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Dispute Settlement under a North American Free Trade Agreement

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American Bar Association Section of International Law and Practice Reports to the House of Delegates*

I. Dispute Settlement Under a North American Free Trade Agreement**

RESOLUTION

The Joint Working Group of the American Bar Association, the Canadian Bar Association and the Barra Mexicana (hereafter "Joint Working Group") recommends that the American Bar Association, the Canadian Bar Association and the Barra Mexicana adopt the following Recommendation and Report:

RECOMMENDATION

BE IT RESOLVED that (the American Bar Association) (the Canadian Bar Association) (the Barra Mexicana) recommends the adoption by the Governments of Canada, Mexico and the United States, in connection with the North

*CAUTIONARY NOTE: Only the RESOLUTION(S) presented herein, when approved by the House of Delegates, become official policy of the American Bar Association. These are listed under the heading RECOMMENDATION(S). Comments and supporting data listed under the sub-heading REPORT are not approved by the House in its voting and represent only the views of the Section or Committee submitting them. Reports containing NO recommendations (resolutions) for specific action by the House are merely informative and likewise represent only the views of the Section or Committee.

**The following people worked on this Recommendation and Report: For the American Bar Association: Henry T. King, Jr., chair; Louis B. Sohn; Jay Vogelson; John M. Stephenson. For the Canadian Bar Association: T. Bradbrooke Smith, chair; Ivan Feltham; George Alexandrowicz; William C. Graham. For the Barra Mexicana: Hector V. Rojas V, chair; Claus Von Wobeser; Jose Louis Siqueiros; Julio Trevino; Carlos Loperena R.

American Free Trade Agreement (''NAFTA''), of adequate and sound dispute resolution procedures embodying shared legal values that, in order of priority, include

a) the establishment of a Tribunal to decide disputes concerning the interpretation and application of NAFTA;
b) broad recourse for private parties in respect of trade disputes with which they are concerned; and
c) an effective and flexible system for the identification and management of disputes.

BE IT FURTHER RESOLVED that (the American Bar Association) (the Canadian Bar Association) (the Barra Mexicana) authorizes the Joint Working Group to submit to government officials of the three countries suitable comments and explanations, consistent with the foregoing principles.

DISPUTE SETTLEMENT UNDER A NORTH AMERICAN FREE TRADE AGREEMENT

A Report by a Joint Working Group of the American Bar Association, the Canadian Bar Association and the Barra Mexicana

[This Report represents the collective view of the members of the Joint Working Group on the necessary features of a dispute settlement regime for a North American Free Trade Agreement. It has been submitted to the appropriate officers of the respective bar associations for consideration and endorsement. If a draft Agreement were to be made available in future, the Report could subsequently be revised and updated.]

Introduction

This report represents an attempt by the three bar associations to give some guidance from the perspective of lawyers on the dispute settlement aspect of the proposed North American Free Trade Agreement. The extension of the rule of law to international trade related disputes is important both to the Parties to the proposed Agreement and to the many private parties whose interests may be affected in the course of its application.

The development of a dispute settlement regime involves a careful balancing of many factors. These include many political and economic considerations, not all of which can be taken into account by the Joint Working Group since its members are not privy to the current negotiations. To make a more precise assessment, a draft of the new Agreement embodying their impact would be required.

However, the Group is concerned to produce a report which not only will represent a considered approach by the three bar associations but also will be of assistance to the negotiators. It has sought, therefore, to take into account obvious practical limitations as well as known political and legal constraints. It is hoped, in consequence, that the recommendations in this report, representing as they do the views of legal practitioners in the three countries, will be helpful and will merit close attention by those charged with the elaboration of the Agreement.

The recommendations are concerned with three broad components of an effective dispute settlement formula: first, the management of disputes; second, a regime for the settlement of disputes; and third, private party involvement in the dispute resolution process. Following a review of a number of general considerations which have influenced the Group in arriving at its conclusions, the various considerations bearing on these subjects and related aspects are examined and are summarized. While they form a considered and composite approach to the dispute resolution component of the Agreement, the major recommendations are also capable of individual adoption.

General Considerations

The New Dimension:

The addition of a third Party to the existing Canada/U.S. free trade framework adds a whole new dimension to the trading relationship. The interpretation of the Agreement will be important to all three Parties even though a particular issue may involve only two states or a private party and one state administration. The management of the Agreement to ensure its smooth functioning will be of concern to all three.

Moreover, the very fact of extending the formalized trade relationship to a third party and its citizens will increase substantially the difficulties involved in framing an adequate regime of dispute resolution. One must add to this the new

elements of a different legal system, a third language and different culture as well as another framework of domestic trade legislation even though that legislation may take its inspiration from essentially the same sources. Modifications to the existing Canada/U.S. regime of dispute resolution of more than a cosmetic nature will obviously be necessary.

Thus, there is a significant challenge to the Parties in their elaboration of an effective and fair regime of dispute resolution. But in recognizing this challenge one must not overlook the fact that all three countries, because of their heritage, share a mutual concern to work out a law-based regime that will reflect their common adherence to and belief in the rule of law.

THE OLD PRECEPTS:

What is also most relevant in considering the recommendations which follow are the basic principles which have been at the root of previous ABA/CBA reports on international dispute settlement and which are now endorsed by the reconstituted Joint Working Group. These relate to the three main areas taken up in the recommendations.

1. The Group is convinced of the importance to any regime of dispute resolution mechanism of adequate means to manage the Agreement so as to encourage use of nonconfrontational mechanisms to resolve issues. This implies not only increased awareness and dedication of special resources within each administration but also the development of new intergovernmental means for defining and defusing and disputes, including fact finding or other processes, when negotiations fail to produce a resolution of a particular problem.
2. A consistent theme of previous reports has been the fundamental importance of having a mechanism for definitive settlement of legal disputes when all other options have failed. This is not only for the purpose of some final resolution to a particular problem, but also to backstop the negotiating process. A mechanism is required to provide the boundaries for negotiations in the same way that the existence of judicial recourse to the courts does in each domestic system.
3. Access of private parties to the regime of dispute settlement is also considered fundamental by the Group. The object is, where possible, to remove disputes from the state-to-state level, where considerations extraneous to the particular dispute may be injected into the process, and to transfer it to a more technical level. As well, particularly in a trade context, neither should states in most cases have to carry the burden of espousing citizens' claims nor citizens be forced to depend on attracting the attention and support of their state. Finally, where there is private party access, it gives to aggrieved individuals some sense that their interests are important and are not entirely subordinated to those of the Parties.

The reconstituted Joint Working Group feels that these considerations are equally relevant to a broader North American Free Trade Agreement. To the

extent they are now reflected in the existing Canada/U.S. Agreement, an effort should be made to maintain and enhance those elements. They are most important, not only to an effective system, but also to ensuring the extension of the rule of law in this area.

Chapters 18 and 19 of the existing Canada/U.S. Agreement cannot be simply incorporated into a new North American Free Trade Agreement without modification. On the assumption that they will be the foundation, or at least principal points of reference, for a new dispute settlement regime, the Group has used them as a framework for this report. The changes required in them ought to reflect the three principal considerations to which the reconstituted Joint Working Group continues to subscribe.

Relationship to the GATT:

The Group is of the view that recourse to the GATT alternative for dispute resolution should be maintained. The Group is agreed that the mechanism should be triggered by the complaining party only. This follows the Canada/U.S. formula.

Treaty Architecture:

An important aspect of the proposed Agreement in relation to dispute resolution is the architecture of the treaty. Here the major issue is the relationship between the dispute resolution provisions of the new Agreement and those of the Canada/U.S. Agreement. The Group proceeded on the basis that it is most unlikely that the existing agreement will be replaced in its entirety. If this be so, the obvious solution is to leave the old provisions in place to the extent that they are not inconsistent with the new Agreement.

This point also raises the issue of the extent of the application of the tripartite Agreement. In this regard, it is also conceivable that the Canada/U.S. Agreement may eventually be rendered without effect if the new Agreement is one that is framed so as gradually to take over the entire field of the trade relationship between the Parties. In any event, the new treaty ought to have a provision to deal with this problem of applicability under and in accordance with rules it establishes.

On this approach, complete accord on all features of the new Agreement is not rendered essential for the two Parties to the existing scheme. The only problem in this latter regard will be the extent to which new and different mechanisms for dispute resolution are developed that may not apply to the existing arrangement but may, indeed, be considered more or, possibly, less desirable than those which are currently in force between Canada and the United States. If a jurisdictional provision is included as suggested, then this problem can be addressed and resolved.

A more technical point is that the Canada/U.S. Agreement has a multiplicity of dispute resolution mechanisms scattered throughout its text. To some extent this is unavoidable. On the other hand, in a new North American Agreement, an

effort should be made to bring together, to the extent it is feasible so to do, all of the dispute resolution mechanisms into a single or several consecutive, interconnected chapters. Such a consolidation would also focus consideration on dispute resolution generally.

Dispute Management

The Group considers that the complexities arising from a three-Party trade agreement without any background of tripartite dispute resolution between them argues for something more than the essentially *ad hoc* and informal arrangements currently in force between Canada and the United States. However, it is not convinced that a new international bureaucracy is required to be put in place at the inception of the Agreement. Enhanced arrangements within the existing structures may be all that is required at first as long as there is the possibility of adding new institutions in the future. What is essential is that the structure lend itself to meeting certain goals.

Disputes under the Agreement ought to be identified in their nascent stage. They ought to be managed in a way that will see them not only identified early but quickly resolved by negotiation. Where this fails, the system should ensure that issues are

(a) clearly defined and their parameters narrowed,
(b) where desirable, devolved for either future resolution or disappearance with the effluxion of time, and
(c) where necessary, resolved by following other procedures in the Agreement with as little confrontation as possible.

While to date the limited experience with the Chapter 18 mechanism in the Canada/U.S. Agreement seems to indicate that it has functioned reasonably well, the interrelationship between three bureaucracies will prove to be more complicated. A new tripartite North American Free Trade Commission, taking its inspiration from Article 1802 of the current Agreement, ought to provide more clearly for consultative arrangements at the public service level. In this regard Article 1802:4 of the current Canada/U.S. Agreement authorizes the establishment of *ad hoc*, or standing committees or working groups to whom responsibilities may be delegated. This permissive power should be spelled out in more detail.

Not only should the "early warning" mechanism based on existing governmental institutions be improved but also additional arrangements contemplated for the future. It should be possible for the Governments to constitute a modest intergovernmental body, perhaps a standing committee, to assist in the identification of disputes and, possibly, with the modalities of their resolution. It should be possible to effect this without in future having to amend the Agreement.

Besides a possible early warning function, powers in respect of coordination, mediation and fact finding would be desirable for such a body. For example, a fact finding function would enable Parties to put certain disputes in a holding

mode without appearing to neglect them. This could facilitate resolution at a later stage since impartial fact finding is frequently a precondition to the satisfactory resolution of problems. Coordination could become a problem and the existence of an intergovernmental mechanism might also be useful for this purpose.

The Group, therefore, recommends that the Agreement specifically authorize the Parties, if and when they determine it will be of assistance, to establish a permanent mechanism to assist with the resolution of disputes, although not necessarily to have some independent role in their management. It could be international. It could be joint, with three sections. It would be permanent, although it ought to be called upon only when certain tasks are required.

One specific mode of approaching such a mechanism would be through small organizations established in each capital as sections of an appropriately named institution. This is the formula used for the International Joint Commission. This body would be required to meet regularly but on a limited basis and would have as its mandate to undertake specific tasks either itself or through experts at the instance of at least two of the three Parties. One additional function might be to monitor for the Governments the administration of the Agreement from the point of view of dispute resolution.

It is also conceivable that, in future, such a mechanism might well become a catalytic force in dispute resolution. With time, if the Parties supported the evolution, it could acquire some weight in the process which would enable it to make recommendations, or participate in, various dispute resolution processes such as conciliation or mediation which are also implicitly now provided for in Article 1805:2 of the Canada/U.S. Agreement.

If this were done in the Agreement with some particularity, then the changing conditions, brought on by a functioning and important international instrument could, in future, be met in a flexible fashion and with a minimum of dislocation. Indeed, if the Parties contemplate the extension of the new Agreement to other states, such a mechanism would appear to be a necessary concomitant. Good as the existing bureaucracies may be, this optional plan would, in the view of the Group, add to the flexibility the new Agreement will obviously require.

Adjudication Regime

TREATY INTERPRETATION:

The centerpiece of the recommendations of the Group is that a permanent body, fulltime or capable of being convened without delay, be established to deal with disputes between the Parties which involve the interpretation and application of the new Agreement. Such a body would be the key element in the entire dispute resolution process. It would be a permanent institution although it need not involve structures which at the outset require full-time attention by those responsible. A stronger and more elaborate system than that now provided for in Chapter 18 of the Canada/U.S. Agreement is required.

The new Agreement will be new international law. Its interpretation can, therefore, properly be conferred on an international tribunal. There ought to be no national constitutional difficulties on this aspect. There are, however, two elements of concern. One is the application or execution of the decisions of the tripartite body by the Parties. This will be dealt with below. The other, and possibly related element, is the connection between interpretation and application of the Agreement and the national laws which either implement it or are impacted by it. In this area there could arise constitutional problems although it is hard to foresee their nature or extent.

The Group feels strongly that an interpretive body, independent and established under the Agreement in a permanent and not in an *ad hoc* fashion, is essential to the ultimate acceptance and smooth working of the document. While the Parties collectively ought to be able to negotiate issues outside a tribunal framework, any one Party should always be able to initiate proceedings before the Tribunal without the concurrence of the others. There should be provision for notification to a Party not initially involved in a dispute and for its participation in the proceedings.

CONSTITUTION OF THE TRIPARTITE TRIBUNAL:

A permanent Tribunal need not necessarily have members who have no other obligations. What is essential is there be constituted a permanent institution that can be called upon to deal promptly with interpretive issues whenever they arise. The members must be independent in both a formal and a real sense. They could be remunerated on a per diem basis until such time as the work of the Tribunal requires full-time membership and the concomitant requirement of provision for salaries. Clearly, however, the members should not have, and should refrain from, activities which might give rise to a conflict of interest with their Tribunal responsibilities.

Neither does a Tribunal have to begin with a full slate of members. It can commence with a minimum number to which, as workload may demand, others may be added. The new Agreement ought to make provision for such extension. At the beginning it may well be that only three members are required. There should, however, be alternate members so that the Tribunal can function effectively and without delay. Both permanent and alternate members would come from the ranks of the bench, bar, or academic communities of the three Parties. The Agreement could provide for additional members, probably six, plus alternates at the nomination of the respective Parties when they shall have agreed that the Tribunal should be enlarged.

The Group does not favor the constitution of a Tribunal with members other than from the three Parties. The new Agreement will be a North American Agreement with issues familiar to jurists from Canada, Mexico and the United States. One must assume an independence of mind on the part of its members

and the evolution of a Tribunal which, because of its composition, would quickly take on the characteristics of a court rather than an arbitral body.

Consideration should, however, be given to the possibility that the Tribunal be empowered to appoint experts in the role of assessors to assist it in technically difficult cases. The Agreement might provide for these contingencies where, in any given case, all Parties agree that the Tribunal should be so constituted or assisted. This would probably also require a somewhat larger panel and it would be necessary to make provision for spelling out those details. One way of handling this and other details would be to empower the North American Free Trade Commission to make detailed rules for the organization and functioning of the Tribunal.

The new Tribunal, perhaps called the North American Trade Tribunal, would be supported by a very small Registry which, again, could be increased if the workload so demanded. Both the Registry and the Tribunal ought to operate from a central location but, perhaps, away from the capitals. This would underscore the neutrality of the institution. Of course, the Parties may prefer a perambulating body which would hold sessions in the territories of each of the Parties. A fixed location which might be seen to be sufficiently neutral from a geographic point of view is, however, to be preferred.

It may be that, initially at least, the Secretaries of the North American equivalent to the Chapter 19 system under the Canada/U.S. Agreement (Article 1909) could perform the Registry task, assuming, of course, that that system is adopted for the new Agreement and a Mexican Secretariat is established. This would allow gradual evolution of the system and avoid a top heavy bureaucratic structure at the inception of the Agreement. Rules governing the operation of the Registry and proceedings before the Tribunal would be made by the Tribunal.

POWERS OF THE TRIPARTITE TRIBUNAL:

The Joint Working Group considers that a North American Trade Tribunal should have jurisdiction with respect to disputes involving the interpretation and application of the North American Free Trade Agreement. This would include issues of the consistency of national laws with the Agreement. Where there are differing views as to their respective rights or obligations under the Agreement, if the Parties cannot agree among themselves, any one of them should have the right to put the issue to the Tribunal.

There is a second area which could be included in the powers of the North American Trade Tribunal. There may well be instances in the domestic courts of the three Parties where a view must be taken on the interpretation of the Agreement. This could also arise in relation to the activities of Chapter 19 type panels. The Working Group believes it would be desirable for the North American Trade Tribunal to be given power, upon request, to provide an opinion to a domestic court on the interpretation of particular provisions of the Agreement. Compare Article 1808 of the Canada/U.S. Agreement. The precise modalities could be set forth in the Tribunal's rules.

It must be acknowledged that divorcing the issue of interpretation from all the facts of a given case may not be desirable in many circumstances. Likewise, there could be problems of timing. On the other hand, the possibility of securing an opinion—which could be adopted or rejected by the domestic court in its application to the particular facts—might well, over time, provide an interpretive framework that would be most useful. The Group recommends that there be incorporated in the Agreement a scheme for reference of questions on the interpretation of the Agreement at the instance of the domestic court concerned. Domestic law may also have to be amended accordingly.

BINDING ARBITRATION AND THE PANEL SYSTEM:

Whether the suggested Tribunal procedure should be in substitution for or in addition to the arbitration and the panel systems as now provided in Articles 1806 and 1807 of the Canada/U.S. Agreement is less clear. The Group recommends that the regime be rationalized and that the Tribunal procedure be the only one available for the disposition of issues relating to the interpretation and application of the new Agreement. To the extent not overtaken by this formula, the existing system could continue to apply to Canada/U.S. disputes.

With respect to future proposed measures which may affect the operation of the new Agreement, the Group would consider it less complicated if only the new system were to apply. There would be but one recourse in these circumstances to the Tribunal. On the other hand, it is recognized that there may be reasons to retain the current Canada/U.S. formula for proposed measures which may demand a less formal and more flexible approach such as that offered by the panel procedures in Article 1807 of the present agreement. Having regard to the proposed right of any Party to initiate proceedings before the Tribunal, agreement of the Parties to the dispute would be required.

In this event the equivalent of Article 1807 of the present agreement may have to be recast and consideration given to whether only two or all three Parties must be represented on a panel. On the face of it, with three Parties to the Agreement, the latter alternative commends itself. Similar complications would be involved were the Parties to wish to retain the section 1806 process as an alternative where the Parties to a dispute agreed.

DECISIONS:

The Joint Working Group also considered the mechanisms for the implementation of decisions under Chapter 18 of the Canada/U.S. Agreement. While the scheme of retaliation there found may be the only one available at international law to underpin decisions or judgments of a North American Trade Tribunal, the current Chapter 18 mechanism lacks the suasion that could be offered by a general obligation to implement decisions.

The Group recommends, in consequence, that the new Agreement incorporate a basic obligation on the Parties to implement decisions of the North American Trade Tribunal. This obligation would be supported by a system for retaliation if decisions were not implemented within a given period of time or not implemented in an integral fashion. To the extent it may be possible to do so, the amount of retaliation allowed ought to be limited to the degree of default of implementation or the seriousness of the issue. Put another way, the retaliation ought to be at the level of the nullification or impairment produced by the failure to implement the decision.

REVIEW OF DOMESTIC PROCESSES:

A feature of the Canada/U.S. Free Trade Agreement is the Chapter 19 mechanism for dealing with the application of national trade laws. That provision was included because there was no agreement on the substantive issues of anti dumping and countervail. Essentially Chapter 19 provides for recourse to a specially constituted panel for the determination of issues relating to the application of national law where these would otherwise be determined by the national courts. Chapter 19 does not change national laws, it simply establishes what appears to be an independent and bilateral mechanism for their interpretation—an interpretation based on the law of the jurisdiction where the matter arises.

Brief consideration was given by the Group to the alternative of the inclusion in the jurisdiction of the Tribunal of domestic-type issues now dealt with under Chapter 19 of the Canada/U.S. Agreement. There may have been merit in this were the matter to have begun without a history of the considerable experience with the special dispute resolution mechanism in Chapter 19. The Group felt it was not practical to seek to recast the system for the new Agreement assuming, of course, that there will be a Chapter 19 type formula included in it.

While at first blush the Chapter 19 system may appear to be flawed in the sense that it is the laws rather than their administration that may be objectionable, it has in practice worked very well. There has been general, if not total, satisfaction with the results of individual cases as well as with the collective experience. It has also permitted the disengagement of the respective national bureaucracies to some large degree and allowed the aggrieved interests in each country to make their cases without any overhanging linkage to other issues. Moreover, the disposition of contentious matters has been speedy.

The very success of this system makes its extension to a new arrangement most desirable. Whether or not it is altogether logical and whether or not it responds fully to the real legal difficulties in the trade relationship, as between Canada and the United States, experience has shown that the system works. It should also work well in a North American context. An effort should, therefore, be made to make such alterations in it as will fully accommodate the third partner in the new Agreement.

These modifications will not, however, be purely formal. The following new aspects must be addressed:

1. The existence of a dispute involving interests in two of the three Parties will have to be signalled to the third Party in case its interests are an issue directly or indirectly. To this end a system focused on the provision of notice will have to be worked out.
2. The present panel system may well have to be revised. Depending on the issue, it could be that all three Parties should be represented on a panel. This may, in turn, involve panels of a different size. This aspect will have to be carefully thought out so as not to result in any watering down in the effectiveness of the present system.
3. With the addition of a third language in the relationship and the possibility of proceedings on both a bilateral and a trilateral basis, the question of the language of panel proceedings to be conducted will arise. In addition, there may be questions of procedure which heretofore have been taken for granted that will require review.
4. Further consideration will have to be given to the binding character of the decisions and their influence on the tripartite relationship. In this latter regard, will a Canada/U.S. decision involving, say, Canadian law, have any effect on the administration of analogous Mexican trade law for similar goods from the United States?

Because of its success and its importance to private parties and their lawyers, the Group recommends that serious consideration be given to extending the Chapter 19 procedure under the new Agreement to tariff classification, sanitary and other standards and rules of origin. Where in proceedings taken before a panel on any such issue a substantial question arises respecting the interpretation or application of the new Agreement the Panel should be empowered to refer the question to the Tribunal in accordance with the procedure described below.

Private Party Issues

DOMESTIC PROCEEDINGS:

As already noted, the current Chapter 19 arrangements have seen private parties largely in control of issues with which they are directly concerned. It has also seen the elimination from the consideration of the matter at hand of other unrelated issues between the U.S. and Canada. It is most desirable that this continue under a North American Free Trade Agreement and, as suggested above, where possible be extended.

There may, however, be issues arising in relation to the administration of domestic trade laws that affect the larger interests of the Parties to the new Agreement. In consequence, each Party might be given the opportunity to involve itself in such domestic proceedings, even if it means detracting from the position of the aggrieved private party. It is to be hoped that such situations will

be rare, but the paramount interest of the Parties to the Agreement should be recognized. The same approach is even more valid in relation to Chapter 19-type panels.

As well, before Chapter 19-type panel procedures are instituted, issues involving private parties before the administrative apparatus of one of the Parties to the Agreement should have some predictable course. In other words, the new Agreement ought, at the very least, to ensure that domestic administrations cannot frustrate recourse by private parties to the international review process where matters covered by the new Agreement are concerned.

Finally, the Group feels that private parties will have to rely on local legal advice and, subject to the immediately preceding consideration, submit themselves to the local legal system so that no special arrangements should be contemplated. This includes language, procedure and substantive law as amended to implement the Agreement.

BEFORE THE TRIPARTITE TRIBUNAL:

It may also be desirable to allow private parties to appear in proceedings before the North American Trade Tribunal. Where an issue of the interpretation or application of the Agreement arises and where a private party is intimately concerned in a concrete and real way, there should be the possibility of that party becoming involved in the proceeding before the Tribunal, with a right ordinarily limited to submitting written argument unless special conditions for participation are otherwise established.

The Group feels that participation could be controlled by a specific requirement that any private party seeking to participate in proceedings before the Tribunal establish that there is involved a matter in which that party has an identifiable and proximate legal interest. Mere concerned bystanders should not be allowed to involve themselves.

A different situation may, however, pertain where a reference procedure is, as suggested, incorporated in the jurisdiction of the Tribunal. In a case where it is followed, it may well be that private parties are the principal protagonists and will have the burden of argument before the Tribunal. Depending on the circumstances, the Parties to the Agreement may have an equal or greater interest. They should be permitted to involve themselves as of right and as full participants to the proceedings. As they would have a broader interest in the operation of the Agreement as a whole, they should be recognized as having an important role in any proceedings where it is to be interpreted.

A question arises, particularly in circumstances where there may be no Chapter 19 procedure, whether a private party should have some right to initiate proceedings before the Tribunal in respect of the implementation of treaty obligations on, say, tariff classification, rules of origin or like matters. The Group takes the view that the Parties to the agreement remain in form the only persons who can initiate proceedings before the Tribunal.

It recommends, however, that each Party make provision for a system whereby private parties can petition their government to raise issues of interpretation and application before the Tribunal when local remedies are exhausted or unavailable. The system might include the obligation on the government to give due consideration to the matter and on the private party to carry the burden of the proceedings in given circumstances. Such a system would have advantages both for the governments and for private parties as the current Chapter 19 procedure attests.

Summary of Recommendations

The ABA/CBA/BM Working Group, having taken into consideration their respective legal systems and the importance to the effective operation of a North American Free Trade Agreement of adequate and sound dispute resolution procedures embodying shared legal values, consider that the new Agreement should, in order of priority, provide for

a) the establishment of a Tribunal to decide disputes concerning the interpretation and application of the new Agreement;
b) broad recourse for private parties in respect of trade disputes with which they are concerned; and
c) an effective and flexible system for the identification and management of disputes.

These elements are fundamental to such dispute resolution procedures and the Working Group recommends they be given effect through adoption of the following:

1. The new Agreement should provide for more extensive and intensive consultation for dispute resolution than now contemplated by the Canada/U.S. Agreement.
2. Provision should be made for the establishment in the future of an optional institutional mechanism for dispute prevention and management. It could be constituted as an international body or a tripartite body with national components. Its task would be to assist Parties in the resolution of disputes.
3. A system of notification to Parties of existing disputes and of monitoring their progress ought to be instituted. A Party should, where it considers its interests under the Agreement to be affected, be able to intervene at an appropriate level to make representations on the subject matter. The system should permit the adoption of conciliation and mediation where they can be agreed on.
4. A permanent tripartite tribunal consisting of an equal number of members appointed by each Party and with their independence guaranteed should be established to hear and determine cases involving the interpretation and application of the Agreement. To this jurisdiction could be added a power to hear references from national tribunals concerning the interpretation of the Agreement.

5. It would be desirable that the tripartite tribunal replace the binding arbitration and panel review systems in the Canada/U.S. Agreement but it is recognized that one or both methods may provide some desirable flexibility in the operation of the Agreement that the Parties would wish to retain.
6. The Chapter 19 process in the Canada/U.S. Agreement ought to be adopted, with necessary modifications, for the new Agreement.
7. The adjudication regime ought to be extended to tariff classification, sanitary and other standards, and rules of origin.
8. The rights of private parties of one state before the national courts and tribunals of the other two states should be protected so that espousal of their claims by their own state at the international level, although not excluded, would be rendered unnecessary in most cases.
9. The rights of private parties before any permanent or *ad hoc* tribunal under the Agreement should be defined and their involvement in any proceeding that may determine their legal interests specifically permitted and its limits defined.
10. Consideration should be given to permitting the Parties to the Agreement to involve themselves in trade related issues arising out of the Agreement where important questions going to its interpretation or operation are before domestic courts. A system of notice ought to enable this to be made effective.

Joint ABA/CBA/BM Working
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