about this by using generalized language that calls for "a fresh look" (or something similar) at the overall NAFTA arrangement. However, items 1-7 add to the basic agreement that has already been reached.

This alternative implicitly accepts the provisions that do exist in the agreement, including some politically sensitive ones. For example, it accepts the provisions regarding the automobile industry that the UAW opposes. Gephardt identified this as one of the areas where "the Agreement continues lopsided sectoral relationships for far too long." However, to call for revisiting the key provisions in the agreement means that, like Gephardt, you support renegotiation. That's alternative 3, discussed below.

Alternative 3.

This alternative would call for reopening the agreement and renegotiating parts of it, as well as filling in the gaps noted in Alternative 2 above. If you call for "renegotiation" (as Gephardt did), then you are likely to start a chain reaction of various U.S. interest groups wanting provisions about their industries being reviewed (e.g., automobiles, energy, glassware, fruit and vegetables). You also open the door to Mexico and Canada insisting on review of the tradeoffs that they had agreed to (e.g., computers, financial services).

There is a history of changes in proposed agreements. For example, the negotiating history of the NAFTA predecessor, the U.S.-Canada Free Trade Agreement (FTA), saw several major changes in the agreement between the time that an agreement of about 40 pages was reached and initialled on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of about 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

Nevertheless, calling for renegotiation will be interpreted by many editorial writers, businesspeople, and others as being inconsistent with your past statements on NAFTA and as your moving to a "protectionist" position in response to the entreaties of labor unions and other interest groups supporting you.

On the other hand, the campaign's polling data might indicate that it will help you in certain battleground states. Those supporting renegotiation include the AFL-CIO, workers concerned about their jobs, and a number of environmentalists.

Attachment A provides a draft outline of a possible statement and listing of problems for either alternative 2 or 3.

Outline of a Possible Statement and Listing of Problems with the Proposed NAFTA Agreement

[Introduction:]

From the outset of this campaign, I have stated that I will support a free trade agreement that opens markets for U.S. exports to Canada and Mexico so long as it provides adequate protection for workers, farmers, and the environment on both sides of the border. I have also stated that we must have strong transition strategies that ensure that workers benefit from a more open world trading system.

We now have a part of the proposed NAFTA arrangement represented in the unsigned document that the three countries have reached. The Bush Administration finally released a draft of it on September 8. President Bush just notified Congress [on September 18] of his intention to sign the proposed agreement. Under U.S. law the President must now wait for at least 90 days before signing the agreement in order to hear the views of Congress and others.

[Alternative 2: If Gov. Clinton supports the proposed agreement, but insists on more:]

Based on my initial review of the agreement, I wish more had been done to further U.S. interests in such areas as automobiles, energy, agricultural, and intellectual property. Nevertheless, because of the potential new jobs and others benefits to the United States through expanded exports and because of the state of the negotiations, I support this proposed agreement as far as it goes.

However, more needs to be done--and must be done--to help workers and farmers and to protect the environment. This can be done through U.S. programs and by negotiating with our NAFTA partners for additional agreements. I call on President Bush to finish the job. If he doesn't, I will move quickly to insist on these measures if I am elected President.

[Alternative 3: If Gov. Clinton does not support the agreement, but insists on changes:]

Let me be clear. I'm for a good agreement. However, based on my initial review of the proposed agreement, this is not a good agreement. George Bush did not do the job. I call on Bush to fix the arrangement. If he does not, I will move quickly to do so so if elected President.

More needs to be done--and must be done--to help workers and farmers and to protect the environment.

[LISTING THE PROBLEMS:]

Among the major problems with the proposed agreement are the following:

[Items that do not require changes in the proposed agreement itself or even supplementary agreements with Mexico and Canada:]

1. A good NAFTA arrangement must be accompanied by adequate funding to help U.S. workers and communities who are adversely affected by its provisions. Worker training, relocation assistance, and other necessary support should be viewed as an entitlement for workers. The recent proposals of the Bush Administration do not provide the necessary assurances. Given the long history of efforts by the Reagan and Bush Administrations to eliminate the Trade Adjustment Assistance Act, press releases by the Bush Administration are hardly enough.

2. The success of a good NAFTA arrangement requires that the Administration ensure that there be adequate funding for environmental clean-up and for the necessary infrastructure along the border to handle the development and increased traffic. A funding commitment by the Bush Administration is still lacking.¹

3. The proposed agreement can also cause unnecessary harm to some farmers, unless help is provided them. Besides enactment of my general farm program, for U.S. farmers adversely affected by NAFTA, U.S. programs should help in at least three ways: (a) strict application of U.S. pesticide requirements to imported food; (b) establishing that growers who lose out to Mexican competition are eligible for worker assistance; (c) utilizing more the existing agricultural programs to help growers identify alternative crops where they would be more competitive.

[Items that could be accomplished through a supplementary side-table agreement, which could be signed simultaneously with the present proposed agreement:]

[2A. Adequate funding for environmental clean-up and for the necessary infrastructure along the border, noted in 2. above, could also be assured by a funding commitment by all three NAFTA partners.]

¹ One caveat. In February 1992, Bush announced a plan to clean up pollution along the U.S.-Mexico border. The plan called for \$379 million in U.S. funds over the next two years and some Mexican support. However, these amounts are inadequate and some U.S. funds would have been reprogrammed or reallocated from funds intended for other purposes --such as cleanup of the Chesapeake Bay! It looks as if Congress will cut these funds substantially.

4. The three countries have just announced [on Sept. 17] an agreement "in principle"^{P. 22} to create a North American commission on environmental cooperation. However, the environmental ministers were not going to formalize this arrangement until they met again in early 1993! The environment should not be on the slow track. Moreover, there is no assurance that this commission will be much more than meetings without substance.

A commission, or authority, should be created promptly that has substantial powers and resources to clean up and prevent border pollution. It should also encourage the enforcement of the countries' own environmental laws through education, training, and commitments of resources.

[Some items arguably could be accomplished through a supplementary agreement, but critics might say that a renegotiation of the proposed agreement would be required.]

5. The NAFTA dispute resolution process is inadequate in the environmental and health area.

A. There should be an enhanced NAFTA dispute resolution process for enforcement of national environmental and health laws. For example, the proposed agreement does not allow a country to use the formal, binding NAFTA process now if another country lowers its environmental standards to entice investment. The sole NAFTA remedy is government-to-government consultation.

B. There should be greater public participation in this enhanced NAFTA dispute resolution process. The dispute provisions are often secretive, and provide no mechanism for public participation in defending challenges to U.S. laws, or in bringing challenges to the practices of the other NAFTA parties.

6. Enforcement of Mexican laws in the areas of the environment and worker standards (such as health and safety and child labor laws) is essentially ignored by the proposed agreement.² In contrast, the proposed agreement allows for improved enforcement of intellectual property and investment issues through Mexican laws and U.S. import laws--with law suits, damages, and injunctive relief. Similar enforcement provisions should be developed in the area of environment and worker standards.

7. A super safeguard mechanism for the automobile industry might be added. It would provide that if trade during the transition period does not expand on a roughly balanced basis in the industry, then the country which is hurt by a substantive adverse surge of imports can ask the other to accelerate its liberalization measures. If the other country does not agree to some relief, then the first country can adjust the pace of its own

² There are limits on importing goods into the United States that are dangerous to the consumer's health, but this is a fairly narrow sanction.

liberalization (possibly by a "snapback" to earlier tariff levels). This will help protect against unexpected developments during the transition period. [This mechanism would be either alone, or together with, the provisions in # 8 below for changing the transition measures for the automobile industry.]

This super-safeguard approach could also be considered for other industries.

[Provisions which would require renegotiation of key provisions of the proposed agreement:]

8. The provisions for the automobile industry have different transition periods for the United States and Mexico, with [in the view of U.S. workers] an uneven tilt in favor of Mexico. This should be carefully reviewed and revised.

9. [Criticisms can also be leveled against the agreement's provisions for other sectors. Two examples that Majority Leader Gephardt has highlighted are the rules of origin for computers and energy. Details can be provided.]

Many of these problems above can be overcome by new U.S. programs, such as on worker training, and by new supplementary agreements between the United States and Mexico, or between the United States and Mexico and Canada. [If going to include items 8 and 9] Some of these problems might well cause the negotiators to go back to the proposed agreement, which is still unsigned.

We should recall the negotiating history of NAFTA's predecessor, the U.S.-Canada Free Trade Agreement (FTA). There were several changes in the agreement between the time that an document of about 40 pages was agreed to and initialled on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of over 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

[Possible Concluding Language:]

My commitment to a good NAFTA agreement is strong. If I am elected President, it will have a high priority. To reassure our NAFTA partners, I will make a meeting with Prime Minister Mulroney and President Salinas one of the first items on my calendar for the transition period.

I will strive for and sign a pro-growth, pro-jobs agreement with Canada and Mexico that does not sell out our people or our environment. If I am President, that is exactly the kind of arrangement we will have.

B. Carter/Draft/Sept. 18

Attachment BPending Events in the NAFTA Process

Sun., Sept. 20	France votes in referendum on the Maastricht Treaty for strengthening the European Community. (Though not on NAFTA, the vote will highlight regional economic groupings.)
Tues., Sept. 22	American Express Pres. Robinson and AFL-CIO Secretary Donohue testify before Senate Finance
Wed, Sept. 30	Senate Finance has hearings on agricultural and energy provisions
During Sept.	House committees, other than Ways and Means, also have hearings. E.g., Panetta's Budget Committee on the budgetary implications, Wyden's subcommittee on environmental issues.
During early Oct.	Some House committees or subcommittees might have field hearings
Late Nov.	Studies due from Office of Technology Assessment and the Congressional Reference Service.
Dec. 17	Earliest date that the President can sign the NAFTA agreement
Late Jan.	Impact study due from the International Trade Commission

Attachment CBackground Information

Basic Overview. NAFTA covers all of North America, expanding upon and modifying the 1988 Free Trade Agreement between the United States and Canada. By including Mexico, the North American free trade area will encompass over 360 million people and over \$6 trillion in annual output.¹

NAFTA will phase out virtually all tariffs between the United States and Mexico over 0-15 years, with the most sensitive products receiving the longest transitions. But NAFTA extends beyond trade in goods—it reduces barriers to trade in services (such as insurance and banking), to investment, and to establishment of businesses. It also addresses many national regulatory controls. For Mexico, for example, it strengthens intellectual property protection and it limits the regulation of trucking.

Economic Impact. U.S. industries likely to benefit including banking, energy, wheat and feed grains, and electronics. Industries likely to be harmed include fruit and vegetable producers, apparel workers, and other low-wage manufacturers currently enjoying high tariff protection, such as glassware and shoes. The Big 3 auto producers will likely support the agreement, but the UAW will almost certainly oppose it.

Secretary of Labor Lynn Martin admitted that one study, which she did not identify, estimated that the job losses from the NAFTA agreement could be as much as 150,000. This was at the Senate Finance hearings on Thursday, Sept. 10.

In an authoritative study, economists Gary Hufbauer and Jeffrey Schott estimate that NAFTA will create about 325,000 jobs in the United States. It will also displace by 1995 about 150,000 jobs, primarily in unskilled and semi-skilled factory positions. Because the jobs created and those displaced will differ in skills and location, Hufbauer and Schott

	<u>Population</u>	<u>Gross Domestic</u> <u>Product</u>	<u>GDP. per capita</u>
Canada	27 million	\$ 570 billion	\$21,418
Mexico	86	238	2,490
U.S.	252	5,392	21,449

(Based on 1990 figures. From reputable sources cited in the New York Times, August 12, 1992, page 1. Other sources might vary slightly, however.) Even without NAFTA, U.S. trade with Mexico—which had a slight deficit in 1990—is expected to reach a surplus of \$7 billion during 1992.

recommend that the United States budget \$1.2 billion over five years to facilitate NAFTA-related job adjustment.

Economists Jeff Faux and Thea Lee of the labor-supported Economic Policy Institute criticize the Hufbauer-Schott estimates as too optimistic. They say that competition from Mexican workers will cause wages of low-skilled U.S. workers to decrease by as much as \$1,000 a worker. Further, they say that 550,000 fewer high-paying jobs will be created in the United States during the next 10 years because added investment will go to Mexico rather than the United States.

Attitudes in Mexico. NAFTA is widely supported in Mexico. Originally proposed by President Carlos Salinas de Gortari, it is the centerpiece of his bold effort to open up Mexico and to modernize it. Defeat of the NAFTA would be a massive setback for Salinas and would place in jeopardy his entire pro-U.S., pro-market strategy. It would also adversely affect Mexican cooperation on a host of common concerns, including drug trafficking and immigration.

Attitudes in Canada. NAFTA is controversial in Canada and its approval by the Parliament is not certain. The 1988 Free Trade Agreement (FTA) between the United States and Canada is unpopular because of a perception that it has hurt Canada economically. Prime Minister Brian Mulroney—who also was in power when the FTA was negotiated and who now has higher unfavorable than favorable ratings—hopes to argue that NAFTA is an improvement for Canada over the FTA. The Canadian leader, who will probably seek a third term, must call elections by the fall of 1993. Many analysts, however, expect a spring 1993 election.

Bush Promises in 1991. In May 1991, President Bush made a number of commitments to Congress when he was seeking "fast-track" authority in order to simplify the later passage of NAFTA (and of a possible GATT Uruguay Round agreement). In his "Action Plan," Bush committed himself "to achieving a balance [with economic growth] that recognizes the need to preserve the environment, protect worker safety, and facilitate adjustment." He also said that "my Administration is committed to working with Congress to ensure that there is adequate assistance and effective retraining for dislocated workers."

Bush has not yet lived up to his 1991 commitments. He has not taken adequate steps to protect the environment and he has failed to deal concretely with worker training and other adjustment measures. The arrangement is still incomplete.



THE AMERICAN SOCIETY OF INTERNATIONAL LAW
2223 Massachusetts Avenue, N.W. Washington, D.C. 20008-2864 (202) 265-4313 Fax (202) 797-7133

Friday evening

Dear Nancy:

Voila! Here is the outline of problems with the NAFTA agreement. I put the outline in the context of a proposed statement, offering formulations for either supporting or not supporting the agreement. I hope it is not too complicated. If it is, I arranged the outline so that you can conveniently just drop the first page.

Also included, as we discussed, is the recent communique about the agreement in principle for a North American commission on environmental cooperation, and President Bush's notification today to Congress of his intent to sign the agreement.

I hope to send later tonight a memo discussing the alternatives available to Gov. Clinton. You might want to wait for it before you distribute anything.

My best,

A handwritten signature in cursive script, appearing to read "Gary".

Draft/Barry Carter/Sept. 18

Outline of a Possible Statement and Listing of Problems with the Proposed NAFTA Agreement

[Introduction:]

From the outset of this campaign, I have stated that I will support a free trade agreement that opens markets for U.S. exports to Canada and Mexico so long as it provides adequate protection for workers, farmers, and the environment on both sides of the border. I have also stated that we must have strong transition strategies that ensure that workers benefit from a more open world trading system.

We now have a part of the proposed NAFTA arrangement represented in the unsigned document that the three countries have reached. The Bush Administration finally released a draft of it on September 8. President Bush just notified Congress [on September 18] of his intention to sign the proposed agreement: Under U.S. law the President must now wait for at least 90 days before signing the agreement in order to hear the views of Congress and others.

[Alternative 2: If Gov. Clinton supports the proposed agreement, but insists on more:]

Based on my initial review of the agreement, I wish more had been done to further U.S. interests in such areas as automobiles, energy, agricultural, and intellectual property. Nevertheless, because of the potential new jobs and others benefits to the United States through expanded exports and because of the state of the negotiations, I support this proposed agreement as far as it goes.

However, more needs to be done--and must be done--to help workers and farmers and to protect the environment. This can be done through U.S. programs and by negotiating with our NAFTA partners for additional agreements. I call on President Bush to finish the job. If he doesn't, I will move quickly to insist on these measures if I am elected President.

[Alternative 3: If Gov. Clinton does not support the agreement, but insists on changes:]

Let me be clear. I'm for a good agreement. However, based on my initial review of the proposed agreement, this is not a good agreement. George Bush did not do the job. I call on Bush to fix the arrangement. If he does not, I will move quickly to do so so if elected President.

More needs to be done--and must be done--to help workers and farmers and to protect the environment.

(LISTING THE PROBLEMS:)

Among the major problems with the proposed agreement are the following:

[Items that do not require changes in the proposed agreement itself or even supplementary agreements with Mexico and Canada:]

1. A good NAFTA arrangement must be accompanied by adequate funding to help U.S. workers and communities who are adversely affected by its provisions. Worker training, relocation assistance, and other necessary support should be viewed as an entitlement for workers. The recent proposals of the Bush Administration do not provide the necessary assurances. Given the long history of efforts by the Reagan and Bush Administrations to eliminate the Trade Adjustment Assistance Act, press releases by the Bush Administration are hardly enough.

2. The success of a good NAFTA arrangement requires that the Administration ensure that there be adequate funding for environmental clean-up and for the necessary infrastructure along the border to handle the development and increased traffic. A funding commitment by the Bush Administration is still lacking.¹

3. The proposed agreement can also cause unnecessary harm to some farmers, unless help is provided them. Besides enactment of my general farm program, for U.S. farmers adversely affected by NAFTA, U.S. programs should help in at least three ways: (a) strict application of U.S. pesticide requirements to imported food; (b) establishing that growers who lose out to Mexican competition are eligible for worker assistance; (c) utilizing more the existing agricultural programs to help growers identify alternative crops where they would be more competitive.

[Items that could be accomplished through a supplementary side-table agreement, which could be signed simultaneously with the present proposed agreement:]

[2A. Adequate funding for environmental clean-up and for the necessary infrastructure along the border, noted in 2. above, could also be assured by a funding commitment by all three NAFTA partners.]

¹ One caveat. In February 1992, Bush announced a plan to clean up pollution along the U.S.-Mexico border. The plan called for \$379 million in U.S. funds over the next two years and some Mexican support. However, these amounts are inadequate and some U.S. funds would have been reprogrammed or reallocated from funds intended for other purposes --such as cleanup of the Chesapeake Bay! It looks as if Congress will cut these funds substantially.

4. The three countries have just announced [on Sept. 17] an agreement "in principle" to create a North American commission on environmental cooperation. However, the environmental ministers were not going to formalize this arrangement until they met again in early 1993! The environment should not be on the slow track. Moreover, there is no assurance that this commission will be much more than meetings without substance.

A commission, or authority, should be created promptly that has substantial powers and resources to clean up and prevent border pollution. It should also encourage the enforcement of the countries' own environmental laws through education, training, and commitments of resources.

[Some items arguably could be accomplished through a supplementary agreement, but critics might say that a renegotiation of the proposed agreement would be required.]

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B. There should be greater public participation in this enhanced NAFTA dispute resolution process. The dispute provisions are often secretive, and provide no mechanism for public participation in defending challenges to U.S. laws, or in bringing challenges to the practices of the other NAFTA parties.

6. Enforcement of Mexican laws in the areas of the environment and worker standards (such as health and safety and child labor laws) is essentially ignored by the proposed agreement.² In contrast, the proposed agreement allows for improved enforcement of intellectual property and investment issues through Mexican laws and U.S. import laws--with law suits, damages, and injunctive relief. Similar enforcement provisions should be developed in the area of environment and worker standards.

7. A super safeguard mechanism for the automobile industry might be added. It would provide that if trade during the transition period does not expand on a roughly balanced basis in the industry, then the country which is hurt by a substantive adverse surge of imports can ask the other to accelerate its liberalization measures. If the other country does not agree to some relief, then the first country can adjust the pace of its own

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liberalization (possibly by a "snapback" to earlier tariff levels). This will help protect against unexpected developments during the transition period. [This mechanism would be either alone, or together with, the provisions in # 8 below for changing the transition measures for the automobile industry.]

This super-safeguard approach could also be considered for other industries.

[Provisions which would require renegotiation of key provisions of the proposed agreement:]

8. The provisions for the automobile industry have different transition periods for the United States and Mexico, with [in the view of U.S. workers] an uneven tilt in favor of Mexico. This should be carefully reviewed and revised.

9. [Criticisms can also be leveled against the agreement's provisions for other sectors. Two examples that Majority Leader Gephardt has highlighted are the rules of origin for computers and energy. Details can be provided.]

Many of these problems above can be overcome by new U.S. programs, such as on worker training, and by new supplementary agreements between the United States and Mexico, or between the United States and Mexico and Canada. [If going to include items 8 and 9] Some of these problems might well cause the negotiators to go back to the proposed agreement, which is still unsigned.

We should recall the negotiating history of NAFTA's predecessor, the U.S.-Canada Free Trade Agreement (FTA). There were several changes in the agreement between the time that an document of about 40 pages was agreed to and initialled on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of over 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

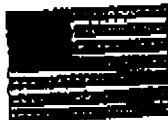
[Possible Concluding Language:]

My commitment to a good NAFTA agreement is strong. If I am elected President, it will have a high priority. To reassure our NAFTA partners, I will make a meeting with Prime Minister Mulroney and President Salinas one of the first items on my calendar for the transition period.

I will strive for and sign a pro-growth, pro-jobs agreement with Canada and Mexico that does not sell out our people or our environment. If I am President, that is exactly the kind of arrangement we will have.



Environment Environnement
Canada Canada



Environmental Protection Agency
United States



Secretaría de Desarrollo Social
Mexico

FOR RELEASE: THURSDAY, September 17, 1992

Luke Hester @ EPA 202-260-4355
Ramiro Pineda, Mexican Delegation
Javier Trevino @ Mexican Embassy 202-728-1650
Malcolm McKechnie @ Canadian Embassy 202-682-1740

The Ministers responsible for the environment of Canada, Mexico and the United States today held their first joint discussions on possible ways and means to strengthen environmental cooperation in North America. Jean J. Charest, Canada's Minister of the Environment, Luis Donaldo Colosio Murrieta, Mexico's Secretary of Social Development, and William K. Rallily, Administrator of the U.S. Environmental Protection Agency, share the view that more formal cooperation mechanisms are required to meet the environmental challenges leading into the 21st century.

The Ministers recognise that environmental cooperation among the three countries is only possible under the principle of full respect for the sovereignty of each country.

They agreed in principle to the creation of a North American commission on environmental cooperation. The goal is to set in motion a process

(more)

for sustained, long-term and effective trilateral environmental cooperation. Where appropriate, this mechanism will provide for public participation. Ministers instructed officials to work expeditiously to develop proposals to implement this structure.

The Ministers endorse the view that the North American Free Trade Agreement is the most environmentally-sensitive trade agreement ever negotiated. It was emphasized that NAFTA will promote both economic growth and strong environmental protection within the three countries. They noted especially the NAFTA preamble which includes a commitment to sustainable development and environmental conservation and protection. Additional provisions in the agreement ensure that: (a) the integrity of the Parties' domestic environmental regulatory regimes is maintained, (b) efforts are made towards enhancement of standards, (c) disputes concerning environmental measures are resolved in an environmentally sensitive manner; (d) the trade provisions of key international environmental agreements are protected, and (e) Parties refrain from attracting or retaining investment by permitting the creation of pollution havens.

The Ministers draw attention to the important links among trade, economic growth, and the environment. Increasingly, it is recognized that these linkages pose both opportunities and challenges to our

(more)

current and future institutions. One such critical challenge is the need to maintain appropriate, high standards of environmental protection, particularly through strict enforcement of environmental laws and regulations. The Ministers agreed that enforcement and compliance with environmental laws is fundamental.

In order to take advantage of the opportunities and meet the challenges that cooperation on environment offers, they agreed today that this meeting will be the first of many. They instructed their officials to begin discussions as soon as possible on future areas of trilateral cooperation. The Ministers have also asked their officials to consult, as appropriate, with stakeholders to ensure their effective and ongoing participation in this important process.

While recognizing the different economic and financial conditions in each country, the commitment to increased cooperation among the United States, Canada and Mexico is highlighted today by the signing of a Trilateral Memorandum of Understanding on Environmental Education. This agreement seeks to increase public awareness of sustainable development issues by promoting, coordinating and implementing joint environmental education and training activities.

The Ministers also addressed specific cooperation activities. At present, our countries are cooperating successfully on environmental

(more)

programs to protect transboundary resources such as the Great Lakes, our border waters, the Gulf of Mexico, and air flows between our countries. We are also beginning to cooperate on the exchange of environmental information, the study of economic instruments, and programs for public information, emergency response and emissions reporting procedures for toxic chemicals.

In closing, the Ministers concluded that more formal environmental cooperation is needed among the United States, Canada and Mexico. Therefore, they agreed to meet for the second time early in 1993, when they will review a series of proposals for formalized trilateral environmental cooperation, particularly the formation of a North American commission on environmental cooperation.

SEP 18 '92 10:20 FROM US TRADE REP/CONG AFFS TO SAUCUS

PAGE.001/002

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20500

September 18, 1992

MEMORANDUM

FROM: MARY TINSLEY
Assistant U.S. Trade Representative for
Congressional Affairs

SUBJECT: Notification of the NAFTA

Today the President officially notified the Congress that he intends to enter into the North American Free Trade Agreement. The President's notification is accompanied by:

- The text of the agreement and the schedule of tariff reductions;
- Reports prepared, as required by statute, by the 38 private sector advisory committees to the Office of the U.S. Trade Representative; and
- The "Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments."

Attached is the text of the President's letter to the Speaker of the House and the President of the Senate and White House fact sheet. We will shortly provide every member of the Congress a copy of the text, the report of the Advisory Committee for Trade Policy and Negotiation, and the "Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments." Please call 595-6951 if you have any questions.

SER 18 '88 10:56 FROM US TRADE REP/CONG AFS TO SAUCUS

PAGE.002/008

THE WHITE HOUSE**Office of the Press Secretary
(Banking Ridge, New Jersey)****For Immediate Release****September 18, 1992****The North American Free Trade Agreement:
Official Notification of Congress****FACT SHEET**

The President today officially notified Congress of his intention to sign the North American Free Trade Agreement (NAFTA) with Canada and Mexico. Under the fast track procedures, the President may sign the agreement 90 calendar days after giving this notice, that is, on or after December 17, 1992. The NAFTA negotiations were concluded on August 12, 1992.

The NAFTA eliminates tariffs and other barriers to the flow of goods and services between the United States, Mexico, and Canada. It lifts barriers to investment, strengthens the protection of intellectual property, and improves upon trade rules to ensure that U.S. firms can reap the full rewards of the market opportunities NAFTA creates.

The President's notification is accompanied by:

- The text of the agreement and the schedule of tariff reductions;
- Reports prepared, as required by statute, by 38 private sector advisory committees to the Office of the U.S. Trade Representative; and
- A "Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments." As the Report demonstrates, the commitments that were made in the context of last year's debate over the extension of fast track negotiating authority have been fulfilled, if not exceeded.

The NAFTA Agreement

NAFTA makes America more globally competitive. It links the United States to our first- and third-largest trading partners, Canada and Mexico, to create one of the largest, richest markets in the world, with over 360 million consumers and \$6.4 trillion in annual output. NAFTA will enhance the ability of North American producers to compete in world markets, spur economic growth on the continent, expand U.S. employment, and raise our living standards.

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NAPTA will generate new, higher-paying jobs for Americans. More than 600,000 Americans now owe their jobs to our exports to Mexico. This number is expected to swell to over 1 million by 1995 with NAFTA. Over 1.8 million Americans already owe their jobs to our exports to Canada. This agreement will not only create more jobs, but better jobs, for workers in export-related jobs earn 17 percent more per hour than the average American wage.

NAFTA will help Mexico grow, which has a high payback for us: 70 cents of each Mexican import dollar is spent on U.S. goods and services. Economic growth will not only make Mexico a better customer, but also a stronger and more stable neighbor, easing pressures for illegal immigration. The lesson of history is clear: if opportunities do not go to the people, people will go to the opportunities.

NAFTA will be of particular benefit to small and medium-sized companies that are experiencing the fastest export growth. Unlike big companies, small and mid-sized firms often do not have the resources to get around high trade barriers. With trade barriers removed, U.S. firms need not move to Mexico to sell to Mexico.

NAFTA improves the environment. It maintains U.S. environmental, safety, and health standards; allows us to enact even tougher standards; and encourages our partners to strengthen their standards. NAFTA has also intensified our bilateral cooperation with Mexico to enhance environmental protection.

Finally, NAFTA safeguards U.S. workers by ensuring a smooth transition to free trade over 15 years and by providing strict rules of origin, safeguard protections against import surges, and measures to curb Mexico's artificial export incentives.

Never before has a trade agreement offered such a balance of economic growth, opportunity, worker benefits, and environmental sensitivity.

Next Steps

Today's formal notification is the latest step in the process of Congressional consideration of the agreement. This process is governed by fast track procedures for approval of trade agreements, which were extended by Congress last year for agreements signed before June 1, 1993. Under those procedures:

- Ninety calendar days after giving this notice, the President may sign the agreement.
- Any time after signing the agreement, the President may transmit implementing legislation to Congress. The Administration intends to work closely with Congress on developing such legislation.

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- Once the implementing legislation is transmitted, it will be entitled to fast track treatment. Congress must vote on the legislation -- without amendments -- within 90 session days of Congress. In the past, passage has taken considerably less time because Congress and the Administration have collaborated on the drafting of implementing legislation.

Thus, while it is possible for the President to sign the NAFTA this year, the "fast track" timetable dictates that the Congressional process of approving implementing legislation cannot begin until next year.

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To <u>Trey L</u>	From <u>John A.</u>
Co.	Co.
Dept.	Phone #
Fax # <u>228-2611</u>	Fax #

September 14, 1992

TO: MIKE MCCLOSKEY AND CARL POPE
 FROM: JOHN AUDLEY

SUBJECT: NAFTA ANALYSIS

Now that NAFTA is public I have had time to examine the over 1000 page document (parts of it) twice. Enviro's met with EPA last night to discuss it, and I am now prepared to give you my first analysis.

In general, NAFTA has greatly improved standards protection, plus the protection of states and federal governments to set higher standards than currently accepted by international standard setting bodies. There is still some ambiguous language in these sections, however. As a result, NRDC is not supporting the Agreement in its report to the President. The other areas of NAFTA remain problematic. The Agreement provides no real guarantees regarding enforcement of environmental laws: does not resolve the production process problem, its investment language is deplorable, and they remain unwilling to address the issue of funding within NAFTA. In addition, while they have made some progress in dispute resolution, the process remain trade oriented and secretive, with trade officials retaining the right to withhold all aspects of dispute panel decisions from the public.

In conversations with other enviro's, we have decided not to concentrate too much efforts on S&P and TBT language, but instead concentrate on effective enforcement, funding, and citizen participation. In my testimony before House Ways and Means Committee Thursday, my testimony will shape these issues into three areas: a misunderstanding of the concept of sustainable development, enforcement, and funding.

get letter [Enviro's are meeting here this morning, Tuesday, to discuss the Agreement, and to prepare a letter outlining our collective concerns to the USTR. We will begin the same discussion process as we did when URGATT was announced, with the hope of getting their comments on the record.

The environmental ministers are meeting here in D.C. on Thursday, and will have a luncheon meeting with some environmental organizations (guess whose not invited), as they talk about (another) bi-lateral (US/Mex) working Commission, this one on trade and the environment.

Analysis

1. Commitment to Sustainable Development merely window dressing

In the Preamble, NAFTA promises to promote sustainable development. Beyond this commitment, it is difficult to determine how they feel they are pursuing this philosophy. NAFTA's energy policy promotes the liberalization of trade in fossil fuels, noting that it "is desirable to strengthen the important role that trade in energy and basic petrochemical goods play" (Article 601). NAFTA says nothing about

reducing the use of pesticides and fertilizers.

2. NAFTA's relation to international environmental agreements (iea's)

Article 104 and Annex 104 recognize the obligations under Endangered Species, Montreal Protocol, and Basel as international agreements, and the 1983 US/Mexico la Paz Agreement and US/Can hazardous movement treaty (1986). NAFTA provides for future additions, provided that all Contracting Parties agree to accept the constraints the iea places on trade.

*Where
from this
was it?*

In conversations with EPA yesterday this issue was greatly discussed. True, Parties do not have to be signatories to the iea to agree to recognize it in NAFTA (as with Basel); however, how a country can recognize the constraints of an international agreement without first respecting it domestically is difficult to understand. Witness President Bush's fight against domestic endangered species laws, his resistance to global warming pacts. Also, as other nations accede to NAFTA (Article 2205), the ability to get consensus will be greatly reduced. In short, NAFTA's requirement for consensus makes it difficult for nations to implement the conditions of iea's without responding to pressures of trading partners first.

In addition, I suggested a difficulty related to trade and these iea's. If all countries recognize Basel, what guarantees does NAFTA provide to insure that increases in industrial waste generated in Mexico will be properly disposed of. Until Mexico establishes adequate environmental infrastructures to handle commercial waste (probably ten years and 20 billion dollars), assurances must be provided to guarantee that this waste is properly handled; if you want to make the economic argument, so that those production costs are properly internalized and the competitive playing field stays level. There are no provisions for this in NAFTA, or in the Integrated Border Environmental Plan (IBEP).

3. Protection of Certain Natural Resources

In Subchapter C, Annex 301.3 Parties reserve the right to protect the exportation of logs of any kind. However, any other good (and the definition of goods includes natural resources) shall not be prohibited from exportation (Article 309). Canada might have difficulties protecting water exports to the U.S.

4. Difficulties in increasing CAFE fuel economies

X NAFTA requires that automotive standards, including emission and fuel economies, be harmonized between countries (Annex 913-C and within chapter on automobiles). Harmonization will take place over six years.

What this means is that the US will have to harmonize its automotive standards with a country that currently does not have fleet fuel economy requirements. Our efforts to increase fleet averages to 40 mpg will be

greatly discouraged until after harmonization takes place. Then any efforts to increase fuel averages will have to face pressure from other governments, plus the "least inconsistent with the conditions of this Agreement" condition

5. Efforts to rewrite "least trade restrictive" to "least inconsistent with the terms of this Agreement"

EPA spent a fair amount of time congratulating themselves for eliminating the 'least trade restrictive' clause from NAFTA. Least trade restrictive was one of the conditions for acceptable restrictions to trade; born in GATT, it required that any attempt to achieve an environmental goal prove itself to be least trade restrictive. However, conversations between Rob Housman, attorney at CIEL, revealed that there is no new language to help determine a difference between the two concepts. According to Robert Hudag, "GATT guru on disputes", it is simply an attempt at administrative efficiency; ultimately the dispute panels will make the decisions.

6. Standards related measures (to include S&P and TBT)

Admittedly, great progress has been made by trade negotiators in this area. Both sections repeatedly state the right of federal, state, and local governments to set higher standards than currently accepted by international standard setting bodies (Article 754, 904(1)). The Committees established to address these areas must notify the public of intentions to change standards (60 days prior) and must provide all information and listen to comments of any "interested party".

Some problems remain. Higher standards must be considered "appropriate", which is defined by the risk assessment article (757). This Article remains ambiguous, but seems to indicate the right to choose which aspects of risk assessment are most appropriate. It appears that economic cost-benefit is not mandatory, although other portions of S&P (Article 754(5): Unnecessary Obstacles), does require that measures take into account technical and economic feasibility. Accepting the standards of Contracting Parties is problematic, as we must accept their standards, so long as they provide adequate scientific evidence. The environment is considered a legitimate reason for setting higher standards, and in setting appropriate levels of risk.

7. Investment is a joke

EPA congratulated themselves on Investment language. However, it is so short I can quote the entire guarantee.

Article 1114: Environmental Measures (the last article in the chapter)

1. Nothing in the Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure, otherwise consistent with this Chapter, that it considers appropriate to ensure that investment activity in its territory is undertaken in

a manner sensitive to environmental concerns.

2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or to waive or otherwise derogate from, such measures as an encourage for the establishment of investment.

Any disputes between Parties over whether a country has failed to enforce its environmental laws, or reduced their laws in any way, will encourage consultation between the countries, with the goal of avoiding future problems.

*incl
analysis?*
In sum, there are no real safeguards for the environment here. No requirement for the use of best available technology, no requirement that technological assistance be given to Parties to promote environmental protection (intellectual property is well protected in this Agreement), and when problems arise Parties can "talk" about it.

I provided a specific example. EPA recently implemented new worker safety procedures for agricultural laborers. They estimate the cost of compliance to be about \$6 million dollars. In essence, our government has identified a legitimate health and safety cost, and asked the industry to pass the cost on to consumers. Now if producers in Mexico does not have the same requirements, how can the competitive playing field be level? US industries will argue that they cannot compete with Mexico produce, and will either put pressure on the government to change these laws or move the produce to Mexico. Because the production process issue is left unresolved in Mexico, and because there is no real enforcement guarantees, and no commitment to assist through technology, we have no guarantee that our consumers will be protected, or that industries won't go to Mexico to avoid these costs.

Recall our Club member Mr. Little in Nuevo Laredo. He internalizes the cost of effluent pre-treatment as per EPA regulations; a cost of about 3% of total production. None of his competitors do, and it is not required by the Mexican government (although IBEP calls for it by 1996).

He insists on internalizing these costs, despite the fact that the "playing field is not level". NAFTA could do something about this but it doesn't

7. Double Standard for Investors

NAFTA lays out specific guidelines for investors to seek compensation for personal damages resulting from anti-trust, or product dumping. Investors seek damages through arbitration, and ultimately through the Dispute Panel process, if no decision can be made. They have the assurances that governments will seek to capture any determination through countervailing duties, if responding parties do not conform to decisions in arbitration of dispute.

No such provisions exist for "non-nafta investing citizens". If environmental dumping occurs, citizens in Mexico have no direct access to parent companies to seek damages, except those already provided by law and precedence.

8. Dispute Settlement Procedure

As bad as ever, except one change. The burden of proof is now on the complaining party. And if the Responding Party (defendant) considers their actions to fall under the guidelines in Article 104 and 7 (the environmental guidelines) they can insist that the dispute be resolved in NAFTA, not GATT (2005: paragraph 3 and 4). Otherwise, the complaining party has the right to choose which forum the dispute is resolved under.

Panelists are all trade experts or international legal scholars (Article 2009 and 10). Panelists may seek the advice of experts of scientific review boards, provided all disputing Parties agree to the use of this additional information (Article 2014 and 15). The Panel is not required to listen to concerns of citizens through amicus briefs, nor can citizens observe the proceedings. The Panel submits their report to the Commission on Trade (headed by cabinet level people, like Carla Hills), who hold all information as confidential. They may publish the report, "unless the Commission decides otherwise" (Article 2017).

Panel decisions remain secret, subject to the concerns of traders, and with no guarantees for procedural transparency. A recipe for disaster, a real Quayle Committee for trade policy.

9. No Provisions for Funding

The Administration continues to believe that increases in general revenue resulting from expanded commerce will provide adequate revenues to address environmental concerns. However, this revenue increase will have to replace the revenue loss resulting from ending import duties (4% of \$20 billion dollars worth of trade) and then increase revenues to pay for environmental infrastructures which will cost upwards of \$20 billion dollars. That is assuming these additional revenues are directed at environmental concerns. They have great faith in Mr. Salinas as an environmental president, but his term of office ends in two years. Despite the poor history of environmental commitment in Mexico, they are unwilling to make the creation of environmental infrastructure a part of the agreement.

Example: Mexico has committed \$460 million to the border plan. \$80 million will come from the World Bank loan; where will the rest of it come from. The Mexican embassy here says from general revenues, but their general revenues are in worse shape than our own. As industry leaders on the border admit, the biggest reason the Mexican government is addressing the environment is because of US pressure under NAFTA. Notice that 90% of their increases in environmental programs are on the border, where only 3% of their population lives. And the problems

elsewhere in Mexico are as bad, if not worse.

MEMO

TO: KATIE
 FROM: GEORGE
 DATE: SEPTEMBER 16, 1992
 RE: ASSESSMENT OF SIERRA CLUB NAFTA ANALYSIS

1. Page 1, Sustainable Development: I would not emphasize this issue because it is hard to determine what is sustainable development, and how it can be placed in specific provisions in NAFTA. The key issue regarding sustainable development is whether NAFTA will require that environmental laws be enforced in each country, and whether NAFTA will have penalties for environmental dumping. Many people do not know what sustainable development is, but everyone knows that US producers and workers should not be placed at a competitive disadvantage because they are obeying environmental regulations.

2. Page 2, NAFTA and Annex 104: I do not find a place in NAFTA that states that all Parties must agree to place future environmental agreements in Annex 104. That is a reasonable interpretation, but NAFTA appears to be silent on the procedures for addition of environmental agreements. If consensus is required, then they raise a good point in arguing that this may reduce US flexibility in regard to future international environmental agreements. For example, if Mexico did not sign the Montreal Protocol and it was not in Article 104, then NAFTA would prohibit the US from applying the trade provisions of the Protocol to Mexico.

3. Page 2, Mexico's ability to abide by Basel Convention: This is part of the more general question of whether there will be any meaningful environmental provisions in NAFTA that call for monitoring of domestic enforcement of environmental laws, dispute settlement, and penalties for environmental dumping.

4. Page 2, Right to Prohibit Exports of Natural Resources: The NAFTA appears to grant the same right to prohibit exports of natural resources as the GATT. This is because NAFTA Article 316 allows a Party to adopt or maintain an export restriction under the provisions of GATT Article XX (g) if the following conditions are also met: (1) the percentage of exports (whose supply has been reduced) to a Party should not fall below the most recent 36 month period. (2) The Party restricting exports does not raise their price above domestic prices. (3) the restriction does not require the disruption of normal channels of supply to the other Party or normal proportions among specific goods or categories of goods exported [pages 3-11, 3-12].

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Article XX (g) allows a Party to restrict exports in order to conserve exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption.

[Also, NAFTA Article 316 incorporates additional exceptions (to export restrictions) that are in GATT Article XI 2(a), which allows export restrictions necessary to relieve critical shortages of foodstuffs or other essential products, and GATT Article XX (i) and (j)].

5. Page 2, CAFE standards: I am not sure that NAFTA requires harmonization of US and Mexico CAFE standards. It does establish that a car is domestic under CAFE if at least 75 percent of the value added is in the US, Mexico, or Canada [Appendix C, page 3-A-13]. Appendix C also states that "The United States shall make any future changes pertaining to the definition of domestic production in the CAFE Act or its implementing regulations equally applicable to value added in any of the Parties (page 3-A-14)". My interpretation is that NAFTA does not prevent the US from raising CAFE standards in the future, as long as value added by Mexican producers is treated as domestic. A higher CAFE standard would appear to be justified under the Standards-Related Measures Code because its purpose is to reduce pollution. However, I am not sure that NAFTA would allow the US to raise CAFE standards.

[The problem here is that the CAFE law required firms producing cars for the US market to meet two fuel efficiency standards, one for their domestically produced cars and another for their imported vehicles. The purpose was to stop the Big Three from importing all their small cars. This resulted in 'games' by the Big Three so that they could continue to import small cars. For example, Ford's Crown Victoria, made in Canada, contains enough imported parts to qualify for import status, thereby not reducing the CAFE standards of Ford's domestic fleet.]

6. Page 3, "least inconsistent with NAFTA": This phrase is placed in Article 104 (Relation to Environmental and Conservation Agreements), and it is true that some interpretations could place a difficult burden of proof on environmental trade measures that conflict with NAFTA. However, I cannot find this phrase in the chapters on Sanitary and Phytosanitary Measures and Standards-Related Measures. Hence they may be less susceptible to interpretations that harm environmental goals. However, any 'reasonable criteria' such as the requirement that sanitary measures be based on scientific evidence can be used to play havoc with environmental goals if there is no political commitment. While language that is clearly antithetical to environmental concerns should be avoided, it will not be possible to make the language ironclad against the type of interpretations that Quayle and others would make.

7. Page 3, Standards-Related Measures, Local Standards: Local governments are not mentioned in Articles 754 or 904(1). I believe that local governments are exempt from NAFTA product standard obligations because Article 105 (Extent of NAFTA Obligations) only includes the Parties and their state governments. [Although Article 105 does not apply to Standards-Related Measures, Article 902 is virtually the same except that it calls for non-governmental standardizing bodies to abide by the product standard rules. The latter provision is included in the Sanitary Rules as Article 753]

8. Page 3, Standards-Related Measures, publication of attempts to change standards: This requirement [pages 7-43, 9-7] is not designed to be environmentally friendly. The purpose of this requirement is to make sure that governments proposing new product standards or modifying old ones allow comments from other governments on the trade effects, reasons for the standard level, etc. In contrast, public hearings and comment are not required for challenges to existing national product standards.

9. Pages 3-4, Investment and Environmental Regulation: They are correct in stating that (1) there are no real safeguards to ensure that Mexican environmental regulations are enforced, and (2) this will result in a playing field in which the firm that internalizes environmental costs loses money, and (3) the puffball approach to environmental protection is contradicted by the inclusion of real safeguards in areas such as investor rights and intellectual property.

10. Page 5, no provisions for 'non-NAFTA investing citizens': I would not argue for the right of citizens in Mexico to get damages for bad environmental practices. That approach is subject to the charge of paternalism. The 'official reason' for protection of investor rights in Mexico is that such protection indirectly aids US firms' competitiveness and thereby workers and bondholders in the US. Thus we need 'rules of the game' for investment and intellectual property in Mexico to assure 'fair trade'. The purpose of these rules is not to help Mexican citizens. I would use the same approach for environmental regulation. The argument for environmental rules in the NAFTA is not that it would protect Mexican citizens. Rather, it is to protect producers and workers located in the US from an 'unfair competition' based on lowering of environmental standards.

[Meaningful rules for environmental regulation in the NAFTA would protect Mexican citizens, but I would not argue on that basis.]

11. Page 5, Dispute Settlement: It is correct that the only substantive difference between NAFTA and GATT dispute settlement is the change in the burden of proof. Also, the secrecy of all Panel deliberations is a major defect, particularly given the administration's support of the Council of Competitiveness.

12. Page 5, Environmental Funding: This issue may be better solved indirectly by requiring enforcement of environmental regulations in the NAFTA. Mexico is likely to come up with money for intellectual property protection and administration of investor rights because they have to do this to avoid sanctions in the Agreement. It may be less intrusive and easier administratively to attempt to get strong commitments on environmental regulation. In any event, there is an equity argument for technical and/or financial assistance for any NAFTA provision that requires Mexico to take government actions that protect US interests (funding for patent office, investor arbitration, environmental regulation, etc.). The key issue is whether there will be requirements in the NAFTA (or a meaningful parallel process) for environmental regulation analogous to those for investor rights, etc. If domestic enforcement of environmental laws is required, then the discussion of environmental funding may get serious.

M E M O R A N D U M

DATE: July 24th

TO: agj

FROM: lsf

SUBJECT: nafta

There are rumors of possible breakthrough tomorrow at Mexico city meeting of trade negotiators. Bentsen's staff think that although they have made a lot of progress recently, they have come up against some problems they are not likely to crack over the weekend.

Progress made in financial services, tariffs, textiles and all this nearly wrapped up. Progress in other sectors, but still significant unresolved issues in agriculture, energy, glass and forest tariffs, government procurement, autos and trade remedies.

On the other hand, there is second rumor that they may announce agreement on the environmental component of the agreement and tout that.

With or without breakthrough in Mexico, another driver is pending speech by Gephardt on Monday. Bentsen's staff think he will say something along the line that the agreement (which he cannot have seen as yet) looks basically like a one-way trade benefit to Mexico: but he will say that what we really need is to focus on the environmental aspects and on trade adjustment and workers rights.

There seems to be a lot of nervous too and fro among Clinton advisers as to how to respond. I believe Clinton should take a page from Perot's book, and state that he does not intend to react beyond his stated position, at a minimum until he has the finished package in writing, to study.

Even then, there will be a considerable further period before it is possible to assess the overall agreement because a great deal of detail will be worked out between Congress and the Administration, the Administration and the Mexicans and Canadians AFTER the text is agreed. (see below for discussion of sequence).

Focus instead on parameters: how good are the environmental terms, and how enforcible? how good are the trade terms? how good the ultimate provisions to be worked out by Congress and the Admin for trade adjustment assistance to help American

labor? Will need separate evaluation of each, and then a single ultimate choice.

What is the sequence? Political, as opposed to legal process begins with handshake and photo op when two presidents say the work is over. Maybe 2-4 weeks later documents would be initialed. Then notification given Congress of intent to enter agreement (thefirst moment when Congress gets full text). Ninety days after notification, President can actually sign.

If notification given later than Aug 5th, President cannot sign before the election. Assume he signs, there follows an INDETERMINATE period to work out implementing legislation covering matters such as environmental matters, trade adjustment assistance package, and so on.

When this process is finished, Congress sends the legislation to the President informally. President then sends it back formally to Congress. THIS EVENT STARTS THE 90 legislative day clock to final up or down vote.

Reason I have repeated all this is to underscore how much time and hard bargaining must pass before all elements of the final package are equally within view. Until that moment happens, you can reasonably defer final judgment, though you may make comments along the way.

Suppose, however, that the green segments of the package -- elements that are part of the actual nafta agreement -- are announced this weekend. What are enviro groups concerned about? What could be said?

Enviro issues are:

- o Fear that NAFTA could be used to flatten US sanitary and phytosanitary standards under guise of harmonization. Admin promised this would not happen. Promise kept? Small print? What do buzz-words such as "sound science" mean?

- o Fear that there will be inadequate mechanisms for monitoring performance under the agreement; tracking environmental issues arising from the operation of the agreement; fact finding; conflict resolution and adjudication. What systems set up? How credible? How open? What access and standing for private persons and groups as opposed to governments?

- o Fear that NAFTA could in some way be used to interfere with operation of basic multilateral agreements regarding the environment (eg Montreal or Basil). Admin said this would be taken care of. How well. Fine print?

o Fear that Mexico might either change its laws or fail to enforce them so as to reduce environmental expenses to business and thereby give free ride to US business wanting to move south? Admin has apparently accepted principle that if a country does not enforce its own laws or fails to enact legislation at all, this would be a source of grievance.. That is a very important concept, with both positive and negative peaks. Admin has however only said that this could lead to consultations. How much stronger should the response be than consultations?

o Fear that dispute resolution panels would not specifically draw upon environmental experts, as opposed to various kinds of more classically denominated scientists.

o Desire to have a general exception for environmental measures. GATT has an exception for non-discriminatory measures that protect plants, animals, human health and natural resources -- but "environment" not mentioned. Fear this will be repeated in NAFTA.

Bottom line. I think Clinton could be very explicit about areas of concern, while delaying judgment on pass/ fail.

use of this special land." The reserve will protect sage scrub, vegetation unique to the California and Baja CA coast, and will house the "ecologically sensitive" CA gnat-catcher. Nature Conservancy's Walter Gerken: "We are hopeful that it will become a model for other private landowners to study and emulate" (8/7).

===== GLOBAL ISSUES =====

*7 NAFTA: U.S.-CANADA BEER WAR HAS "A LOT OF ENVIRO ISSUES"

Environmentalists are "anxiously watching" the beer war between Canada and the U.S. because "the fight is a prototype of what many trade disputes between nations will be like in the 1990s," (James Rusk, Toronto GLOBE AND MAIL). On the surface, the dispute is over the 50 percent "tit-for-tat" tariffs both the U.S. and Ontario imposed on imports of each other's beer. But, according to Zen Mackuch, lawyer with the Canadian Environmental Law Foundation: "There are a lot of environmental issues tied in here. ... Frankly, the U.S. system should not be imposed on us when ours is more environmentally sound."

The primary difference between the two systems is distribution. In Ontario, domestically produced beer is sold through a monopoly distributor owned by the province's brewers. In the U.S., beer is sold "like a soft drink," mostly in cans and at thousands of outlets. In Ontario, beer is sold mostly in bottles, more than 99 percent of which are returned to the store for refilling. The U.S. has objected to Ontario's "environmental levy" of ten cents a can; if the free trade agreement forces Ontario to give up its deposit law, "it could mean the days of refillable bottles will come to a quick end and aluminum cans will take over the beer market" (8/10).

*8 NAFTA II: GAO SAYS U.S. FIRMS OPERATE WITHOUT PERMITS

A General Accounting Office "survey of American-owned factories in northern Mexico found that every one was operating without required environmental permits, with the blessing of Mexico's Commerce Ministry," reports today's JOURNAL OF COMMERCE.

The ministry, "which is overseeing the North American trade talks, has responsibility for ensuring that all maquiladoras meet the regulatory standards of other Mexican agencies," including SEDUE, the U.S. EPA's Mexican counterpart. As the talks come to a close this week, "Democrats are readying an attack on the agreement, charging that lax environmental enforcement in Mexico will lure U.S. factories south of the border" (John Maggs, 8/11).

W.S. JOURNAL reports "Sen. Ernest Hollings (D-SC) highlighted [the problem] a completed pact is likely to face when it reaches Congress" by releasing the GAO report (8/11).

LACK OF PROGRESS IN PACT NEGOTIATIONS: "In these post-Olympic days, bureaucrats here seem to be shooting for their own

kind of world record: they have been hours away from finishing a North American Free Trade Agreement for a week" (Keith Bradsher, N.Y. TIMES, 8/11). JOURNAL OF COMMERCE reports officials from Mexico, Canada and the U.S. "are having more trouble than expected working out the final details. ... An agreement might be possible today or Wednesday, negotiators indicated" (8/11).

BUSH POLITICAL "RISKS": NAFTA "carries significant political risks" for President Bush, reports Reuters in today's PHILA. INQUIRER. Robert Hormats, vice chair of New York investment-banking firm Goldman Sachs: "I basically think NAFTA is a big plus for the economy in the long run. But one has to be honest in addressing short-term implications. There will be job displacements." The paper reports the "adverse job effect is especially expected to hit the Midwest" as industries move south. "On the other hand, the border states of New Mexico, Texas, Arizona and California are expected to experience an increase in trade" (Susan Cornwell, 8/11).

===== WORLDVIEW =====

*9 KOREA: "EARTH ENVIRONMENT AD HOC TEAM DUE"

Today's KOREA TIMES reports that the "government will operate an earth environment ad hoc team to better cope with international environment issues, a Foreign Ministry official said yesterday. ... [T]he special team would be headed by Vice Foreign Minister Ro Chang-hee and [be] comprised [of] the directors-general for trade, international economy, international organization and Asian, American and European affairs" (8/11).

*10 AUSTRALIA: "NO-SHOWS" LEAVE GREEN FORUM TO GOVERNMENT

"The Federal Government has until next month to revive its ecologically sustainable development and greenhouse strategies after the abandonment of day two of a consultative forum" (SYDNEY MORNING HERALD). Enviro groups boycotted the meetings 8/7, and industry and union representatives did not show up 8/8, "leaving Federal and State bureaucrats to talk among themselves. ... State bureaucrats complained about a lack of federal direction," while the executive branch argues the states want to weaken the federal strategies. A Conservation Foundation rep. "said the bureaucrats