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Settlement of Disputes under the Proposed Free Trade Area Agreement

SECTION RECOMMENDATIONS AND REPORTS

American and Canadian Bar Associations Joint Working Group on the Settlement of International Disputes

I. Settlement of Disputes under the Proposed Free Trade Area Agreement

I. RESOLUTION

The Joint Working Group of the American and Canadian Bar Associations (hereafter "Joint Working Group") recommends that the American and Canadian Bar Associations adopt the following Recommendation and Report:*

RECOMMENDATION

BE IT RESOLVED that (the American Bar Association) (the Canadian Bar Association) recommends the adoption by the Governments of Canada and the United States, in connection with their free trade agreement, of appropriate dispute resolution mechanisms in relation to trade disputes involving their respective countries, and, in particular, the establishment of:

*The *recommendation* proposed by the Joint Committee was approved by the Legislation and Law Reform Committee of the Canadian Bar Association on May 14, 1987, and by the Governing Board of the American Bar Association on June 5, 1987 (with the standard disclaimer that the *report* is not policy of the Association but is submitted as a possible basis for a free trade agreement between the two countries).

(a) A Joint Canada-United States Free Trade Commission to assist the two countries in the management of trade disputes between them by organizing special studies and consultations and helping to establish and choose appropriate dispute resolution mechanisms;

(b) A Joint Canada-United States Free Trade Tribunal to interpret the free trade agreement and to decide legal disputes between them relating to their rights and obligations under the agreement; and

(c) Appropriate procedures enabling reference to the above-mentioned Tribunal from domestic courts and administrative bodies of either country of questions involving the interpretation of the free trade agreement, at the instance of affected parties, including private parties.

BE IT FURTHER RESOLVED that (the American Bar Association) (the Canadian Bar Association) authorizes the Joint Working Group of the International Law Sections of the American and Canadian Bar Associations to submit to the government officials of both countries in charge of the free trade negotiations suitable comments and explanations, consistent with the foregoing principles.

II. REPORT

INTRODUCTION

The purpose of this Report is to present to the American and Canadian Bar Associations certain guiding principles and proposals concerning the mechanisms for the settlement of disputes arising out of the interpretation, application or operation of a free trade agreement between Canada and the United States. These proposals are consistent with, and constitute a supplement to, the two draft treaties on the settlement of disputes between the two countries that were proposed by the Joint Working Group and were approved unanimously by the governing bodies of both Associations in 1979. The new proposals are broader, as they envisage a wider range of necessary or useful procedures and institutions and narrower, as they are limited to the area of trade disputes. In some cases, basic principles contained in the 1979 resolutions have been changed to adapt them to the requirements of this specific subject matter.

The two main assumptions of the present Report are based on those of the 1979 one: In the first place, the legal systems of the two countries are similar, emphasizing the rule of law and the importance of settlement of disputes by impartial tribunals. Once the rules are codified in the free trade agreement, there should be an institution to interpret that agreement in an impartial fashion. Secondly, it is desirable to solve most disputes originating in private claims through giving private parties recourse to

domestic and international institutions, without having to get the two Governments involved directly in every dispute.

In addition, this Report takes into account recent developments in the theory and practice of conflict resolution, and suggests various methods of more effective dispute management, joint and cooperative. Such management requires the availability of alternative means of bringing the parties together and helping them in finding an equitable solution.

Two principal common institutions are proposed in this Report:

(a) a Joint Canada-United States Free Trade Commission (hereafter "Commission"), which would monitor the trade relations between the two countries, warning about undesirable developments and trends, organizing special studies and consultations, and directing each arising issue into the channel most appropriate for its resolution (such as fact-finding, mediation, conciliation, or arbitration by a special tribunal),

(b) a special Joint Canada-United States Free Trade Tribunal (hereafter "Tribunal") which would consider legal issues relating to the interpretation, application or operation of the free trade agreement, and decide legal disputes arising under that agreement that may be submitted to it directly by the two Governments or by reference from national courts or administrative tribunals or agencies, at the instance of the other parties or the Commission.

The various parts of this Report deal, respectively, with the 1979 report, issues connected with the proposed free trade agreement that may give rise to disputes, general guidelines for the settlement of trade disputes, dispute management, arbitration, and access of private persons to dispute settlement procedures. Illustrative drafts of treaty texts on dispute settlement that may be appropriate for the special trade relationship between Canada and the United States are presented in an appendix. If desired, the Working Group would prepare additional appendices, providing further details respecting the structure and functions of various proposed institutions and the procedures that might be utilized.

A. Summary of the 1979 Report

The settlement of disputes between Canada and the United States was studied by the Joint Working Group in the 1970's, and its report to the American and Canadian Bar Associations noted the existence of a variety of disputes on economic, trade and investment questions, such as import, export and investment restrictions, energy resources, antitrust and extraterritorial jurisdiction problems, and pollution of boundary waters and of the air.[1]

1. American Bar Association and Canadian Bar Association, Settlement of International Disputes Between Canada and the United States of America: Resolutions adopted by the American Bar Association on August 15, 1979 and the Canadian Bar Association on August 30, 1979 with Accompanying Reports and Recommendations 11–113 (1979).

In 1979, the two Bar Associations approved two draft treaties, prepared by the Joint Working Group, one providing for equal access to and equality of remedies available in the courts of the two countries in transfrontier pollution cases and the other providing general procedures for third-party settlement of disputes.[2] The first one was implemented to some extent by another Joint Working Group, established by the Uniform Law Conference of Canada and the United States National Conference of Commissioners on Uniform State Laws, which prepared a Draft Transfrontier Pollution Reciprocal Access Act.[3] This uniform law was approved by the Uniform Law Commissioners of the two countries in August 1982, and is now in force in the Canadian Provinces of Ontario, Manitoba and Prince Edward Island and the States of Colorado, Missouri, Montana, New Jersey and Wisconsin. The second draft treaty contained a proposal to confer compulsory jurisdiction on an arbitral tribunal or a special chamber of the International Court of Justice over any question of interpretation, application or operation of a treaty in force between the two countries. It also provided for optional jurisdiction over eight specified categories of disputes; for instance, those relating to pecuniary claims of nationals of one country against the other country, immunities of States and of their agencies and subdivisions, environmental issues, the management of natural resources of common interest, or transnational application of civil and criminal laws. Acceptance of jurisdiction over any one of the specified categories was to be made by supplementary agreements through an exchange of notes between the two Governments without need for further legislative action.[4]

Since 1979, the Joint Working Group was able to bring together the legal advisers of the United States Department of State and the Canadian Department of External Affairs to discuss the possibility of the two Governments' approval of such a treaty and to dispel some objections to such a treaty. Nevertheless, despite the resolution of the dispute relating to the Delimitation of the Maritime Boundary in the Gulf of Maine Area by a decision of a chamber of the International Court of Justice,[5] no serious negotiations have been started on a more comprehensive agreement for the settlement of various disputes between the two countries.

The only *general agreements* in force between the two countries on the settlement of international disputes are the 1899 Hague Convention on the Pacific Settlement of International Disputes that contains general provisions on good offices, mediation, international commissions of inquiry

2. *Id.*, at xiii-xxxii (in English and French).

3. Uniform Transboundary Pollution Reciprocal Access Act, Drafted, Approved and Recommended for Enactment by the National Conference of Commissioners on Uniform State Laws and Uniform Law Conference of Canada (Uniform Law Commissioners, 1982).

4. *See, op. cit. supra* note 1, at xxi.

5. 1984 I.C.J. 246.

and arbitration,[6] and the 1914 Treaty for the Advancement of Peace between the United Kingdom and the United States that provides for a conciliation commission of five members. (This treaty was amended in 1941 to provide for the direct appointment by Canada of its members of the commission.)[7] Both these documents require a special agreement by both parties on the submission of a particular dispute to a third-party settlement. A 1908 general arbitration convention between the United Kingdom and the United States that was then applicable also to Canada, not only required a special agreement in each case, but also excluded all disputes that affect the vital interests, the independence or the honor of the two parties or that concern the interests of third parties.[8] This convention expired in 1928, when the two parties were preoccupied with the negotiations relating to the Briand-Kellogg Pact for the Renunciation of War.[9]

Both Canada and the United States are also bound by a number of *multilateral treaties* that provide for the judicial settlement or arbitration with respect to disputes relating to the interpretation or application of these treaties.[10] There are a few bilateral treaties that provide for the settlement of disputes between the two countries that relate to the interpretation or application of these treaties.[11] Although there are more than 200 such treaties, multilateral or bilateral, between the two countries, covering subjects ranging from aeronautical research to zoology, and although their number and variety increase from year to year, only a few of them contain dispute settlement clauses.

The 1909 Boundary Waters Treaty established a permanent International Joint Commission to deal with applications for the use, obstruction

6. For text of the 1899 Hague Convention, see 32 Stat. 1779, U.S. Treaty Series No. 392, 1 Bevans 230. While the United States is a party to both the 1899 and 1907 Hague Conventions, Canada is a party only to the 1899 one. For a recent review of twenty Canada-United States arbitrations, see Wang, "Adjudication of Canada-United States Disputes," 1981 CAN. Y.B. INT'L L. 158–228.

7. For the original text of the United Kingdom-United States Treaty for the Advancement of Peace, see 12 Bevans 370, 108 Br. & For. S. Papers 384; for the amended text see 6 Bevans 190, 1941 Can. T.S. 9.

8. For the text of the 1908 arbitration treaty, see 12 Bevans 295, 101 Br. & For. S. Papers 208.

9. See 4 Documents on Can. For. Rel. 568–70, 573–74, 584–86.

10. Among these treaties are: The 1944 Convention on International Civil Aviation, 61 Stat. 1180, TIAS No. 1591, 3 Bevans 944, 15 UNTS 295; the 1919 Constitution of the International Labor Organization, as amended in 1946, 62 Stat. 3485, TIAS No. 1868, 4 Bevans 188, 15 UNTS 35; 1953 Convention on the political Rights of Women, 27 UST 1909, TIAS No. 8289, 193 UNTS 133; the 1961 Convention on Diplomatic Relations, 23 UST 3227, TIAS No. 7502, 500 UNTS 95; the 1973 International Telecommunication Convention, 28 UST 2495, TIAS No. 8572.

11. See, for instance, the 1924 Convention for the Prevention of Smuggling of Intoxicating Liquors, 43 Stat. 1761, U.S. Treaty Series No. 685, 12 Bevans 414, 17 LNTS 182 (the *I'm Alone* Case was submitted to a Joint Commission under this convention); the 1977 Agreement Concerning Transit Pipelines, 28 UST 7449, TIAS No. 8720.

or diversion of boundary waters. That Commission was also charged with making reports and recommendations with respect to differences between the two countries, involving their rights or those of their inhabitants along the boundary, that were referred to the Commission jointly by the two Governments.[12] Over the years, the Commission has considered more than two hundred applications and references, and its recommendations, based on careful technical studies and consultations with all the interested parties, have usually been accepted by the two Governments.[13] In recent years, the Commission has been asked by the two countries for recommendations concerning not only water levels and use but also water and air pollution.[14] However, no cases were submitted to the Commission for "decision" under Article 10 of the treaty. Submission under that provision depended on a special agreement of both countries requiring, as far as the United States is concerned, prior advice and consent of the Senate.[15]

B. International Trade Issues

The Governments of Canada and the United States agreed in 1985 to begin negotiations on a bilateral free trade treaty. In response, the American and Canadian Bar Associations established a new Joint Committee on Trade and Investment to study the legal issues involved in such a treaty in cooperation with the present Joint Working Group. Most of the free trade issues to be studied relate to the substance of the treaty, both as to scope and content. They involve in particular the rules that should govern the relations between the two countries not only with respect to trade and investment in the strict sense, but also with respect to such closely related issues as antitrust laws, intellectual property protection, patent rights and those regulatory systems and administrative practices which significantly affect bilateral trade and investment. Other issues relate to finding appropriate ways and means for preventing disputes that may arise under the new trade agreement and for resolving them if they cannot be prevented. The dispute disposition process contains ordinarily two parts:

> First, developing adequate solutions for existing disputes through a basic agreement on the rules of international law that should govern various aspects

12. For the text of the Boundary Waters Treaty, see 12 Bevans 319, 102 Br. & For. S. Papers 137; see also BLOOMFIELD and FITZGERALD, BOUNDARY WATERS PROBLEMS OF CANADA AND THE UNITED STATES (Toronto, 1958); M. Cohen, "The Regime of Boundary Waters: The Canadian-United States Experience," 146 Hague Academy, Recueil des Cours 219–340 (1975.III).

13. *See* 3 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 813–871 (1964).

14. *See, e.g.*, 3 *id.* 789, 828, 853, 855, 869.

15. *See* 3 *id.* 816.

of international trade and investment and embodying these rules in the trade agreement or annexes thereto, and providing a process for easy adaptation of the agreement or its annexes to the rapidly changing circumstances of international economic relations; and

Second, providing various means for resolving disputes relating to the interpretation, application or operation of the trade agreement.

The mission of the new Joint Committee on Trade and Investment is to study the whole range of substantive issues involved in the first set of questions. By contrast, the Joint Working Group intends to deal, through this Report, only with the second set of questions. The Joint Working Group will explore herein the applicable principles and the various options that are available for the settlement of such disputes. It will use as precedents dispute settlement provisions included in various international agreements dealing with similar situations.

C. Guiding Principles

The following principles should serve as useful guidelines to the Canadian and United States negotiators in arriving at the dispute settlement provisions of the free trade agreement:

Principle 1

Any free trade agreement between Canada and the United States must include an effective dispute settlement system designed specifically for a free trade area.

A free trade agreement of the type contemplated in the current negotiations between Canada and the United States should contain provisions for the resolution of three classes of disputes. These are disputes: (a) between the two countries; (b) between one of these countries and a national of the other country; and (c) between nationals of one of the two countries and a national of the other. It is in the interest of all to resolve such disputes expeditiously.

This dispute settlement system has to be specifically designed for its task of dealing with Canada-United States trade issues. The conflict resolution provisions contained in the General Agreement on Tariffs and Trade ("GATT") have proven largely ineffective when applied to relations between Canada and the United States. Those provisions were drafted not for this specific situation, but for a wide range of disputes among many disparate nations.

It would be desirable, therefore, to include in the Canada-United States free trade agreement an express provision that, except when the two governments so agree, they shall not avail themselves of the GATT provisions for the settlement of disputes, but will resolve all disputes relating to the interpretation, application or operation of the free trade agreement by the system of dispute settlement specified in that agreement.

Principle 2

Such a system for dispute settlement should consist of a variety of dispute settlement means and techniques.

The system for dispute settlement should contain a full scale of techniques ranging from simple governmental or private party negotiations through mandatory third-party dispute settlement procedures. The system would have to deal with various stages of the differences that arise in a long-term relationship. The system would cover the gamut of means of dispute disposition, including dispute avoidance, dispute management, dispute settlement and post-dispute monitoring and evaluation. It is obvious that each stage in the relationship between the two countries would require different kinds of means and techniques. Moreover, it is apparent that a particular dispute might call for not merely one, but possibly several, sequential means depending on the nature, subject and context of the particular dispute.

Principle 3

The system should facilitate the presentation to the two Governments of recommendations with respect to each subject matter or stage of a dispute, suggesting the means or techniques to be used to solve the problems. However, the parties, by agreement, should be able to substitute other means if they feel that they would be more likely to reach a solution thereby.

A dispute often is complicated by the superimposition of a further dispute as to the appropriate procedure for the resolution of a particular dispute. To prevent this, the dispute settlement system should include a "traffic director" that would determine what dispute settlement method should be used by the parties, taking into account any guidelines on the subject that may be included in the agreement. However, since the parties themselves have the best sense of the most appropriate procedure for achieving a solution, they should make the ultimate decision as to the means by which the dispute should be settled. If, within a specified period, the parties have not agreed on a method, it would be necessary for the traffic directing entity to make specific recommendations on the subject. If one of the parties should reject the recommendations, the other party would be entitled to resort unilaterally to another means (for instance, a meeting of trade ministers) that the free trade agreement might authorize to deal with such a situation.

Principle 4

The dispute settlement system should encourage the resolution of disputes by existing domestic means of dispute settlement rather than by country-to-country procedures. Any natural or legal person who is a national of one of the two countries should be granted equal access to the courts and administrative agencies of the other country in any case involving an

interpretation, application or operation of the free trade agreement that might seriously affect that person's significant interests.

Dispute resolution should become routine and expeditious. Recourse to domestic courts and administrative agencies should be the preferred mode of dispute resolution. To the extent that there exist obstacles to the participation of foreign nationals in domestic judicial or administrative proceedings, they should be promptly removed. Canadian or United States nationals should be granted access equal to that of nationals of the other country in cases relating to the free trade agreement whenever their significant interests are involved.

The cost and political damage often connected with a country-to-country resolution of even routine disputes would be avoided, wherever possible, by interpersonal resolution. This is consistent with the approach adopted by the uniform laws that followed the proposal presented by the present Joint Working Group in 1979 in relation to transfrontier boundary pollution;[16] it rests on essentially similar legal and administrative considerations.

Principle 5

A. When the rights of one of the two countries under the free trade agreement are involved, provision should be made for resolving the dispute by utilizing country-to-country procedures. A country should be able to participate in the case of one of its nationals who is utilizing the normal means of dispute settlement in the other country, as provided for by Principle 4, when the country considers that its significant interests may be seriously affected. Even if a person's rights are finally disposed of in proceedings conducted in accordance with Principle 4, either country should be able to refer the matter to a country-to-country procedure for a review of the principles involved.

Fundamental and sovereign rights of one country should not be totally subject to determination in the courts or administrative agencies of the other country, but should be resolved by country-to-country procedures. Either country should be able to have such matters determined through procedures which will safeguard its rights under the agreement or customary international law; it should be able to resort to a forum in which it will not subject itself to the sovereignty of the other state, such as, for instance, the Joint Tribunal.

A country may find it necessary, however, to participate in a case in another country if its own significant interests appear likely to be seriously affected by a decision in that case. It should be allowed to intervene, or at least to present an *amicus curiae* brief, in an ongoing case in the other country. If the dispute presents questions of interpretation of the free

16. *See supra* note 3 and the accompanying text.

trade agreement, either country should be entitled to propose that such questions be referred to the Joint Tribunal or another special joint institution for advice. (See Principle 6).

Principle 6

The dispute settlement system should establish a procedure by which questions of law respecting the free trade agreement or matters of international law affecting that agreement could be referred by either state from state courts to a tribunal constituted jointly by them. Both states should also authorize by domestic legislation a reference to the Joint Tribunal by a domestic court or agency, whenever a question of interpretation of the free trade agreement should arise in such court or agency.

A similar principle has been utilized within the European Economic Community and has been successful in harmonizing the conduct of domestic courts with that of the Community institutions in applying the fundamental Community treaty and international law.[17] Such a procedure could play a very valuable role in the coordination and harmonization of the domestic laws of the two countries respecting the agreement. The free trade agreement or an annex thereto should describe in some detail the exact relationship between the suggested international institution and procedure and domestic courts or agencies and specify the character of the decisions of the Joint Tribunal or other institution to which a reference has been made.

D. Dispute Management

The 1979 Report of the Joint Working Group[18] was not limited to dispute settlement. In Part II, it dealt with the practice of Canada and the United States in the three main stages of various disputes between them: dispute avoidance (pp. 19–23), dispute management (pp. 23–30), and dispute settlement or resolution (pp. 30–38). It noted the importance of various mixed commissions, and especially of the International Joint Commission on boundary waters ("I.J.C."), in managing a variety of disputes of both intergovernmental and non-governmental origin. The history of these disputes shows that there is a special need for a "traffic director," an institution that would have the limited role of determining (as noted above in Principle 3) what would be the most suitable procedure for dealing with a particular dispute. While the role of the I.J.C. was largely confined to problems relating to boundary waters, other matters, especially those

17. See European Economic Community Treaty, Article 177. For the text of that treaty, see 298 UNTS 11. See also T. C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 247–82 (1981); E. STEIN, P. HAY & M. WAELBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 261–71 (1976).

18. *See supra* note 1.

involving transboundary pollution, have been referred to it from time to time.[19]

Based on seventy years of the experience of the I.J.C. and on precedents established in other free trade areas,[20] the Joint Working Group offers the following suggestions as appropriate for the settlement of trade disputes:

1. A Joint Canada-United States Free Trade Commission (hereafter "Commission") should be established. It should be composed of an equal number of members from each country.

2. The members of the Commission should be persons held in high regard in both countries and should have appropriate background and expertise in trade matters. The Commission's members should represent the disciplines and professions needed to deal with various areas covered by the free trade agreement. They should serve full time, in view of the likely large volume of issues to be considered. They should hold office for non-renewable five-year terms. The legislation of each country should provide for security of tenure and adequate pay and benefits.

3. The Joint Commission should adopt its own rules of procedure and those of its subsidiary agencies or entities. The chairperson should serve a term of no more than five years and then be succeeded by a chairperson who is a national of the other country. They should alternate similarly thereafter.

4. The Commission should have a joint secretariat that would enable the Commission to play a cooperative, creative and positive role.

5. Matters could be brought before the Commission: (a) by joint reference by the two Governments; (b) by either of the two Governments; or (c) upon the Commission's own initiative, or on the basis of a petition by a private party, provided neither Government objects.

6. The Commission would monitor emergent disputes, and would bring them to the attention of the two Governments as early as possible, and would ask them at that time whether they wish to deal with the dispute directly through diplomatic negotiations or consultations, or whether they would like the Commission to consider what steps should be taken to prevent the deterioration of the situation.

7. If either Government so requests, the Commission should make recommendations to the two Governments as to the manner in which a dispute should be managed. The Commission may propose to the two Governments the elucidation of the facts, mediation, conciliation or arbitration.

8. If elucidation of the facts is required, the Commission may propose to conduct an investigation or suggest the establishment of a joint fact-finding group of experts. The findings would be independent of any control of the Commission, but the Commission would be entitled to present to the two Governments its comments and recommendations respecting such findings.

9. The Joint Commission may establish a roster of experts acceptable to both Governments from which persons might be chosen jointly by the two Governments, or by the Commission when so authorized by the two Governments, to serve as mediators or conciliators. Once a dispute arises, the Commission may ask the two Governments to authorize it to select from that roster a mediator,

19. *See supra* notes 12–15 and the accompanying text.

20. *See, e.g.*, the 1985 Israel-United States Free Trade Area Agreement, Article 19(1)(d)-(f). For text of that agreement, see 24 INT'L LEG. MATERIALS 653 (1985).

or a conciliation commission, whenever the Commission should consider that mediation or conciliation would constitute the most appropriate method for achieving a settlement. The Governments may agree that the Commission itself or one or more of its members should act as mediators or conciliators in a particular dispute or category of disputes.

10. The Commission shall also be authorized to establish other subsidiary agencies, or other entities that may prove necessary for the proper exercise of its functions.

11. The Commission, or any one of its subsidiary entities, in addition to assisting in settling a dispute, may be authorized by the two Governments to suggest long-range solutions that would diminish the chance of recurrence of a particular dispute or category of disputes.

12. The members of the Commission, and its staff, should be granted such immunities as might be necessary for the independent exercise of their functions, including the immunity for their official acts. The employees should be considered as employees of the Commission rather than of the respective Governments, and should act accordingly.

E. Joint Tribunal

The 1979 Report provided for the establishment, whenever necessary, of an arbitral tribunal, and for a reference to a chamber of the International Court of Justice, if the tribunal cannot be established. As it is not likely that Canada and the United States would be able to arrange for a chamber of the Court able to deal with a large number of trade disputes on a continuous basis, a different arrangement will be necessary for assuring a method for the resolution of disputes under the free trade agreement.

The alternative methods of dispute resolution discussed in the previous section of this Report are likely to resolve most of the disputes arising under the agreement, but past experience shows that a hard core of disputes will still require reference to an impartial tribunal for final decision. The tremendous effort being made to codify the rules that will govern the free trade area will be nullified, if there should be no means to resolve finally the disputes relating to the interpretation of these rules. The Joint Working Group agreed, therefore, to propose the establishment of a Joint Canada-United States Free Trade Tribunal with jurisdiction to interpret the agreement and to decide disputes arising thereunder. This jurisdiction should extend not only to disputes between the two Governments but also to disputes relating to the interpretation of the agreement arising in domestic tribunals or agencies.

The Joint Working Group is conscious of the fact that the establishment of such a tribunal would require overcoming some serious difficulties on both sides of the border. In the United States, there is the traditional reluctance of the Senate to agree in advance to arbitration of a broad category of disputes, and its insistence that in each case an agreement to submit a particular dispute to a tribunal requires its advice and consent.

In Canada also there are difficult questions about the participation of Provinces in issues involving international trade and in the settlement of disputes relating thereto. In 1979, similar problems with respect to trans-frontier pollution disputes were solved to some extent by using the device of uniform laws (as noted in Section A above). The Joint Working Group believes that once all institutions and persons concerned realize that a free trade agreement requires for its effectiveness a special tribunal, a way will be found to establish it without jeopardizing the agreement as a whole.

Once that decision is made, there is great advantage in having a permanent tribunal rather than having to go through a laborious appointment process time after time, whenever a case is to be submitted to the tribunal.

A permanent tribunal need not have a rigid composition. It should be large enough to allow constitution of panels of different size and membership constituted according to the character or importance of the dispute or the parties' wishes. For example, an intergovernmental dispute might require a five-person body while the normal panel for references from national courts might be three. Similarly, the process of selection in the case of reference from a domestic court might be quite different from that in an intergovernmental dispute. Significant revisions might be required in the provisions on the subject included in the draft treaty contained in the 1979 Report.

Ideally, the tribunal should be composed of eminent persons having high reputation as being both impartial and familiar with international trade problems. It can be hoped that a sufficient number of them may be found among judges, lawyers and law professors in Canada and the United States. It is likely, however, that the two Governments would want to have on the tribunal also legal experts from other countries. The Joint Commission may be authorized to prepare a roster of such persons, competent in various areas of trade, who would be acceptable to both Governments, and the President of the Joint Tribunal would select persons from that roster, after consultations with the parties, taking into account the special characteristics of each case.

The decisions of the Joint Tribunal would be binding on both countries, and each country would have to arrange for such measures as may be necessary to ensure compliance with the decision.

In some cases both Governments or one of them may request the Joint Tribunal not for a decision whether a violation of the free trade agreement has occurred, but for a declaratory judgment, or even an advisory opinion, elucidating a provision of the agreement or a rule of international law relevant to the interpretation or application of the agreement.

Rules of procedure of the Joint Tribunal would have to be adapted to the special needs of a free trade area. The proceedings should be as

expeditious as possible, without depriving the parties of the right to be heard. Trade disputes would often involve technical questions and various factual issues requiring careful exploration before any law can be applied. The experience of the Court of Justice of the European Communities would be helpful in this regard.

F. Access of Private Persons to Dispute Settlement Procedures

As noted in Guiding Principles 4, 5 and 6, it would be desirable to include in the part of the free trade agreement dealing with the settlement of disputes appropriate arrangements for access by private persons, both natural and legal. Any person whose duties, rights or interests might be seriously affected by a court proceeding or administrative action relating to the application of the agreement should be able to have any issue of interpretation of the agreement that arises in such proceeding or action referred to the Joint Canada-United States Free Trade Tribunal for advice.

Such arrangements need to be accompanied and implemented by domestic legislation that would allow a person who is a national of one of the two countries to the free trade agreement to invoke that agreement directly before a court or administrative tribunal or agency of the other country. Appropriate provisions would have to be inserted in codes of judicial and administrative procedure of the two countries to permit a reference of such an interpretation question to the Joint Tribunal.[21] In particular, when a court or administrative tribunal in the United States or Canada is considering a case requiring an interpretation of a provision of the agreement, the court or tribunal itself should be able to refer the issue of interpretation to the Joint Tribunal. Similarly, a party to the dispute should be entitled to request that this question of interpretation be referred to the Joint Tribunal for the sole purpose of obtaining the advice of that Tribunal on the proper interpretation of the agreement. If a domestic court or administrative tribunal should thus refer a question to the Joint Tribunal, proceedings in the domestic court or tribunal should be suspended, pending the advisory ruling of the Joint Tribunal. After this advice had been given, the domestic court or tribunal would resume the proceedings and would apply the interpretation thus given to the facts of the case before it.

The procedure might be slightly different if an administrative agency of the United States or Canada should start a proceeding leading to an

21. For an example of similar rules, namely the United Kingdom rules relating to references for a preliminary ruling to the Court of Justice of the European Communities, see United Kingdom, Rules of the Supreme Court, Order 114, reprinted in 17 Atkin's Encyclopaedia of Court Forms in Civil Proceedings 213 (2d ed., 1975). These rules relate to the High Court and Court of Appeals; there are separate rules for other courts, *ibid.*, at 214–19.

action that an affected person considers contrary to the agreement and injurious to that person's interests, rights or duties. If the agency concerned should agree that its action might seriously affect that person, it would follow the same procedure as a court or administrative tribunal and would refer the question of interpretation of the agreement to the Joint Tribunal. Should the agency reject the request for obtaining the advice of the Joint Tribunal, the party concerned should be entitled to refer the matter to an appropriate domestic court or administrative tribunal. That court or tribunal, if it should find the request *prima facie* justified, would issue a preliminary order requesting the administrative agency to suspend its proceeding pending the receipt of the advice from the Joint Tribunal, and would formulate the question or questions relating to the interpretation of the agreement that should be referred to that Tribunal. As soon as the Joint Tribunal gives its interpretation of the agreement, the domestic court or administrative tribunal would refer the Tribunal's interpretation to the agency concerned, would authorize it to resume the proceeding, and request it to take the Tribunal's interpretation into account in deciding what action should be taken.

The party to the original proceeding that has requested the reference, any other party to the proceeding, and any agency concerned, would all be entitled to participate in the proceeding before the Joint Tribunal, whether written or oral, to the extent found necessary by the Tribunal. Each of the two Governments would be entitled to present to the Tribunal an *amicus curiae* brief on the issue of interpretation of the agreement.

Appendix
Illustrative Drafts of Certain Clauses Pertaining to Dispute Resolution

1. Among the options available for dispute settlement provisions of a free trade agreement are various types of provisions relating to a Joint Commission, advance notification, consultation, conciliation and arbitration. To illustrate some of these options, a few examples of such provisions adapted from the existing agreements[22] are provided in this section.

2. Annexes I-IV will be prepared as soon as the text of the basic articles is agreed upon.

ARTICLE I. CANADA-UNITED STATES JOINT COMMISSION

1. The Parties agree to establish a Joint Commission (a) to keep under review the implementation of the Agreement; (b) identify potential disputes that may arise with respect to the interpretation, application, or operation of the Agreement, and call the important ones to the attention of the Parties; and (c) to carry such other functions as the Parties confer upon it.

2. [The composition, functions and the *modus operandi* of the Joint Commission are described in Section D of this Report.]

3. The Joint Commission will make arrangements, in particular, for the consultations under Articles II and III, mediation under Article IV, and conciliation under Article V. It may also advise the Parties respecting the submission of the particular dispute or specified questions to an arbitration tribunal or to the Joint Canada-United States Free Trade Tribunal.

22. These drafts take into account the following free trade area agreements: Ireland-United Kingdom, 1965 Agreement Establishing a Free Trade Area, Article 23, 565 UNTS 78; New Zealand-Australia, 1983 Closer Economic Relations [and] Trade Agreement, Article 22, 22 Int'l Leg. Materials 945 (1983); and Israel-United States, 1985 Free Trade Area Agreement, Articles 17–19, 24 Int'l Leg. Materials 653 (1985). There were similar provisions also in Canada-United States, 1935 Reciprocal Trade Agreement, Article 11, 49 Stat. 3960; Exec. Agre. No. 91, 6 Bevans 75.

ARTICLE II. ADVANCE NOTIFICATION AND CONSULTATION

1. Before either Party to the Agreement commits itself to a free trade area, customs union, or reduction by reciprocal agreement or unilaterally, of trade or service barriers, with respect to a third party, it shall notify the other Party and the Joint Commission in writing as far in advance as practicable.

2. Before either Party takes any other measure that may affect seriously the products traded or services provided between them, it shall notify the other Party and the Joint Commission in writing as far in advance as may be practicable. The notice shall include a description of the circumstances leading to the proposed action, the reasons for its urgency, and the likely impact on the trade and services between the Parties.

3. If either Party considers that it may be seriously affected by any of the measures referred to in paragraphs 1 or 2, it shall request consultations with a view to arriving at an equitable and mutually satisfactory solution; and the Party planning to take the measure shall promptly afford an adequate opportunity for such consultations. The Joint Commission may be requested by the Parties to assist in these consultations.

ARTICLE III. CONSULTATIONS CONCERNING ACTIONS ENDANGERING THE BALANCE OF THE AGREEMENT

At the request of either Party, the Parties shall, or at the suggestion of the Joint Commission they may, enter into consultations, either directly or through the Joint Commission, with a view to achieving an equitable and mutually satisfactory solution preserving the balance of this Agreement, if the Party which requested the consultations considers that:

(a) an obligation under this Agreement has not been or is not being fulfilled;

(b) a benefit conferred upon it by this Agreement is being denied;

(c) the achievement of any objective of this Agreement is being or may be frustrated;

(d) any cases of special difficulty have arisen or may arise; or

(e) a measure taken by the other party severely distorts the balance of trade or service benefits accorded by this Agreement or substantially undermines fundamental objectives of this Agreement; or

(f) a change of circumstances necessitates or may necessitate a variation in the terms of the Agreement.

ARTICLE IV. PARTICIPATION OF MEDIATOR

Either Party may request the other Party that a mediator be asked to take part in consultations provided for in Articles II and III; and the other Party shall promptly enter into consultations for the appointment of such mediator. If no agreement is reached on the appointment of such mediator within a period of 21 days, the Parties may ask the Joint Commission to act as a mediator or to appoint a suitable mediator. In such a case, the consultations referred to in Articles II and III shall start as soon as the mediator has been appointed.

ARTICLE V. CONCILIATION

1. Whenever the consultations referred to in Articles II and III do not result in a mutually satisfactory solution within a period of sixty days after their commencement, or within such longer period as the Parties may agree upon, either Party may request the Joint Commission to refer the matter to conciliation.

2. In addition, whenever a dispute arises concerning the interpretation, application or operation of this Agreement, either Party may request that the matter be referred to conciliation.

3. Unless the Parties agree otherwise, the conciliation shall be conducted in accordance with the procedure specified in Annex II to this Agreement.

4. If the resort to conciliation does not lead to an agreement within sixty days after the conciliation procedure has commenced, the conciliator shall present to the Parties within thirty days thereafter a report containing the findings with respect to issues submitted by the Parties, and proposals for an equitable solution preserving the balance of the Agreement.

5. The proposals and reports arising out of a conciliation shall not be binding on the Parties, either with respect to the statement of facts or in regard to questions of law, and they shall have no other character than that of recommendations submitted to the Parties.

ARTICLE VI. JOINT TRIBUNAL

1. Any dispute relating to the interpretation, application or operation of this Agreement, which has not been settled within a reasonable time by direct negotiations, shall be submitted to the Joint Canada-United States Free Trade Tribunal to be established in accordance with Annex III to this Agreement.