

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW AND PRACTICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports the efforts of 1
the governments of Canada, Mexico and the United States to establish, through 2
the North American Free Trade Agreement ("NAFTA") principles, rules, 3
procedures, and institutions for the conduct of trade and other economic relations 4
among the participating countries which are designed to provide transparency, 5
predictability, fairness and due process. 6

REPORT

Introduction

On August 12, 1992, the Presidents of the United States and Mexico and the Prime Minister of Canada announced the completion of negotiations for the North American Free Trade Agreement ("NAFTA" or "Agreement"). The Agreement is consistent with long-standing negotiating objectives of the United States to open markets to trade in goods, services and investment. Furthermore, the Agreement includes provisions ensuring transparency, non-discrimination and due process in the application of national laws and creates provisions for the fair resolution of bilateral or multilateral disputes. To ensure that the United States obtains the benefits offered by the Agreement, Congress should approve the NAFTA under the fast-track process as currently in effect. An attempt to amend the Agreement through the implementing process could open the entire Agreement to renegotiation, defeating the purpose of the fast-track provisions and potentially eviscerating the entire Agreement.

NAFTA is the result of complex negotiations by all three governments, requiring compromise and coordination by sovereign nations. The three governments believe that the enactment of this significant Agreement will create the largest free-trading market in the world, with over 360 million consumers and \$6 trillion in annual output. In addition, NAFTA is the first free-trade agreement to include a developing country and, hence, may serve as an important first step toward hemispheric free trade. While there has been some controversy over the economic consequences of NAFTA, a number of studies show that the Agreement will increase jobs and output throughout the free trade area.

President-elect Clinton has endorsed NAFTA and supported its approval under the fast-track provisions. He recognizes that, as part of a greater economic strategy, NAFTA will create jobs in the United States and promote growth in North America. At the same time, he has voiced concerns that environmental and labor issues must be addressed to protect the environment and U.S. workers and has proposed to handle these matters through supplemental agreements or implementing legislation. Neither the text of the Agreement nor the approval process envisioned by fast-track legislation need to be amended to address these considerations in such a manner.

Consistency with U.S. Negotiating Objectives

The Agreement represents the culmination of months of negotiations aimed at promoting free trade in goods and services and liberalizing investment throughout North America. As such, NAFTA is consistent with the long-standing policy of seeking

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open markets and freer trade which has been the goal of bilateral and multilateral trade negotiations since 1945. In a number of respects, NAFTA advances those goals and successfully embodies important U.S. trade policy objectives such as increased fairness, transparency, and non-discrimination in the application of national laws and fair and adequate dispute resolution provisions.

Key features of NAFTA include the phased elimination of all tariffs on agricultural and industrial goods produced in NAFTA countries. The elimination of these tariffs will promote and strengthen U.S. exports. In addition, NAFTA has provisions designed to open service sectors in both Mexico and Canada--creating substantial opportunities for U.S. exports. NAFTA's government procurement sections also are structured to increase access to public sector projects, providing U.S. companies with tremendous growth opportunities. NAFTA also seeks to assure foreign investment non-discriminatory treatment, an end to local content rules, and the elimination of export performance requirements. Further, NAFTA commits the Parties to strengthen their protection of intellectual property rights. These will both allow substantial exploitation of U.S. inventions and ideas and increase exports of high-technology and entertainment products, both strong growth areas for the United States.

DISPUTE RESOLUTION PROVISIONS

NAFTA also includes significant gains in the area of dispute resolution. Through bilateral and multilateral negotiations of both trade and investment agreements, the United States has consistently strived for transparent, impartial and effective international dispute resolution. NAFTA includes significant advances in establishing mechanisms that reflect these principles. In addition, NAFTA ensures access to international arbitration for investors in disputes against a state concerning investment issues. The objectives embodied in NAFTA reflect goals the American Bar Association has long supported.

Chapter 20: Dispute Settlement

Chapter 20 provides a rapid, efficient and effective means of dispute resolution. It builds on and expands Chapter 18 of the U.S.-Canada Free-Trade Agreement ("CFTA"). Like Chapter 18

^{1/} The American Bar Association, in fact, specifically recommended the adoption of the dispute resolution provisions included in NAFTA. "Dispute Settlement under A North American Free Trade Agreement." Recommendation of the Joint Working Group of the American Bar Association, the Canadian Bar Association, and Barra Mexicana, approved, February, 1992. 22 Int'l Law. 855 (1992).

of the CFTA, Chapter 20 creates the framework for settling disputes relating to the implementation or interpretation of the Agreement. Under this provision, any NAFTA government ("Party") may invoke the Chapter 20 procedures to resolve a dispute concerning interpretation or application of the Agreement, or to challenge a measure of another Party it considers is or would be either inconsistent with the Agreement or cause nullification of impairment of benefits that a Party could reasonably expect would accrue under the Agreement. (Art. 2004)

Paralleling Chapter 18 of the CFTA, NAFTA Chapter 20 creates three levels of dispute resolution. The Complaining Party must first request consultations with the offending Party, which consultations may be joined by the third Party. (Art. 2006) If the Parties fail to resolve their differences through consultation, a Party may request a meeting of the Free-Trade Commission.^{2/} (Art. 2007) If the Commission is unable to reach an acceptable resolution, a Party may request that the matter be referred to an Arbitration Panel. (Art. 2008) The intent of the Agreement is that the Parties will agree to and implement the decision of the Panel, if the dispute reaches that stage. (Art. 2018)

Through these mechanisms, Chapter 20 has integrated the objectives of resolving disputes as amicably as possible while at the same time ensuring that sovereignty and equity are respected. The layered structure of Chapter 20 emphasizes resolution of disputes by mutual accord, but recognizes the need for definitive and fair resolution of disputes where accord cannot be reached. The panel selection process potentially enhances the impartiality of the decision-making body from that created under the CFTA by creating a system under which a Party selects panelists from another Party's roster rather than from its own. The final provisions of Chapter 20 state a clear preference for resolution over retaliation, providing that "[w]henever possible, the resolution shall be non-implementation or removal of a measure not conforming with this Agreement or causing nullification or impairment. . ." Art. 2018(2). However, if the Responding Party implements or fails to remove the measure complained about, the Complaining Party may suspend the benefits enjoyed under the Agreement.

Chapter 19: Binational Panel Review

Chapter 19 of NAFTA also expands Chapter 19 of the CFTA by extending the binational panel review process for antidumping (AD) and countervailing (CVD) duty determinations to Mexico and

^{2/} Article 2001 creates a Free-Trade Commission, composed of Cabinet-level officials or their designees, to, inter alia, assist in the resolution of disputes.

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Mexican products. The central feature of Chapter 19 is the replacement of domestic judicial review of AD and CVD determinations with review by binational panels comprising nationals from the involved Parties. The Parties reserve the right to apply their law, (Art.1902) and panel review must apply the standard of review that would be applied in a national court. (Art. 1904.3) NAFTA, like the CFTA, establishes strict deadlines for panel review, ensuring a final decision within 315 days of the request for panel review. (Art. 1904.14) If a Panel 1) does not follow domestic law, 2) seriously departs from a fundamental rule of procedure, 3) manifestly exceeds its powers, authority, or jurisdiction, or 4) if a panelist violates the rules of conduct, the Agreement provides for appeal of the panel's decision. (Art. 1904.13) NAFTA includes a provision not found in the CFTA which provides for consultations in the event one Party believes that the domestic law of another Party impairs the effectiveness of the panel process. (Art. 1905)

The Chapter 19 binational panel mechanism was an important part of the CFTA. The establishment of binational panels addressed Canada's desire for some involvement in the decision-making process and the 315 day deadline for a panel decision eased Canadian concerns surrounding lengthy litigation schedules in U.S. courts. In turn, U.S. concerns with transparency led the Canadians to amend their law to permit, for the first time, judicial review of the Deputy Minister's decision concerning the existence of dumping or countervailable subsidies. Inclusion of this mechanism was accepted as part of the overall Agreement reach by the Parties.

Similarly, Chapter 19 panels were an important issue in the NAFTA negotiations. Mexico has agreed to significantly improve procedural aspects of its national AD and CVD laws to provide enhanced transparency in its administrative process. In addition, Chapter 19 virtually creates judicial review of Mexican AD and CVD determinations where none existed. NAFTA requires that Mexico amend its domestic laws to provide greater opportunity for participation in the administrative process by allowing full participation by interested parties in its administrative process, establishing explicit timetables for its administrative process, and providing written notice of actions by the competent investigating authority and access by counsel to relevant information. With the enactment of these provisions, Mexico will have significantly increased the transparency and impartiality of the Mexican trade remedy system.

Other important improvements in Chapter 19 of NAFTA over the CFTA counterpart are found in the Extraordinary Challenge Committee (ECC) process. To ensure that the ECC provides an adequate check on the panel process, the ECC is specifically directed to review the legal and factual analysis of the panel's decision to determine if the panel violated a fundamental rule of

procedure or exceeded its power, authority or jurisdiction.^{3/} NAFTA extends to from 30 to 90 days the period for ECC review, thus permitting a more thorough examination of the panel's decision. These improvements to the ECC process enhance significantly the effectiveness of the binational panel process and address Congress' concern about the absence of domestic judicial review of U.S. AD and CVD determinations.

Chapter 11, section B: Investor-State Disputes

Perhaps the most significant achievement in the area of dispute resolution of NAFTA are the provisions creating a mechanism for resolving disputes between individual investors and the host Party. When a Party has breached an obligation established in section A of Chapter 11,^{4/} the injured investor may bring a claim on its own behalf or on behalf of an enterprise it controls. (Arts. 1116 & 1117) In the event of a dispute, the Agreement requires that the disputing parties first try to settle the dispute through consultations. (Art. 1118) If such efforts fail, however, the Agreement provides for referral to arbitration. (Arts. 1119-1121) By signing NAFTA, each Party consents to submit disputes to arbitration. (Art. 1122) This consent to arbitration is a significant step forward, permitting an international forum for adjudicating such disputes while preserving the option of the investor to go to local courts.

With the inclusion of these provisions, NAFTA is a significant advancement over the CFTA because it ensures a private right of action by an investor against a state. Moreover, these provisions bring NAFTA into line with the long-standing U.S. policy of promoting the settlement of investment disputes through international arbitration-- a goal long-favored by the American Bar Association.

APPROVAL UNDER FAST TRACK

In order to ensure that the President had the authority to negotiate multilateral trade agreements, Congress, in the Trade

^{3/} An ECC may also be convened to review whether a panelist violated the rules of conduct.

^{4/} Section A of Chapter 11 creates requirements for standards to be applied by a Party to investors of another state. For example, it requires that each Party accord national and MFN treatment to investors of other Parties. (Arts. 1102 & 1103) It also embodies an international minimum standard of treatment (Art. 1105), prohibits various performance requirements (Art. 1106), and provides for international law protection (including compensation) in the event of expropriation. (Art. 1110)

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Act 1974, authorized the President to negotiate agreements subject to approval under a special "fast-track" procedure.^{5/} This procedure, whereby Congress votes on the entire agreement without amendments, is fundamental to the President's ability to complete such arrangements with any finality. Without such authority, the President could not assure other countries that Congress would not amend the agreement, thereby potentially undermining the delicate balance of negotiated compromises that comprise a multilateral negotiation. In recognition of this need, the Senate Finance Committee acknowledged that

Our negotiators cannot be expected to accomplish the negotiating goals of Title I [tariff and non-tariff authority] if there are no reasonable assurances that the negotiated agreement would be voted up or down on their merits.^{6/}

The President's authority to negotiate under the fast-track procedure was restored for three years under the Omnibus Trade and Competitiveness Act of 1988. In 1991, the President again requested, and was granted, an extension of his negotiating authority under fast-track. The President's current authority under fast-track expires June 1, 1993. In 1991, as now, the American Bar Association fully supported the extension of the fast-track negotiating authority.

At the outset of the negotiations, the Canadians and Mexicans indicated that without the authority granted the President under the fast-track legislation, NAFTA would not have been completed. The Mexicans and Canadians agreed to a text anticipating that the Agreement they announced on August 12, 1992 was the Agreement that would be implemented.

However, resolutions have been introduced in the Senate to amend the fast-track procedures to allow amendments to the implementing legislation.^{8/} Such resolutions recommend changing the Senate and House Rules to permit amendments to the implementing legislation. To allow amendments on specific topics, as the resolutions suggest, would open the legislation to

^{5/} 19 U.S.C. § 2191.

^{6/} S. Rep. No. 1298, 93rd. Cong., 2d Sess. 107 (1974); see also, H.R. Rep. 317, 96th Cong. 1st Sess. 6 (1979).

^{7/} "Resolution Supporting Extension of Fast-track Negotiating Authority," ABA Section on International Law and Practice, submitted April, 1991.

^{8/} E.g., S. Res. 109, Congressional Record, April 23, 1991 S4896.

amendments in other areas, and defeat the entire purpose of the fast-track approval process. Approval of NAFTA under the fast track procedure in its current form is critical to the completion and entry into force of NAFTA. To amend the fast-track approval procedures after the completion of the negotiations, when the Mexicans and Canadians negotiated in good faith on the assumption that Congress would consider NAFTA under the fast track procedures, would call into question the reliability of the United States as a negotiating partner and diminish its authority in future negotiations. Moreover, as noted above, any concerns regarding environment or labor matters (including those raised by President-elect Clinton) can be addressed through supplemental agreements or implementing legislation without changing the present fast-track procedures or renegotiating the Agreement.

MINORITY VIEWS

Some environmentalists and labor leaders have criticized NAFTA as failing to offer adequate protection to the environment and to address labor concerns. Concern has been raised that companies will relocate in Mexico simply to take advantage of Mexico's lower wages and allegedly lower environmental standards. The result, they claim, is not only the loss of jobs but also the degradation of Mexico's environment and the promotion of injurious labor practices to Mexico.

Criticism has also focused on the Chapter 19 binational panel review process. The concern is that the panels will not properly apply U.S. law and hence, a parallel system of law will emerge applicable only to Canadian and Mexican imports.

CONCLUSION

NAFTA represents the sustained efforts and months of hard negotiations by all three parties. It is a significant step toward hemispheric free trade and a model for future agreements. Furthermore, the dispute resolution provisions included in the Agreement reflect long-standing goals of the United States and the American Bar Association to promote the fair and effective resolution of international disputes. For these reasons, the American Bar Association recommends that the Congress, in an expeditious manner, approve NAFTA under the procedures envisioned by the current fast-track provisions and not amend the agreement and thereby threaten its success.

Respectfully submitted,

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Louis B. Sohn
Chair, Section of Internal Law
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GENERAL INFORMATION FORM

Submitting Entity: Section of International Law and Practice

Submitted By: Louis B. Sohn, Chair, Section of International Law and Practice

1. Summary of Recommendation:

The recommendation commends the U.S., Mexican, and Canadian governments for concluding an agreement adopting rules and principles which will provide transparency, predictability, fairness and due process in the conduct of their economic relations generally, and trade relations in particular. The dispute settlement provisions of the agreement are expressly designed to serve those ends; the recommendation urges the Association's commendation of and support for those procedures. Consistent with previous ABA resolutions, the recommendation also urges support for congressional consideration of the agreement and its implementing legislation under the so-called "fast-track" procedures (procedural rules adopted by Congress under its rule-making authority that are intended to assure an up-or-down vote on the Agreement as negotiated as well as its implementing legislation). Lastly, in view of the significant features of the NAFTA noted above, the recommendation urges support for the final signing and approval of the accord by the United States.

2. Approval by Submitting Entities:

Approved by the Council of the Section of International Law and Practice on October 24, 1992.

3. Previous Submission to the House or Relevant Association Position:

This resolution has not been previously submitted to the ABA.

4. Existing Association Policies Relevant to This Recommendation:

In 1987, the Association adopted a resolution in support of similar dispute settlement procedures introduced in the U.S.-Canada Free Trade Agreement. The Association has previously supported the extension of congressional "fast-track" procedures intended for use in implementing trade agreements negotiated by the Executive. In addition, the Executive Committee of the Board of Governors adopted a recommendation this past February that encouraged the development of NAFTA dispute settlement measures, like those eventually included in the agreement by the parties.

5. Need for Action at This Meeting:

Given the likelihood that the agreement will be signed and implementing legislation introduced prior to the August, 1993, meeting of the House of Delegates, the officers of the Section of International Law and Practice believe it is essential for the Association to

take action on this resolution at the February, 1993, Mid-Year Meeting. Action then will be essential to enable the Association to make its views on the agreement issues available both to the administration of President-Elect Clinton and to the incoming Congress. The recommendation has been drafted broadly to enable the Association to express its views on the full range of issues that may arise in the NAFTA approval process.

6. Status of Legislation:

No legislation is pending; however, the NAFTA is likely to be signed and implementing legislation is likely to be introduced in late-spring or early-summer of 1993. The timing will depend on the approach to implementation of the accord adopted by President-Elect Clinton's administration.

7. Cost to the Association:

None.

8. Disclosure of Interest:

None.

9. Referrals:

This Report and Recommendation will be referred to all ABA Sections and entities by December 4, 1992.

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