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AMERICAN BAR ASSOCIATION  
SECTION OF ANTITRUST LAW  
RECOMMENDATION

BE IT RESOLVED, That the American Bar Association 1  
urges the governments of the three signatories to the North 2  
American Free Trade Agreement (NAFTA) to work together in 3  
implementing the competition and antitrust aspects of NAFTA, with 4  
emphasis on the following: 5

- identifying a barrier-free and distortion-free North America 6  
as a fundamental goal; 7
- enforcing national antitrust laws; 8
- prohibiting hard-core cartels that harm other NAFTA nations; 9
- seeking a common approach to principles of comity; 10
- seeking convergence of antitrust procedures where feasible 11  
and efficient; 12
- cooperating in antitrust discovery and enforcement; 13
- addressing the interrelationship between the trade laws and 14  
the antitrust laws; and 15
- considering the development of institutions for dispute 16  
resolution in competition matters. 17

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AMERICAN BAR ASSOCIATION  
SECTION OF ANTITRUST LAW  
REPORT

I. Introduction

The North American Free Trade Agreement (NAFTA) became effective on January 1, 1994. The American Bar Association supported the adoption of NAFTA, citing its role in liberalizing trade and investment throughout North America and strengthening the rule of law in trade and investment relations between and among the NAFTA parties; namely, the United States, Canada and Mexico.<sup>1</sup>

Chapter 15 of NAFTA addresses competition issues and explicitly leaves much to future development, through working group initiatives or otherwise. Having studied the competition-related issues, the Section of Antitrust Law proposes that the governments of the three NAFTA parties address the eight goals or tasks specified in the accompanying Resolution, in order to produce a more competitive North America.

In adopting the Resolution, the ABA would be reaffirming, and furthering in the context of a free trade area, the principles for free competition and intergovernmental cooperation which it adopted at the Annual Meeting of 1991.<sup>2</sup>

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<sup>1</sup>See Statement of Jack H. Watson, Jr. on behalf of the American Bar Association before the Subcommittee on Trade of the Committee on Ways and Means of the U.S. House of Representatives (Sept. 23, 1993).

In February 1993 the House of Delegates passed Resolution 109B supporting "the efforts of the governments of Canada, Mexico and the United States to establish, through the North American Free Trade Agreement ("NAFTA") principles, rules, procedures, and institutions for the conduct of trade and other economic relations among the participating countries which are designed to provide transparency, predictability, fairness and due process." The report accompanying the resolution particularly commended the advances in dispute resolution contained in NAFTA.

<sup>2</sup>Resolution 301 of the ABA House of Delegates (hereafter "Resolution 301") adopted at the 1991 Annual Meeting provides as follows:

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In undertaking its work on the competition issues of NAFTA, the Section of Antitrust Law established a Task Force. The Task Force submitted a Report to the Section, which the

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BE IT RESOLVED, That the American Bar Association makes the following recommendations with respect to international antitrust law:

1. Nations should adopt strong, clear laws against cartels. Nations should strengthen their anticartel enforcement offices, the procedures for enforcing the law and the penalties for infringing it.

2. Nations should eliminate exceptions from the anticartel principle, including:

a. Export Cartels. Nations should enter into an agreement to repeal export cartel exemptions and they should enforce their laws against export cartels. Exporting nations should cooperate with importing nations that seek to enforce the latter laws against export cartels. Legitimate joint ventures should be distinguished and facilitated.

b. Import Cartels. Nations should enforce laws against import cartels and should cooperate with law enforcement of exporting nations whose exporting businesses are harmed by exclusionary cartels.

3. Courts should be reluctant to dismiss cases involving cartels that target or disproportionately affect their nations or people or firms in their territory where dismissal is sought on grounds of allegedly conflicting foreign law or policy.

4. In the enforcement of laws dealing with transnational mergers, nations should harmonize reporting and waiting requirements and enforcers should consult, lend aid in discovery, and in appropriate cases, defer in exercising their own enforcement jurisdiction so as to facilitate and not frustrate salutary transactions.

Section has adopted. The Task Force Report proposes means and options for achieving the goals reflected in the Resolution. While we do not ask the ABA to approve the Task Force Report, which therefore will not constitute ABA policy, we believe the Report contains valuable information and perspectives. The Task Force Report may be obtained on request from the ABA Office of Policy Administration in Chicago.

## II. The Competition Chapter and the Working Groups

NAFTA presents an unusual opportunity for advancing competition policy in North America. In order to give context to our recommendations, we first describe provisions of the competition chapter and we note the formation of the working groups.

Chapter 15 requires each of the three NAFTA Parties to maintain antitrust laws. The chapter recognizes that benefits are to be gained from cooperation and coordination among government antitrust authorities, but provides no framework for this endeavor. Moreover, it recognizes and modestly limits the anticompetitive potential of state enterprises and state designated monopolies.

In Section 1504 of the Chapter, NAFTA provides for a Working Group on Trade and Competition, to be comprised of representatives of the three Parties, to report and make recommendations on relevant issues on competition and trade.

The Section 1504 Working Group has a five-year life, from January 1, 1994. Within this limited period it must establish an agenda and make recommendations on issues underlying an effective competition policy.

## III. The Principles

### A. Working towards a barrier-free, distortion-free North American market

The working groups and the antitrust authorities of the three nations might greatly profit from a statement of principles to guide their tasks. The first question we pose, therefore, is: Should there be an articulated touchstone for competition policy in North America, and if so what should it be?

Consistent with the trade-freeing thrust of NAFTA, with

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the ABA testimony in support of NAFTA, and with House of Delegates Resolution 301, the Antitrust Section proposes that the three governments consider identifying as the touchstone and fundamental goal a barrier-free and distortion-free North American market.

While private restraints on competition are harmful, government restraints are the most impenetrable; people and firms cannot easily maneuver around such restraints to provide consumers and intermediate buyers the goods and services they need and want. Accordingly, the Section recommends that the NAFTA parties consider, as part of the fundamental framework, means for limiting government as well as private acts that undermine the goal of a barrier-free, distortion-free North America.

B. Enforcing national antitrust laws, and considering increased transparency

NAFTA requires each of the parties to maintain an antitrust law. The United States and Canada has each had an antitrust law for more than a century. Mexico enacted its Federal Economic Competition Law in anticipation of NAFTA's adoption.

If firms could, with impunity, erect private border restraints where government border restraints (such as tariffs) had once been, the objectives of the free trade area will have been frustrated. Moreover, one nation's cartels could in theory exploit the neighbor's citizens. Antitrust law should be enforced to prevent these and other anticompetitive effects.<sup>3</sup>

Transparency of law is likewise an important objective. Unclear law chills efficiency of business. Procompetitive business transactions may be foregone, and transaction costs in an environment of legal uncertainty may be unnecessarily high. By contrast, a clear understanding of the law of one's trading partners facilitates trade. Business knows what it can and cannot do, and understanding of law in societies with common objectives tends to produce convergence. Initiatives to increase transparency could include issuance by the enforcement agencies of merger guidelines, and issuance of releases stating why significant investigations are closed.

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<sup>3</sup>See Resolution 301, paragraphs 1 and 2.

- C. Considering agreement to prohibit hard-core cartels that harm another NAFTA party, studying whether such cartels pose a serious impediment to cross-border trade, and aiding enforcement efforts against such cartels

Hard-core cartels (i.e., those subject to criminal sanction in the United States) are the most egregious form of private restraints of trade. By definition, cartelists attempt to control the market, rather than to respond to buyers' needs. Hard core cartels centrally interfere with the efficiency of the marketplace and derivatively with the competitiveness of business.

Sometimes cartels have cross-border effects. If each nation acted in its own short-term interest, it might facilitate and even encourage a cartel with principally cross-border effects, enriching its nation's businesses at the expense of its neighbors, whose consumers might be overcharged or whose goods, services or investment might be blockaded from the cartelized market. Especially in a free trade area, the Antitrust Section suggests, such beggar-thy-neighbor restraints are inappropriate and contrary to the common interests of the community. The Section suggests that the three governments study whether and the extent to which such cartels pose a serious impediment to cross-border trade within the free trade area.

Moreover, the home nation of the cartel normally has better access to the information that will prove the cartel's existence and operations; therefore the home nation can be particularly helpful in aiding anticartel enforcement.

Accordingly the Section recommends that the NAFTA parties consider an agreement to prohibit hard-core cartels that harm another NAFTA party and to aid enforcement efforts against such cartels. These principles were adopted in Resolution 301 for trading nations generally (Resolution 301, paragraph 2). They apply a fortiori to the free trade area.

- D. Seeking a common approach to principles of comity

Jurisdictional conflicts often lead to bitter disputes and create trade tensions among nations. Antitrust disputes may well account for the preponderance of such conflicts. The

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proximity of nations in a free trade area could increase the tensions. On the other hand, the proximity of nations with relatively similar antitrust laws (which is the case with the United States, Canada and Mexico) may facilitate identification of acceptable common rules governing deference, cooperative action, and unilateral action. The Antitrust Section proposes that the three NAFTA nations seek to identify and adopt such common rules. The Task Force Report details a roadmap that could assist the effort. For example, the three nations could consider adopting a principle akin to paragraph 3 of Resolution 301: that in the case of cartels targeted at a regulating nation, comity factors should not ordinarily counsel abstention. Agreement could be sought also on circumstances in which deference would seem appropriate.

While the Antitrust Section does not propose that the ABA adopt any particular solution to the conflicts-of-jurisdiction problem, it urges the governments to consider various alternatives and to seek a common solution.

### E. Seeking convergence of process and procedure and cooperation in enforcement

Disparities in the antitrust procedures of nations can impose high costs on business. In some instances, the differences do not reflect matters of principle and it appears that they might easily be eliminated. Accordingly, the Section suggests, for the free trade area, an idea similar to the one adopted in Resolution 301, paragraph 4: the agencies of the three nations should explore adopting common scheduling requirements for mergers affecting at least two NAFTA countries, so that filings could be made at the same time in each nation. This coordination could facilitate the merger review process even where each agency seeks somewhat different information. Moreover, the nations might explore creating a standard information-reporting form that could be filed in all three jurisdictions where the merger meets the jurisdictional thresholds for at least two of the jurisdictions.

The parties might usefully identify other possibilities for procedural convergence where convergence is efficient and feasible.

Lack of enforcement coordination among the agencies may also result in high costs -- costs of duplicating the investigation and enforcement process and costs of never

obtaining material information. Opportunities for cost-saving might increase as we experience an increasing number of overlapping and related antitrust investigations in North America.

NAFTA is likely to create many practical opportunities for experimentation in making interagency cooperation work. For example, the governments might cooperate with one another in determining whether to undertake an investigation and in framing specific requests for information, while private parties can be given an opportunity to respond with common information wherever possible. Confidentiality may sometimes be a barrier to government cooperation. The governments might explore whether in some cases that barrier should be reduced and, if so, they might consider means by which confidentiality should be safeguarded.

Accordingly, the governments should work together to seek convergence of procedure and cooperation in enforcement, where feasible and helpful, while assuring appropriate protection of confidentiality.

F. Addressing the interrelationship between the trade laws and the antitrust laws in the free trade area

The creation of the free trade area provides an opportunity to consider the interaction of trade laws and competition law. Some believe there is a tension between these two bodies of law, stemming from different objectives that the laws serve. For instance, antidumping remedies focus on material injury to domestic producers from international price discrimination; safeguard or "escape" clause relief focuses on the short-term effects of an increased volume of (fairly traded) imports that are a substantial cause of serious injury to domestic producers; and antitrust (including predatory pricing law) focuses on consumer welfare effects of anticompetitive conduct emanating from any source, private, domestic or foreign in origin.

Others, however, view the trade and competition laws as having the same overall purpose -- the preservation of competition. Dumping remedies are seen as helping to ensure that distortions in foreign markets do not translate into disabling



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domestic producers from competing in their own markets, thereby preserving competition in the long run.

Especially since a free trade area is likely to -- indeed intended to -- reduce distortions in the neighboring markets, the creation of a free trade area provides an unusual opportunity to address the trade/antitrust relationship. To the extent that a free trade area is created, artificial barriers to trade are reduced or eliminated. The reduction of these barriers, by definition, means less protection for domestic industry, and could make dumping more likely. On the other hand, the lowering of artificial trade barriers, which is at the heart of NAFTA, may make dumping and dumping sanctions less likely because, as tariffs are eliminated, firms will find it more difficult to maintain a higher price in the home market than in the export market.

Some would contend that the concept of a free trade area implies that low-pricing problems within the area should be governed by a single rule, regardless of whether the goods cross a national border. Others may take a different view. In any event the relationship is ripe for discussion; it was an agenda item under the Canada/U.S. Free Trade Agreement in 1989, and the issue was deferred until adoption of NAFTA.

There are a number of options for the treatment of dumping in the free trade area, apart from retention of the existing system. These range from relatively minor procedural and definitional changes in antidumping law, to incorporating certain antitrust/competition principles in antidumping analysis, to using the antitrust predatory pricing rule while preserving antidumping law procedures for investigations and remedies, to the complete replacement of antidumping law by competition law.

The proposal to the ABA is more modest. As stated in the Resolution, the Antitrust Section proposes merely that the ABA urge the NAFTA governments to address the interrelationship between the trade laws and the antitrust laws in the free trade area.

- G. Providing for periodic consultations and discussions concerning applications of each party's antitrust law

The Antitrust Section considered whether it should

recommend active efforts to harmonize the substantive antitrust rules of the three nations. It did not adopt this course. It noted that the three nations' substantive law appears to be harmonious to a large extent. It decided that transparency, mutual education, and the cross-fertilization likely to ensue would be more meaningful and valuable than more active harmonization efforts, and that this process itself would have a tendency to move the laws of the three nations into greater harmony.

Common North American competition rules to address conduct and transactions that transcend national borders could ultimately evolve. The Working Group might develop a short list of areas wherein common principles of substantive law would be most helpful to efficient business transactions in North America. These areas, particularly, could be the subject of dialogue and workshops among the agencies, scholars, and practitioners with a view towards cross fertilization and perhaps convergence.

- H. Considering institutions for resolution of antitrust disputes among the NAFTA parties, and fora for ongoing cooperation

A variety of competition related and trade/competition related disputes may arise in the context of NAFTA and generally in the context of a more nearly integrated North America. Disputes might be jurisdictional; they might concern government-sponsored import or export cartels; or they could concern characterization of private cross-border conduct, which might arguably be either abusive or progressive. Yet, NAFTA provides no mechanisms for resolving these issues.

The Antitrust Section suggests that the governments consider the possibility of formal procedures for resolving competition issues. For example, the Article 1504 Working Group might consider procedures for resolving jurisdictional and comity disputes, disputes arising from government-mandated export and import cartels, and injurious or discriminatory non-enforcement of antitrust laws.

Many other opportunities to improve the conditions of competition in North America are likely to arise. Competition problems could usefully be monitored and opportunities for further cooperation and coordination should be identified. The 1504 Working Group might usefully consider institutions or fora for these on-going efforts.

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Accordingly, the Section recommends that the governments work together to consider developing procedures for resolving antitrust disputes and to provide the means for on-going cooperation and coordination on competition issues, with the goal of facilitating the creation of a more competitive North America.

Respectfully submitted,

Alan H. Silberman, Chair  
Section of Antitrust Law

August 1994