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Mr. Robert Lighthizer
Chair of the Trade Policy Staff Committee
Office of the United States Trade Representative

RE: NAFTA Negotiations Docket USTR20170006

Dear Mr. Lighthizer,

I write on behalf of the Canadian American Bar Association (“CABA”) to (i) provide written notification of CABA’s intent to testify at the public consultation hearing scheduled for June 27, 2017 at the United States International Trade Commission, and (ii) to provide a summary of CABA’s intended testimony.

I. About CABA

CABA is an association of American and Canadian lawyers with strong cross-border ties either through citizenship, education or professional designation. Our members include in-house counsel, attorneys in private practice, government lawyers, law school faculty and law students. CABA acts as an associational forum and voice for the cross-border legal community and is committed to promoting the rule of law, facilitating bilateral trade, and preserving the special relationship between two of the world’s largest and most comprehensive trading partners.

CABA’s operations involve providing informational and networking resources to legal practitioners, academics and policy makers aimed at facilitating cross-border legal practice and creating a platform for the study and debate of cross-border legal topics. CABA additionally carries out in-depth legal and policy research and engages in cross-border advocacy initiatives that further its mission and the interests of its members.

As a California non-profit corporation based in New York City, CABA hosts professional events on both sides of the border, including in New York City, Los Angeles and Toronto, during the year and sponsors various activities with other professional organizations and law schools. These events include cross-border panels involving judges and other members of the legal community, Continuing Legal Education (“CLE”) seminars focusing on cross-border legal issues, and networking opportunities for our members. CABA also invites prominent Canadian and American lawyers engaged in important international legal, political or diplomatic work to share their experiences, reflections, and career paths with our members in an informal interview setting.

II. Summary of CABA’s Intended Testimony

CABA believes that a harmonized cross-border legal regime is necessary for a modernized and efficient trade relationship between Canada and the United States. CABA intends to focus its testimony on the ways in which the NAFTA renegotiations offer an opportunity both to stimulate and reduce barriers to bilateral trade by harmonizing cross-border legal regimes and facilitating cross-border legal practice.

CABA will identify four areas of cross-border law and legal practice that the renegotiation process should address.

(1) Recognition and Enforcement of Foreign Judgments and Arbitral Awards: The law of recognition and enforcement of foreign judgments and arbitral awards governs the conditions under which a domestic court will recognize and enforce a judgment or arbitral award rendered by a foreign court in its territory. The regimes of Canada and the United States are regulated at the provincial level in Canada (by the common law) and the state and federal level in the United States (usually by statute), and diverge on whether domestic courts should enforce final orders against non-resident defendants. Unlike the Canadian regime, U.S. recognition and enforcement law is reluctant to recognize foreign orders (particularly arbitral awards) against defendant companies not headquartered or incorporated in the state where enforcement is sought, rendering enforcement of such orders much more difficult in the United States. CABA submits that the NAFTA renegotiations offer the parties an opportunity to revisit this position, which runs counter to fair trade principles and fails to account for the modern mobility of people and capital across borders, both between states and internationally.

(2) Orders with Extraterritorial Effect: As commerce becomes increasingly globalized and digitized, the unique properties of the Internet have increased relevance for international trade. Information pertaining to cross-border commerce is available on the Internet and is accessible in the U.S. and Canada (and virtually anywhere in the world) without regard to where it originates and notwithstanding that its legality could hinge on which country's court is evaluating it. The two trading partners must preserve their power to restrain online commercial activity that they consider illegal but also respect each other's (and other nations') authority to decide which information may be accessed within its borders. The NAFTA renegotiation process offers an opportunity to take steps towards a legal blueprint for addressing online commercial activity in a manner that respects state sovereignty—for example, by restricting Internet orders to Canadian or U.S. territory. This is particularly important in areas, such as those touching on freedom speech, where Canada and the United States take differing legal approaches.

(3) Free Movement of Legal Professionals: The free movement of legal professionals is essential to providing necessary legal support to cross-border trade. Modern law firms operate on either side of the border and rely on the ability of their attorneys to practice U.S. and Canadian law and to serve corporate clients that operate across the U.S.-Canadian border and around the world. As a cross-border bar association, CABA sees firsthand the free movement of legal professionals between Canada and the United States and how that movement promotes the mutual understanding between legal cultures that is essential to a close trade relationship. CABA will submit that, at a minimum, the TN professional work authorization provisions pertaining to lawyers contained in the existing NAFTA treaty must be preserved in any renegotiated NAFTA treaty.

(4) Data Privacy: In a world economy that increasingly depends on e-commerce, the movement of data across borders attends international trade. Conflicting approaches to data privacy between trading partners such as Canada and the United States add costs to doing business and can even stifle trade. Inconsistent data privacy provisions additionally create obstacles to cross-border litigation and to the effective gathering of evidence. As a number of recent decisions by Canada's Privacy Commissioner have illustrated, Canada's approach to data privacy has begun to diverge from that of the United States. CABA submits that a renegotiated NAFTA is an opportunity for the U.S. and Canada to lay out a common and mutually agreeable approach to data privacy that will govern their trade relationship.

CABA looks forward to sharing its testimony with the Commission.

Yours sincerely,

Ivo Entchev, Esq.

President

Canadian American Bar Association