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SUBJECT: DRAFT NAFTA DISCUSSIONS PAPERS

...STILL WAITING FOR KYLE'S REACTIONS

Import Surges

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ISSUE

This memorandum sets out options to deal with the issue of import surges.

Background

In his October 4 speech, President Clinton said he would seek authority from Congress to "negotiate an agreement to deal with the ability of both countries [the United States and Mexico] to move in the event there is an unexpected and overwhelming surge in imports into either country which could dislocate a whole sector of the economy so quickly that there's nothing we could do about it to overcome the economic impact."

The working group identified the following major considerations in assessing how to address the import surge issue:

- o As an exception to general rules that phase out import restrictions, the existing NAFTA text contains various "safeguard" mechanisms (described in attachment 1) that allow temporary restrictions, subject to specified conditions, to prevent or remedy injurious import increases (including import surges).
- o Making it easier to impose or maintain import restrictions under an additional import surge agreement would almost certainly provoke charges that we are re-opening the NAFTA.
- o Mexico is much more likely to take safeguard actions against U.S. exports than vice versa, because Mexico has a rising merchandise trade deficit with the United States, an overall economy less than four percent of the size of the U.S. economy and, in almost all cases, far smaller individual industries than those of the United States; for that reason, U.S. export industries have strongly opposed any softening of the safeguard mechanism;
- o The free-trade oriented Mexican Government, however, does not want to make safeguards easier; the Mexicans probably fear that they and we would be too tempted to be too protective.
- o There has been relatively little general domestic interest in making it easier to take actions to limit imports via safeguards.
- o The U.S. sugar industry wants to re-open NAFTA to provide automatic, prolonged protection, and are pressuring for a special "sugar safeguard" with that effect; accomodating sugar would be likely to elicit similar demands to re-open NAFTA from industries in all three countries.

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OPTIONS FOR DEALING WITH IMPORT SURGES

1. No import surge agreement; action addressing import surges would be limited to implementing NAFTA rights in U.S. implementing legislation, publicizing those rights, and perhaps increasing monitoring of import trends.

Pros:

- o Avoids re-opening NAFTA and creating new mechanisms more likely to be used against U.S. exports than to protect U.S. imports.
- o Mexico and Canada might be willing to do more in the more important areas of labor and the environment if we did not press for a new agreement on import surges.

Cons:

- o Does not literally meet the terms of the President's October 4 speech.
 - o Doesn't address the desires of sugar and other sectoral groups for restrictions beyond those allowed by NAFTA.
2. Establish a trilateral "Safeguard Committee" reporting to the NAFTA Trade Commission, with some or all of the following functions
- a.) monitoring the use and effectiveness of the NAFTA's safeguards provisions
 - b.) providing an "early warning" system: monitoring underlying sectoral trends that might provide an early indication that "surges" might arise in a particular sector;
 - c.) in the event that the safeguard provisions of the agreement appeared inadequate to prevent likely massive damage to a substantial sector of one of the parties, to make recommendations to the Commission for appropriate action.

Pros:

- o Could help parties to make effective, timely use of the safeguards provisions, while also helping to prevent abuse of the NAFTA and avoiding "re-opening."
- o Examining underlying trade and investment trends in theory might enable prediction of import surges and help reduce the individual and societal costs of dislocation from unforeseen surges.

DRAFTCons:

- o Will not satisfy those (such as sugar interests) seeking new and easier devices to restrict trade than those allowed in NAFTA.
- o On the other hand, could become a forum that encouraged unnecessary protective actions, VRA's etc.
- 3. Create agreed "interpretive notes" or similar devices in a supplemental agreement that effectively changes the safeguard provisions of NAFTA to make it easier to take safeguard actions in general, and/or in specific cases such as sugar.

Pros:

- o Offers greatest protection to industries fearing import competition and/or a way to one or more specific sectors, such as sugar.

Cons:

- o Re-opens NAFTA, which might lead to broader pressure to re-open NAFTA in other respects, even beyond environment and labor, by this device.
- o Easing safeguard rules by any means is more likely to be used against U.S. exports than to be useful for U.S. import sensitive industries.
- o Hard to negotiate.

Environment and Labor

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ISSUE:

What to include in the North American Free Trade Agreement (NAFTA) supplemental agreement on environmental and labor issues regarding institutional (a "Commission") and enforcement issues.

DISCUSSION:

President Clinton has proposed tri-national commissions and a supplemental agreement to address concerns about inadequate enforcement of laws protecting the environment and worker standards and safety. In the environmental area, most judge Mexico's standards relating to air, water, and hazardous wastes as high or higher than those in the United States. However, inadequate enforcement results in harm to the environment and could give some competitive advantage to firms operating in Mexico in industries with high pollution abatement costs.

In the labor area, American unions are concerned that low Mexican wages, and lax enforcement of worker health and safety standards will encourage plants to locate or move to Mexico. In addition, many charge that close ties between the government and entrenched Mexican union leaders undermine nominally strong worker rights, notably the right to organize.

The review groups on labor and environment noted that, under the different legal frameworks of the three NAFTA countries, significant procedural -- and even constitutional problems -- could arise from reciprocal obligations contained in a supplemental agreement. The group also noted that almost all options require increased funding, which could divert resources from other activities.

This paper addresses only the standards, enforcement and institutional structure issues. In the environment and labor packages, the Administration will also need to address other issues, such as environmental clean-up and funding mechanisms, technical assistance, infrastructure needs, and the role of the environment and labor commissions with respect to NAFTA. A considerable amount of work is already underway on these issues, [could refer here to attachments] but they are not yet ripe for decision.

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Page 2

WHAT ARE THE OBJECTIVES

- o Provide mechanisms to improve enforcement of environmental protection measures and labor standards
- o Provide mechanisms to improve environmental and labor standards and conditions, where these are deficient
- o Improve U.S.-Mexico border conditions
- o Ensure a NAFTA which raises income, prosperity and good social conditions in Mexico and does not lower them in the United States

STANDARDS:

Option 1: Agree on which specific national environmental and labor standards (or which regulatory bodies) will be subject to oversight of enforcement with no Commission role in improving standards.

Pros:

- o Would not require amendment of basic environment and labor laws and regulations (though it may prove difficult to agree on which national measures should be covered)
- o Allows the U.S. to exclude from the agreement's obligations the work of certain regulatory agencies whose work might be otherwise be considered environmental or health related

Cons:

- o Limits Commission's ability to encourage improved standards, where these are deficient
- o State and local authorities in the United States, which have an especially extensive role in environmental measures, may nonetheless resist inclusion in the agreement.

Option 2: In addition to option 1 undertake commitment to develop and apply higher standards throughout the region through charters or codes of conduct. In the case of those standards where there is already a NAFTA obligation to enhance and make compatible standards, the Commission(s)'s role could be advisory or shared.

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Page 3

Pros:

- o Establishes a benchmark for oversight of the agreement's operation
- o Could include voluntary undertakings in the wage area

Cons:

- o Environmentalists worry that this could result in pressure to lower standards or to harmonize downward
- o Such standards, if not strictly voluntary, would be inconsistent with certain U.S. environmental protection laws which rely on market approaches instead of standards

COMMISSION STRUCTURE

All proposals for the multilateral commission see it made up of governmental officials. It would have a private-sector advisory committee, which would likely require some government funding. Its meetings would generally be open to the public except for discussions involving ongoing litigation or business confidentiality. The options focus directly on the structure of the commission's secretariat and indirectly on the amount of independence from the government that the secretariat might have.

Option 1: Following the model of the NAFTA or FTA secretariat, the commission would maintain three national secretariat offices which would have responsibility to share all documentation and coordinate work and reporting functions.

Option 2: Establish the secretariat as an independent international organization with its own management and staff

Considerations:

- o Labor and Environmental groups strongly prefer option 2 because they believe an independent secretariat will be more effective, less subject to political pressure and more capable of growth.
- o Experience with independent secretariats in other international organizations has been mixed: some have been independent, fair and effective, some lethargic, some unpredictable
- o Option 1 is clearly less costly in budgetary terms; annual budget for a powerful independent commission could exceed \$200 million; U.S. funding would likely come from the 150 account and could divert revenue from other international organizations

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Page 4

INVESTIGATIVE POWERS

Option 1: Provide that the Commission must rely exclusively on publicly available information in making reports/investigations (analogous to report cards done on economic policy by OECD, IMF etc.)

Option 2: Provide Commission authority (by consensus or alternatively by majority) to request additional information or investigation from governmental authorities.

Option 3: Provide Commission authority to demand additional information or investigation by governmental authorities

Option 4: Provide Commission authority to conduct its own investigations (subpoena authority etc.)

Considerations:

- o These are progressively stronger (and therefore more intrusive) options.
- o The strength of each option depends partly on whether the "Commission" operates by consensus, by majority, or by and independent panel or secretariat.
- o The last option is unconstitutional for the United States.
- o The stronger the option, the better the oversight and enforcement, but also the greater the risk of "harassment."

ENFORCEMENT

Option 1: Regular commission reports, based on publicly available information, prepared by consensus of the three governments, on national enforcement.

Pro: Will raise public awareness of insufficient enforcement and so encourage improvements

Con: Need for consensus and absence of investigative powers may weaken reports

Option 2: Regular reports, prepared by independent experts or an independent secretariat on national enforcement, plus some or all of the following: stronger investigative powers (from investigative options); ability for governments and/or citizens to raise specific complaints of non-enforcement and have reports and recommendations thereon; require governments to respond to reports and recommendations.

Pros:

- o Should produce stronger and more focussed reports and greater public pressure for improvements of deficiencies
- o Enables response to particular problems

Cons:

- o More intrusive, as governments do not normally allow international bodies to judge their enforcement of their own laws; and therefore more likely to encounter resistance from Mexico, Canada, and State and local authorities of the United States
- o Requires government resources to pay experts
- o Greater risk of harassment, retaliatory calls for investigations, etc, especially if citizens can initiate complaints directly to commission.

Option 3: Improve national enforcement of laws by: requiring procedural rights in courts or administrative proceedings comparable to those required in the NAFTA intellectual property chapter; providing that Commission itself can have standing in domestic courts; requiring that Mexico accord standing to seek enforcement of specified labor and environmental laws in its courts comparable to that of the United States; expanding the idea of "citizen attorney-generals" for all three countries.

Pros:

- o While accepting national sovereignty, strengthens national enforcement in a visible way.
- o Commission standing to sue -- with commission deciding to intervene by majority vote -- would lead to better enforcement in circumstances where Mexican parties lack funds to sue.
- o Appealing to many U.S. groups, especially if they too could sue in Mexican courts.

Cons:

- o Expanding standing to an international body and/or to those "citizen attorney generals" may be resisted as intrusive by enforcement authorities in the United States, especially at the state and local level, and by businesses fearing harassment litigation.
- o Standing proposals could impinge on national regulatory and prosecutorial discretion in the United States.

Option 4: Authorize trade sanctions, preferably directed against the company or entity benefitting from non-enforcement, if violations of environmental and worker safeguards are not corrected.

Pro:

- o Provides clear incentive to enforce laws
- o Sought by many in Congress and in the private sector

Con:

- o Will be seen by U.S. interest groups, Mexicans and Canadians as "re-opening" NAFTA and thus will increase calls for additional restrictions in other areas.
- o U.S. may not have legal ability to remedy particular situation; will raise federal/state issues in U.S.
- o May prompt Mexico to keep standards (as opposed to enforcement) low

Option 5: Provide for direct imposition of injunctions or fines by dispute settlement panel or an independent secretariat on violators of environmental and worker safeguards.

Pro:

- o Provides clear incentive to enforce laws
- o Sought by many in Congress and in the private sector

Con:

- o Probably inconsistent with U.S. Constitution
- o Dispute settlement panel or secretariat would assume powers reserved to courts

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Possible Attachments:

- (A) Department of State paper on Environment
- (B) Department of Labor paper on Worker Standards and Safety
- (C) Campaign position
- (D) Current state of play on U.S.-Mexican Bilateral Cooperation on environmental matters and Mexican Enforcement Regime
- (E) Current state of play on U.S.-Mexican Bilateral Cooperation on labor matters and Mexican Enforcement Regime