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Settlement of International Disputes between Canada and the USA

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*AMERICAN BAR ASSOCIATION
AND
CANADIAN BAR ASSOCIATION*

SETTLEMENT OF INTERNATIONAL DISPUTES BETWEEN
CANADA AND THE USA

*Resolutions Adopted
By the American Bar Association on 15 August 1979
and
By the Canadian Bar Association on 30 August 1979
with
Accompanying Reports and Recommendations
20 September 1979*

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PREFACE

On 15 and 30 August, respectively, the American and Canadian Bar Associations took a historic step, approving and recommending to the attention of the Canadian and the United States Governments, as possible basis for negotiation, two important documents:

- (a) a draft treaty on a regime of equal access and remedy in cases of transfrontier pollution between Canada and the United States; and
- (b) a draft treaty on third party settlement of disputes relating primarily to the interpretation, application or operation of any treaty in force between Canada and the United States.

This volume contains the English [...] texts of the two resolutions and the two treatises, the special report presented to the House of Delegates of the American Bar Association by that Association's Section of International Law, and, last but not least, the extensive report of the Joint Working Group on the Settlement of International Disputes, which for several years has studied the subject and prepared by a truly joint effort both the draft treatises and a commentary on them, together with a comprehensive survey of the many and varied disputes between the two countries, of the means used for their settlement, and of the needs for the improvement and reinforcement of existing procedures.

The two chairmen of the Working Group are grateful to the members of the Group for their contributions to the final report and especially the cooperative spirit in which they have worked, and to the two Associations and their officers for the constant support they have received in completing this arduous but rewarding task.

Henry T. King, Jr.
T. Bradbrooke Smith, Q.C.

Co-Chairmen of the
Joint Working Group
on the Settlement of
International Disputes

American and Canadian
Bar Associations

1. RESOLUTION

Adopted by the House of Delegates of the American Bar
Association
at Dallas, Texas, on 15 August 1979.

BE IT RESOLVED, that the American Bar Association commends to the attention of the competent officials of the Government of the United States, as possible bases for negotiation with the Government of Canada:

(a) the draft treaty on a regime of equal access and remedy in cases of transfrontier pollution between the United States and Canada; and

(b) the draft treaty on third party settlement of disputes relating primarily to the interpretation, application, or operation of any treaty in force between the United States and Canada, which are contained in the Report of March 20, 1979 of the American and Canadian Bar Associations Joint Working Group on the Settlement of International Disputes.

2. RESOLUTION

Adopted by the Canadian Bar Association
at Calgary, Alberta, on 30 August 1979.

BE IT RESOLVED THAT the Canadian Bar Association commends to the attention of the competent officials of the Government of Canada as possible bases for negotiation with the Government of the United States:

(a) the draft treaty on a regime of equal access and remedy in cases of transfrontier pollution between the United States and Canada; and

(b) the draft treaty on third party settlement of disputes relating primarily to the interpretation, application, or operation of any treaty in force between the United States and Canada,

which are contained in the Report of March 20, 1979 of the American and Canadian Bar Association Joint Working Group on the Settlement of International Disputes.

[French portion of the Settlement of Disputes Between Canada and USA omitted.]

4. DRAFT TREATY ON A REGIME OF EQUAL ACCESS AND REMEDY IN CASES OF TRANSFRONTIER POLLUTION

Article 1: Definitions

For the purposes of this Treaty:

(a) "Pollution" means any introduction by man, directly or indirectly, of substance or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources or eco-systems, impair amenities or interfere with other legitimate uses of the environment.¹

(b) "Domestic pollution" means any intentional or unintentional pollution, the physical origin of which is situated wholly within the area under the jurisdiction of one Party and which has effects within that area only.²

(c) "Transfrontier pollution" means any intentional or unintentional pollution whose physical origin is subject to, and situated wholly or in part within the area under the jurisdiction of one Party and which has effects in the area under the jurisdiction of the other Party.³

(d) "Country of origin" means the Country within which, and subject to the jurisdiction of which, transfrontier pollution originates or could originate in connection with activities carried on or contemplated in that Country.⁴

¹ The Oxford English Dictionary defines "pollution" as "the presence in the environment, or the introduction into it, of products of human activity which have harmful or objectionable effects." While similar, the Treaty's definition is more specific in defining the potential negative effects of pollution. "Pollution" is not defined in the Black's Law Dictionary. See 7 J.A. SIMPSON & E.S.C. WEINER, THE OXFORD ENGLISH DICTIONARY 43 (2d ed. 1989). See generally BLACK'S LAW DICTIONARY 1197 (8th ed. 2004).

² Neither The Oxford English Dictionary nor Black's Law Dictionary define "domestic pollution." See generally SIMPSON & WEINER, *supra* note 1. See generally BLACK'S LAW DICTIONARY, *supra* note 1.

³ Neither The Oxford English Dictionary nor Black's Law Dictionary define "transfrontier pollution." *Id.*

⁴ By contrast, the phrase "country of origin" in the North American Free Trade Agreement ("NAFTA") context is used to refer to the cases where exported goods are eligible for favorable tariff treatment because their country of origin is a signatory to the

(e) “Exposed Country” means the Country affected by trans-frontier pollution or exposed to a significant risk of transfrontier pollution.⁵

(f) “Persons” means any natural or legal person, either private or public.⁶

Article 2: Rights of Persons Affected⁷

(a) The Country of origin shall ensure that any natural or legal person resident in the exposed Country, who has suffered transfrontier pollution damage or is exposed to a risk of trans-frontier pollution, shall at least receive equivalent treatment to that afforded in the Country of origin, in cases of domestic pollution or the risk thereof and in comparable circumstances, to persons of equivalent condition or status resident in the Country of origin.

(b) From a procedural standpoint, this treatment shall include but shall not be limited to the right to take part in, or have resort to, all administrative and judicial procedures existing within the Country of origin, in order to prevent domestic pollution, to have it abated, and/or to obtain compensation for the damage caused.

Agreement. The requirements for such treatment are in the NAFTA’s Rules of Origin. See North American Free Trade Agreement, U.S.-Can.-Mex., arts. 401-15, 1904, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

⁵ Neither The Oxford English Dictionary nor Black’s Law Dictionary define “exposed country.” See generally SIMPSON & WEINER, *supra* note 1. See generally BLACK’S LAW DICTIONARY, *supra* note 1.

⁶ Black’s Law Dictionary defines “person” as “a human being.” Black’s Law Dictionary defines a “legal person” under the term “artificial person” as “an entity, such as a corporation created by law and given certain legal rights and duties of a human being; a being, real or imaginary who for the purpose of legal reasoning is treated more or less as a human being.” BLACK’S LAW DICTIONARY, *supra* note 1, at 1178.

⁷ Currently, the NAFTA prefers parties pursue private causes of action in environmental disputes. However, a party can appeal to “the Party’s competent authorities to investigate alleged violations of its environmental laws and regulations.” The NAFTA Environmental Side Agreement emphasizes autonomy to national environmental laws and regulations rather than using the agreement to create strong rights for individuals to seek corrective action. See William D. Merritt, *A Practical Guide to Dispute Resolution Under the North American Free Trade Agreement*, 5 NAFTA L. & BUS. REV. AM. 169, 199-201 (1999).

- (c) In the case of requirements for security of cost, this treatment shall at least be equivalent to that accorded to a non-resident national of the Country of origin.

Article 3: Rights of Public and Private Organizations⁸

- (a) (1) Where the domestic law of either Party or a political subdivision thereof permits persons who are resident or incorporated within its own territory, such as environmental defense associations, to commence or to participate in administrative and judicial procedures to safeguard general environmental interests, that Party or subdivision shall grant the same rights for comparable matters to similar persons resident or incorporated in the territory of the other Party, provided that these persons satisfy the conditions laid down for persons resident or incorporated in the Country of origin.
- (2) When some of the conditions concerning matters of form laid down in the Country of origin cannot reasonably be imposed on persons resident or incorporated in the exposed Country, these latter should be entitled to commence proceedings in the Country of origin if they satisfy comparable conditions.
- (b) When the law of a Party or a political subdivision thereof permits a public authority to participate in administrative or judicial procedures in order to safeguard general environmental interests, that Party shall provide competent public authorities of the exposed Country with equivalent access to such procedures.

Article 4: Notice to Persons in the Exposed Country

- (a) The Country of origin shall take any appropriate measures to provide persons exposed to a significant risk of transfrontier pol-

⁸ The NAFTA grants symmetrical treatment of parties in both countries. However, the NAFTA removes the parties' choice of forum by instituting review through binational panels. Each nation retains its law and precedents, but either government can demand an appeal to a binational panel. See Juscelino F. Colares & John W. Bohn, *NAFTA's Double Standards of Review*, 42 WAKE FOREST L. REV. 199, 206 (2007).

lution with notice sufficient in form and content to enable them to exercise in a timely manner the rights referred to in this Treaty. As far as possible, such notice should be at least equivalent to that provided in the Country of origin in cases of comparable domestic pollution. It shall be sent also to any authority designated for this purpose by the exposed Country.

(b) The exposed Country may designate one or more authorities which will have the duty to receive and the responsibility to disseminate such notice within limits of time compatible with the exercise of existing procedures in the Country of origin.

(c) Where such an authority has been designated, notification to it shall constitute fulfillment of the obligation of the Country of origin under paragraph (a). Failure of the exposed Country to designate an authority under paragraph (b) in no way affects the obligation of the Country of origin under paragraph (a).

Article 5: Limitation of Rights Granted

In no event shall the provisions of this Treaty be construed as granting, per se, any greater rights to persons resident or incorporated in the exposed Country than those enjoyed by persons of equivalent condition or status resident or incorporated in the Country of origin.

[French portion of the Settlement of Disputes Between Canada and USA omitted.]

6. DRAFT TREATY ON A THIRD-PARTY SETTLEMENT OF DISPUTES

Article 1: Compulsory Jurisdiction

In any dispute between the States Parties, any question of interpretation, application or operation of a treaty in force between them, which has not been settled within a reasonable time by direct negotiations or referred by agreement of the Parties to the International Court of Justice or to some other third-party procedure, shall be submitted to third-party settlement at the written request of either Party addressed to the other's cabinet officer in charge of foreign affairs, or by an exchange of notes between the two.⁹

Article 2: Optional Jurisdiction

1. Any other dispute between the States and Parties relating to a question or principle of international law may be submitted to third-party settlement by special agreement between the Parties. Without limiting the generality of this principle, the Parties regard disputes concerning the following matters as particularly appropriate subjects for such special agreements:

- a. pecuniary claims in respect of losses or damage sustained by one of the Parties or its nationals as a result of acts or omissions of, or attributable to, the other Party;¹⁰
- b. immunities of States and of their agencies and subdivisions;¹¹

⁹ The NAFTA Chapter 20 contains the primary dispute resolution mechanism with two exceptions: antidumping and countervailing duties. Chapter 19 covers these disputes. Alleged breaches of the NAFTA provisions follow a three step resolution process: (1) consultations between parties; (2) if consultations fail, a meeting of the Free Trade Commission; and (3) if the meeting of the Free Trade Commission fails, formation of an arbitral panel. See Merritt, *supra* note 7, at 181.

¹⁰ This is a non-exhaustive list that was included to provide examples of disputes commonly submitted for international arbitration. Additionally, this area of law is relatively well established and can be readily applied. See generally American Bar Assn. & Canadian Bar Assn., *Reports and Recommendations of the American and Canadian Bar Associations Joint Working Group on the Settlement of International Disputes*, 22 INT'L LAW. 879 (1988).

¹¹ This is a non-exhaustive list that was included to provide examples of disputes

- c. privileges and immunities of Heads of States, Foreign Ministers and other high officials;¹²
 - d. consular privileges and immunities;¹³
 - e. treatment of the other Party's nationals;¹⁴
 - f. environmental issues;¹⁵
 - g. the management of natural resources of common interest;¹⁶ and
 - h. transnational application of civil and criminal laws.¹⁷
2. The special agreements referred to in the previous paragraph shall, for each case or group of cases, become effective through an exchange of diplomatic notes without any legislative action.¹⁸

commonly submitted for international arbitration. Additionally, this area of law is relatively well established and can be readily applied. *Id.*

¹² This is a non-exhaustive list that was included to provide examples of disputes commonly submitted for international arbitration. Additionally, this area of law is relatively well established and can be readily applied. *Id.*

¹³ This is a non-exhaustive list that was included to provide examples of disputes commonly submitted for international arbitration. Additionally, this area of law is relatively well established and can be readily applied. *Id.*

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¹⁶ Parties in dispute often need the support of a third party in facilitating the conflict management process when they have become caught up in their differences and are no longer able to find constructive ways to move forward. *See generally* Antonia Engel & Benedikt Korf, *Negotiation and Mediation Techniques for Natural Resource Management*, FAO, 2005, at 73, available at <http://www.fao.org/docrep/008/a0032e/a0032e06.htm>.

¹⁷ Agreement to settle disputes by various forms of third-party resolution makes possible international agreement and international contracts to which the parties would not otherwise agree. *See generally* LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUE* 56 (1995).

¹⁸ Because in international law a diplomatic note was regarded as binding on the state that issued it, a legislative action is unnecessary. It is becoming more necessary and possible for popular participation in foreign policy making. However, when policies regarding national security are involved, if we still call for democratizing American foreign policy, public opinions may rule out many traditional war-planning and war-

Article 3: Organization of Third-Party Settlement

Unless the Parties otherwise agree in a particular case, third-party settlement pursuant to Article 1 or Article 2 above shall be organized in each case as follows:

(a) Within 60 days either of the receipt by the other Party of the request for third-party settlement or of the date of signature of a special agreement, as the case may be, each of the Parties shall appoint one member of the arbitral tribunal. Within a further period of 60 days the Parties shall, by common agreement, select a third person who shall be the Chairman of the tribunal. Within further period of 60 days the Parties shall, by common agreement, select a third person who shall be the Chairman of the tribunal. If no agreement is reached on the selection of a Chairman within this period, either Party may request the President of the International Court of Justice to make the appointment. If the latter is prevented from acting or is a national of one of the Parties, the nomination shall be made by the Vice-President of the Court. If the latter is prevented from acting or is a national of one of the Parties, the appointment shall be made by the senior judge of the Court who is not a national of either Party. The time limits specified in this paragraph may be extended or shortened by agreement of the Parties.¹⁹

(b) If, for any reason, a tribunal is not constituted pursuant to the previous paragraph within 120 days of the receipt of the request for arbitration or of the date of signature of the arbitral agreement, either Party may, by written application submit the dispute to the International Court of Justice, to be decided by a Chamber thereof composed in accordance with the following paragraph. The acceptance by the Parties of the jurisdiction of the Court and its

prevention strategies. See generally Cageprisoners.com, Court Can Rely on Diplomatic Note From U.S. Embassy, www.cageprisoners.com/articles.php?id=17814 (last visited Apr. 14, 2009); see also Alan Tonelson, *Diplomacy vs. Democracy*, <http://www.nytimes.com/1990/02/04/books/diplomacy-vs-democracy.html?pagewanted=1> (last visited Apr. 14, 2009).

¹⁹ Under the NAFTA, if the Commission has convened and the matter has not been resolved within thirty days or the time period to which the Parties agree, then “any consulting party may request in writing the establishment of an arbitral panel.” Once it receives this request, the Commission will establish this panel. NAFTA, *supra* note 4, art. 2008.

special Chamber is subject to the condition that the Chamber has been established in accordance with that paragraph.²⁰

(c) The Parties agree that either of them will be authorized to request, at the time submitting a dispute to the Court, that the Court form a Chamber for consideration of the case pursuant to Article 26(2) of the Court's Statute and Articles 17 and 18 of its Rules, consisting of three judges, one national of Canada, one of the United States, and one of another State to be agreed upon by the Parties. If, at the time of application, one of the States Parties does not have a national on the Court, it shall, pursuant to Article 31(2) of the Court's Statute, nominate a person to sit as judge. If there is no agreement between the Parties on the third member of the Chamber within 30 days of the submission to the Court of an application pursuant to the previous paragraph, or if a Party with no national on the Court does not nominate a person to sit as judge within such time, that member or those members shall be elected by the Court from among its members. In any such case the Parties may jointly request that any election be made from among judges coming from a particular geographical region or representing a particular legal system or tradition.²¹

(d) Vacancies which may occur in an arbitral tribunal composed according to paragraph (a) above shall be filled in such manner as provided for original appointments. Vacancies occurring in the Chamber of the Court established pursuant to paragraphs (b) and (c) above shall be filled in accordance with the Statute and Rules of the Court.²²

²⁰ Under the NAFTA, when the Parties receive the panel's final report, they shall agree to the resolution of their dispute and report this decision to their Sections of the Secretariat. *Id.* art. 2018.

²¹ The disputing Parties shall agree on the chair of the panel, but if they are unable to agree, the Party chosen by a lot will choose the chair. If there are two Parties, then each Party will pick two panel members who are citizens of the other Party. If there are more than two Parties, then the Party complained against selects two panelists and the complaining Parties select the other two panelists. *Id.* art. 2011.

²² Unlike the Settlement of International Disputes, Article 1,124 of the NAFTA provides that in the event of a vacancy, or when the Parties are unable to mutually agree on an arbitrator, the Appointing Authority (International Centre for Settlement of Investment Disputes (ICSID) Secretary General) will choose arbitrators to complete the Tribunal. *See id.* art. 1124.

Article 4: Competence

1. The arbitral tribunal or the Chamber of the Court constituted in accordance with Article 3 shall have jurisdiction in any questions or dispute submitted to it in accordance with the provisions of this Treaty.
2. Any disagreement (a) as to whether such tribunal or Chamber has jurisdiction under this Treaty or any agreement concluded pursuant thereto, or (b) as to the extent of such jurisdiction, shall be settled by the decision of that tribunal or Chamber.

Article 5: Provisional Measures

1. An arbitral tribunal which considers *prima facie* that it has jurisdiction under this Treaty or an agreement concluded pursuant thereto shall have the power to prescribe, by order, any provisional measures which it considers appropriate to preserve the respective rights of the Parties pending final adjudication.
2. Such provisional measures may only be prescribed, modified or revoked upon the request of a Party and after giving both an opportunity to be heard.
3. Each order issued pursuant to the Article shall specify the time during which it is to be in effect, which in no case shall be longer than six months. Either Party may apply to the tribunal for renewal of an order issued pursuant to this Article.
4. Any order prescribing, modifying or revoking provisional measures shall be notified forthwith to Parties who shall promptly comply therewith.

Article 6: Location of Proceedings²³

1. Arbitration proceedings commenced at the request of one Party shall take place in the capital of the other Party, unless the Parties otherwise agree.
2. Arbitration proceedings commenced by agreement of the Parties shall take place at a location determined either (a) by the Parties' agreement, or (b) in default thereof by the tribunal itself.
3. Where a dispute is submitted to a Chamber of the Court pursuant to paragraphs (b) and (c) of Article 3, the Parties may request that the Chamber sit at the capital of one of the Parties.
4. The tribunal hearing a case may hold proceedings at locations other than its principal seat as and when the circumstances of the case make it desirable.

Article 7: Conduct of Proceedings

1. An arbitral tribunal constituted in accordance with paragraph (a) of Article 3 shall function in accordance with the Rules of Procedure annexed to this Treaty, unless the Parties should otherwise agree.
2. At the request of a Party, the tribunal may call upon any agency, subdivision or national of either Party to appear to give evidence or testimony, provided that the tribunal may not hear or receive evidence or testimony pursuant to this paragraph without the consent of the Party whose agency, subdivision or national is being called.
3. A Chamber of the Court formed pursuant to paragraphs (b) and (c) of Article 3 shall function in accordance with the applica-

²³ The NAFTA differs from the Settlement of International Disputes regarding the location of the arbitration. The NAFTA Article 1130 provides that the main consideration when deciding location is whether or not one Party is a Party to the New York Convention. If they are a Party to the Convention, then the arbitration will be held in that Party's territory. *Id.* art. 1130.

ble provisions of the Statute and Rules of the Court, unless the Parties should, by common agreement, request otherwise.

Article 8: Applicable Law²⁴

1. In deciding any question or dispute submitted to it pursuant to this Treaty, a tribunal or Chamber shall apply the principles and rules of international law, especially as reflected in the treaties and practice of Canada and of the United States, as well as other relevant principles of substantive law in force in either of the two countries, particularly those manifesting their common legal traditions.

2. If a case requires the application of the principles of substantive law in force in either of the two countries, but in the opinion of the tribunal there exists such a divergence between the relevant principles in force in Canada and in the United States that it is not possible to make a final decision on that basis, the tribunal shall apply such other common legal principles referred to in paragraph 1 as it considers appropriate, having regard to the desire of the Parties to reach a solution just to all interests concerned.

3. The Parties may agree on particular principles or rules to be applied by the tribunal.

Article 9: Finality, Binding Force and Interpretation of Decisions²⁵

1. Subject to Article 10, the decision of a tribunal or Chamber rendered pursuant to this Treaty is final and binding, and shall be complied with by both Parties. If the constitutional law of a Party does not permit or only partly permits a Party's compliance with the tribunal's decision, or if the necessary legislation has not been

²⁴ A Tribunal established under Article 1131 of the NAFTA shall decide the issues in dispute in accordance with the rules of the NAFTA and applicable rules of international law. *See id.* art. 1131 (stating, a "tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.").

²⁵ Unlike the Draft Treaty, the NAFTA decisions are not final and binding on the Parties. Under the NAFTA, a five-member arbitral panel issues a final report. Upon receipt of the report, the Parties determine a resolution which normally conforms, though it is not required, to the panel's recommendations. There are, however, enforcement measures, such as the suspension of benefits, to force the Parties to reach an agreement following the panel's issuance of the report. *See generally id.*

enacted, the Parties agree that the judgment of the tribunal shall specify pecuniary or other equitable satisfaction for the injured party.

2. In the event of disagreement as to the meaning or scope of the decision, the tribunal or Chamber which rendered it shall construe it upon the request of either Party.

3. The tribunal may, either *proprio motu* or on the request of one or both of the Parties, correct any manifest technical or clerical error in its judgment.

Article 10: Advisory Opinions

In any particular case, the Parties may agree that, instead of binding judgment, an arbitral tribunal constituted in accordance with paragraph (a) of Article 3 should render an advisory opinion.

[French portion of the Settlement of Disputes Between Canada and USA omitted.]

8. REPORT TO THE EXECUTIVE AND TO THE 1979
ANNUAL MEETING OF THE CANADIAN BAR
ASSOCIATION
JULY 1979

In 1975 and 1976, officers of The Canadian Bar Association were approached by representatives of the American Bar Association for the purpose of considering a proposal whereby the two associations would take an initiative toward creating a legal structure for peace in the world.²⁶

The discussions resulted in a modified proposal, a demonstration research project on the matter of disputes settlement between the two countries. This project was to be carried out by the representatives of the Section of International Law of the American Bar Association and representatives of the Constitutional and International Law Section of the Canadian Bar Association functioning as a joint working group.

This project was approved by the Executive of the Canadian Bar Association in December of 1976 and a modest budget was appropriated to it. The Canadian members of the Joint Working Group were designated as T. Bradbrooke Smith, Q.C., the then Chairman of the Constitutional and International Law Section; Co-Chairman, Professor J.G. Castel of Osgoode Hall Law School; and W.C. Graham, Q.C. with Professor George Alexandrowicz of Queen's University as co-rapporteur. American members were Henry T. King, Jr., Co-Chairman; Gerald Aksen; Professor Don Wallace; and Arthur T. Downey with Professor Louis Sohn of Harvard as co-rapporteur.

Following four lengthy meetings, the Joint Working Group distributed a draft report to a large number of interested persons for comment. It was also the subject of a panel discussion at the Annual Meeting of the Canadian Bar Association held in Halifax in August 1978. Reaction to the report was actively sought and all responses were reviewed at a final meeting of the Working Group early in 1979 following which the final report, dated March 20, 1979, was prepared.

While the entire area of disputes between the two countries is canvassed in the Report, the Group decided to confine its substantive rec-

²⁶ The Canada-United States relationship is such a valuable example of promoting peace in the world because though the two countries may momentarily disagree on certain issues, they overcome these differences in recognition of the mutual interests that unite them, which far outweigh any possible disagreement. See Canada and the United States: No Two Nations Closer, <http://www.canadainternational.gc.ca/can-am/Closer-etrouites.aspx> (last visited Apr. 12, 2009).

ommendations to two areas in respect of which it felt there was some real prospect of early adoption. These areas are the equalization of rights and remedies of private parties in both countries in relation to transfrontier pollution and the arbitration of differences of a legal nature between the two governments. For each, a draft treaty has been prepared that both subsumes the issues involved and provides a possible basis for negotiation between Canada and the United States.

The thrust of the proposed transfrontier pollution regime is that persons in both countries should have equal access to judicial and administrative procedures for prevention of and compensation for pollution damage. It should not matter on which side of the border the polluter is located, where the person affected lives, or in which jurisdiction the judicial or administrative protection is available. What is being proposed here is not a new legal system, but the adjustment of the two countries' existing municipal legal systems to accommodate equally residents of both in pollution matters. Moreover, the regime presented in the draft articles would not alter substantive rights or obligations on either side of the border; it would merely grant equal access to whatever procedures and remedies exist in either country. Thus, if a North Dakotan has a right of action for pollution prevention in a court somewhere in the United States, so should a Manitoban similarly affected, and vice versa.²⁷

The Group took a great deal of its inspiration in preparing this portion of the report from the 1977 OECD recommendation for the "Implementation Discrimination in Relation to Transfrontier Pollution."²⁸ Both Canada and the United States are members of OECD and should take the lead in putting the Council's recommendation into practice. The Group recognized the fact that there might be questions of detail and concerns about the practicalities of implementation of this proposal in the two federal systems. A number of suggestions were made as to how to resolve some of the problems and these are included in the text of Part III of the Report.

²⁷ The 1977 OECD recommendation document outlines many of the problems both the United States and Canada will encounter in the implementation of equal judicial and administrative access in transfrontier pollution matters. Among the recommendations, most importantly, are general principles that facilitate interstate cooperation and compatibility in legislating policy. See *infra* Annex B.

²⁸ It is efficient for the actual or potential victim to have a remedy in a court that lies in the country where the pollution originated. In addition, polluters will be held accountable for their actions because victims will have a right to legal action in their jurisdiction. Cooperation in matters such as transfrontier pollution will lead to better diplomatic relations between the two countries and make it easier for the two nations to tackle future problems in the years to come. *Id.*

Part III of the Report contains suggested treaty articles which would provide the framework necessary for the implementation of the suggested system. Article I defines the critical descriptive terms to be used in the remainder of the treaty including "pollution," "domestic pollution," and "transfrontier pollution." Article 2 is the main operative provision of the treaty. It ensures that the actual or potential victim of transfrontier pollution will have a remedy in the courts of the country where the pollution originated, if a victim residing in that country would have had a remedy in the case of domestic pollution. Article 3 enables public and private environmental groups in one country to have the same right to protect the general environmental interest of their country in the courts or administrative proceedings of the other as comparable groups in the latter have. Article 4 ensures that each party will have sufficient information from the other so that the residents of the country affected by transfrontier pollution may make full and effective use of all remedies available under the treaty.

In recommending this approach the Joint Working Group had in mind the requirements of private parties and litigants. It should not be necessary, and it is certainly not desirable, that the intercession of Governments be resorted to in cases of pollution damage. Bearing in mind the similarities in the legal systems and in the approach taken by legislatures in relation to pollution, the Group regards this proposal as not only just, but eminently practical. While the problems of implementation are considerable, having in mind the federal systems, the goal is not by any means out of reach.

The second proposed treaty reflects the view that a system for third-party settlement of legal disputes between the two Governments should be established and maintained for use as and when required. The system offered has the simplicity and flexibility of arbitration and the permanence and consistency of judicial settlement. It is custom-designed for the legal backgrounds of our two countries and for their situation as North American neighbors. Essentially, it is composed of a mechanism to which either the United States or Canada could submit disputes arising out of any question of the interpretation application or operation of a treaty in force between them. This would be the main jurisdictional provision of the dispute settlement mechanism. The Group felt that such a provision would strike a balance between giving to it at its inception a strictly limited jurisdiction but yet providing it with a basic core of jurisdiction that would enable it to function from its inception.

As the Group had an optimistic view of its acceptance and use by both countries, it was further provided that it should have a rather more extended optional jurisdiction, based on the consent of the parties. The

categories of appropriate subjects in respect to which parties could be expected to use the dispute settlement mechanism are the following:

- a. pecuniary claims in respect of losses or damage sustained by one of the Parties or its nationals as a result of acts or omissions of, or attributable to, the other Party;
- b. immunities of States and of their agencies and subdivisions;
- c. privileges and immunities of Heads of States, Foreign Ministers and other high officials;
- d. consular privileges and immunities;
- e. treatment of the other Party's nationals;
- f. environmental issues;
- g. the management of natural resources of common interest; and
- h. transnational application of civil and criminal laws.

The mechanism for dispute settlement is a three-person arbitral tribunal. However, if the parties cannot agree on its constitution within 120 days, then the matter is referred to a special chamber of the ICJ. It is hoped that the normal procedure will be the setting up of an arbitral tribunal in accordance with the wishes of the parties rather than the Chamber of the Court, which will only be used as a last resort. The Group has also made suggestions for the procedure and the applicable law to be used in such third-party dispute settlement procedures.

The main provisions of this treaty are as follows: Article 1 limits compulsory jurisdiction to questions of interpretation, application, or operation of a treaty in force between the two countries. Article 2 makes it clear that all disputes not subject to such compulsory jurisdiction may be submitted to third-party settlement only through an ad hoc agreement of both countries and sets forth eight categories of disputes especially appropriate for such special agreements. Article 3 provides the details of the procedure for the constitution of a three-member arbitral tribunal or for submission of a dispute to a special chamber of the International Court of Justice. Article 4 enables an arbitral tribunal or judicial panel to determine the scope of its jurisdiction. Article 5 discusses provisional measures which may be prescribed by arbitral tribunals. Articles 6 and 7 deal with questions of applicable law. Article 9 specifies that parties shall comply with the decisions rendered pursuant to this treaty. Article

10 allows the tribunal to render an advisory opinion if the parties agree thereto.

The proposed system establishes legal procedures to complement existing diplomatic and related procedures. Even though the preponderant majority of cases are resolved by bilateral negotiations, the availability of a third-party decision to the process is crucial. There are questions on which the two States may reasonably disagree, and in which a genuine reconciliation of legally supportable conflicting positions cannot be had through negotiations because each side continues to maintain the legal validity of its claim. At other times difficult and unsettling negotiations do lead to a solution, but it may not be a genuine accommodation. Instead it can be merely a patching over of the fundamental disagreement, or a solution based on political advantage or bargaining power.

In addition, negotiations cannot, by themselves, continue to constitute an adequate dispute settlement system for two countries with a relationship which continues to grow in extent and complexity. What has worked reasonably well in the past may be inadequate in the future. Third-party settlement can ensure that, in appropriate cases, issues are kept self-contained and are dealt with on their own merits, without "linkage" to other bilateral issues. It, therefore, accommodates the widely held view that in complex bilateral relations it may frequently be unwise to "trade off" the interests of different groups and regions. Consequently, the proposed treaty suggests that where a dispute is a legal one or has legal aspects, obligatory arbitration or adjudication may be the most efficient and equitable means of settlement. Where a dispute is wholly legal, the prospect of compulsory arbitration encourages negotiators to find a solution. Where a dispute is partially legal, arbitration of the legal questions can reduce the dimensions of the dispute and provide a framework which will simplify resolution of the remaining issues.

Finally, it is believed that general compulsory jurisdiction is especially appropriate for Canada and the United States in large part because their mutual treaties are many and varied. If arbitration or adjudication is permitted to range over this entire field, the satisfaction which either State may find in any particular decision will be balanced by success of the other State in other decisions. The net result over a period of time will then properly reflect the equality and fairness inherent in genuine third-party proceedings. The automatic availability of third-party settlement should reduce tension and diminish frustration by assuring that a genuine and impartial solution can be had if negotiations will not produce one.

In summary, the Group believes that the automatic availability of third-party settlement will not create acrimony or mistrust. Rather it will reduce tension and diminish frustration; it will assure that a genuine and

impartial solution can be had if negotiations will not produce one. Because negotiations between the two States have been reasonably successful, the two Governments should have sufficient faith in the relationship to be able to agree on a compulsory settlement regime. The members of the Group feel that it is legitimate to hope that the Governments may, as between themselves, have the same faith that they expect from their citizens. If any two States should be able to settle their legal disputes through legal procedures, it is the United States and Canada.²⁹

At the same time, in making these recommendations the Group emphasizes that the proposed arbitral/judicial system is not offered in opposition to or replacement of the present system of bilateral negotiations, including use of the International Joint Commission; what is offered is merely a supplement to the diplomatic relationship. Under the proposed treaty, third-party settlement would be available only when all efforts at negotiation had failed. The arbitral or judicial panel would not have jurisdiction until then; it would be obliged to dismiss a case brought prematurely. And substantial international and municipal jurisprudence would provide clear and certain guidance in the determination of whether the obligation to negotiate fully and in good faith had been complied with. Furthermore, the decision about when to move from the diplomatic to the legal phase in any case would, by terms of the proposed text, be left in the hands of the cabinet officers in charge of foreign affairs.

The Group recognizes that there are a number of issues currently outstanding between the two countries, some of which are quite pressing and difficult to resolve. Several of these are noted in Parts I and II of the report. While it is tempting to seize the moment and offer its recommendations as the solution to these pending questions, the Group does not do so. What the Group is suggesting is that the two Governments, in the face of the demands of the day, set aside some time to consider a system which might moderate those demands on some future day.

T. Bradbrooke Smith, Q.C.
Co-Chairman of the ABA/CBA Joint Working
Group on the Settlement of International Disputes

²⁹ The United States and Canada enjoy an extensive trade relationship. The inevitable disputes that arise from this relationship, in most instances, are adequately handled using the dispute resolution mechanisms provided for in bilateral and multilateral agreements. *See generally* Press Release, Cliff Snow, Prakash Narayanan & Andrew Thompson, Blake, Cassels & Graydon LLP, *Emerging Issues in Trade Litigation Between Canada and the United States* (June 12, 2007), http://www.blakes.com/english/view_disc.asp?ID=1442 (concluding that joint reliance on diplomatically initiated rules-based systems is healthy for the trade relationship between Canada and the United States).

9. REPORT TO THE HOUSE OF DELEGATES OF THE
AMERICAN BAR ASSOCIATION BY THE SECTION OF
INTERNATIONAL LAW
AUGUST 1979

In 1975 and 1976, officers of the Canadian Bar Association were approached by representatives of the American Bar Association for the purpose of considering a proposal whereby the two associations would take an initiative toward creating a legal structure for peace in the world.

The proposal for the project originated at a meeting of the leadership of the Section of International Law of the American Bar Association which was held in October 1974. After the discussions with representatives of the Canadian Bar Association, it was felt that the most practical course of action would be a research project on the matter of dispute settlement between the two countries to be carried out by a joint working group composed of members of the two associations. The approval by the Canadian Bar Association of this project was secured in December 1976.

The project has been a joint effort in the fullest sense of the word and essentially a partnership between representatives of the two bar associations. Henry T. King, Jr., Gerald Aksen, Professor Don Wallace, Jr., and Arthur T. Downey have represented the Section of International Law with Professor Louis B. Sohn acting as U.S. rapporteur.

The Joint Working Group on the Settlement of International Disputes held numerous meetings between December of 1976 and March of 1979. In July 1978, a preliminary draft of the Group's report was sent for review to about 150 people and organizations in both countries. The Group tried to canvass all those who might be interested in commenting on the proposed recommendations in the report.

The entire area of disputes between the two countries was canvassed in the report of March 20, 1979, which is referred to in the resolution. However, the Group decided to confine its substantive recommendations to two areas where it feels that new procedures ought to be considered. These areas are the arbitration of differences of a legal nature between the two Governments and the equalization of rights and remedies for private parties from both countries in cases of transfrontier pollution. For each area, the Group has prepared a draft treaty text which it offers as a possible basis for negotiation between the two Governments.

The thrust of the draft treaty on transfrontier pollution is that persons in both countries should have equal access to judicial and administrative procedures for prevention of and compensation for pollution damage. It should not matter on which side of the border the polluter is located, where the person affected lives, or in which jurisdiction the judicial or

administrative protection is sought. What is being proposed here is not a new legal system, but the adjustment of the two countries' existing municipal legal systems to accommodate equally residents of both pollution matters.

The substantive provisions of the treaty (the text of which is attached hereto) are summarized as follows:

Article 1 defines the critical descriptive terms to be used in the remainder of the treaty including "pollution," "domestic pollution," and "transfrontier pollution." Article 2 is the main operative provision of the treaty. It ensures that the actual or potential victim of transfrontier pollution will have a remedy in the courts of the country where the pollution originated, if a victim residing in that country would have had a remedy in the case of domestic pollution. Article 3 enables public and private environmental groups in one country to have the same right to protect the general environmental interests of their country in the courts or administrative proceedings of the other as comparable groups in the latter have. Article 4 ensures that each party will have sufficient information from the other so that the residents of the country affected by transfrontier pollution may make full and effective use of all remedies available under the treaty. Article 5 is designed to ensure that the treaty does not inadvertently put the nationals of one State in a better position to enforce the pollution laws of the other State than can be done by the citizens of that other State.

The second proposed treaty reflects the view that a system for third-party settlement of legal disputes between the two Governments should be established and maintained for use as and when required. The system offered has the simplicity and flexibility of arbitration and the permanence and consistency of judicial settlement. It is custom-designed for the legal backgrounds of our two countries, and for their situation as North American neighbors.

The main provisions of this treaty are as follows: Article 1 limits compulsory jurisdiction to questions of interpretation, application, or operation of a treaty in force between the two countries. Article 2 makes it clear that all disputes not subject to such compulsory jurisdiction may be submitted to third-party settlement only through an ad hoc agreement of both countries and sets forth eight categories of disputes especially appropriate for such special agreements. Article 3 provides the details of the procedure for the constitution of a three-member arbitral tribunal or judicial panel to determine the scope of its jurisdiction. Article 5 discusses provisional measures which may be prescribed by arbitral tribunals. Articles 6 and 7 deal with location and conduct of arbitral proceedings. Article 8 deals with questions of applicable law. Article 9 specifies that parties shall comply with the decisions rendered pursuant to this

treaty. Article 10 allows the tribunal to render an advisory opinion if the parties agree thereto.

The proposed system establishes legal procedures to complement existing procedures. Even though the preponderant majority of cases are resolved by bilateral negotiations, the availability of a third-party decision to the process is crucial. There are questions on which the two States may reasonably disagree, and in which a genuine reconciliation of legally supportable conflicting positions cannot be had through negotiations since each side continues to maintain the legal validity of its claim. At other times, difficult and unsettling negotiations do lead to a solution, but it may not be a genuine accommodation. Instead, it can be merely a patching over of the fundamental disagreement, or a solution based on political advantage or bargaining power.

In addition, negotiations cannot, by themselves, continue to constitute an adequate dispute settlement system for two countries with a relationship which continues to grow in extent and complexity. What has worked reasonably well in the past may be inadequate in the future. Third-party settlement can ensure that, in appropriate cases, issues are kept self-contained and are dealt with on their own merits, without "linkage" to other bilateral issues. It, therefore, accommodates the widely held view that in complex bilateral relations it may frequently be unwise to "trade off" the interests of different groups and regions. Consequently, the proposed treaty suggests that where a dispute is a legal one or has legal aspects, obligatory arbitration or adjudication may be the most efficient and equitable means of settlement. Where a dispute is wholly legal, the prospect of compulsory arbitration encourages negotiators to find a solution. Where a dispute is partially legal, arbitration of the legal questions can reduce the dimensions of the dispute and provide a framework which will simplify resolution of the remaining issues.

Finally, it is believed that general compulsory jurisdiction is especially appropriate for Canada and the United States in large part because their mutual treaties are many and varied. If arbitration or adjudication is permitted to range over this entire field, the satisfaction which either State may find in any particular decision will be balanced by success of the other State in other decisions. The net result over a period of time will then properly reflect the equality and fairness inherent in genuine third-party proceedings. The automatic availability of third-party settlement should reduce tension and diminish frustration by assuring that a genuine and impartial solution can be had if negotiations will not produce one.

CONCLUSION

The recommendation before the House of Delegates is the product of a genuine effort of cooperation between the bar associations of the United States and Canada. The draft treaties, if they were to enter into force, would greatly enhance relations between the United States and Canada. Accordingly, the American Bar Association should adopt the recommendation and report.

10. REPORT AND RECOMMENDATIONS OF THE
AMERICAN AND CANADIAN BAR ASSOCIATIONS JOINT
WORKING GROUP ON THE SETTLEMENT OF
INTERNATIONAL DISPUTES

Committee Members:

Canadian Bar Association:	American Bar Association:
T. Bradbrooke Smith, Q. C.,	Henry T. King, Jr.,
Co-Chairman	Co-Chairman
George Alexandrowicz,	Gerald Aksen
Co-Rapporteur	Arthur T. Downey
Jean-Gabriel Castel	Louis B. Sohn,
W. C. Graham, Q.C.	Co-Rapporteur
	Don Wallace, Jr.

INTRODUCTION

In 1975 and 1976, officers of the Canadian Bar Association were approached by representatives of the American Bar Association for the purpose of considering a proposal whereby the two associations would take an initiative toward creating a legal structure for peace in the world.

The proposal for the project originated at a meeting of the leadership of the Section of International Law of the American Bar Association, which was held in October 1974. After consultations, it was agreed that it should be undertaken by the Section in conjunction with one or more bar associations of other friendly countries. Precedents for this type of cooperative effort included joint projects undertaken by the American and Canadian Bar Associations during and just after World War II, which influenced the drafting of the United Nations Charter and promoted U.S. acceptance of the International Court of Justice.

After the discussions with representatives of the Canadian Bar Association referred to, it was felt that the most practical course of action would be a demonstration research project on the matter of dispute settlement between the two countries to be carried out by a joint working group composed of members of the two associations. The approval by the Canadian Bar Association of this was secured in December 1976.

The project has been a joint project in the fullest sense of the word and essentially a partnership between representatives of the two bar associations. Henry T. King, Jr., Gerald Aksen, Professor Don Wallace, and Arthur T. Downey have represented the Section of International Law with Professor Louis B. Sohn acting as U.S. rapporteur. For the Canadian Bar Association, T. Bradbrooke Smith, Q.C., W.C. Graham, Q.C., and

Professor J.G. Castel have been the designated representatives, with Professor George Alexandrowicz of Queen's University, Kingston, Ontario acting as Canadian rapporteur.

The Group held two meetings in 1977: one at Harvard Law School in May 1977 and the other at Osgoode Hall Law School in Toronto 1977. In January 1978, the Group met at New York at the American Arbitration Association with Henry P. Smith, III, the then Chairman of the U.S. Section of the International Joint Commission, and with other Representatives of that body to review its role in the disposition of issues between the two countries relating to boundary waters. At a meeting held in May 1978 at the Faculty of Law of the University of Toronto, the Group met with Maxwell Cohen, Q.C., Chairman of the Canadian Section of the International Joint Commission, to review further the work of the Commission.

At this point, a preliminary draft of the present report was prepared. From the time it first became available in July 1978 to its final review by the joint working group, it was sent for review to about 150 people and organizations in both countries. The Group tried to canvass all those who might be interested in commenting on the proposed recommendations of the report. It is obvious we may not have got the drafting into the hands of everyone who might wish to comment and any oversight in this regard should not be construed as a conscious decision by the Group, but rather as a result of its members' lack of familiarity or contact with a particular person or organization.

Some twenty of the persons polled were good enough to make detailed comments on the draft report. Their names are listed in an appendix to the present report. To them the Group gives its special thanks.³⁰ At a meeting held in New York at the American Arbitration Association in March 1979, the Group went over the draft, in light of these comments. Each and every comment was considered although not all produced changes in the text, as the Group decided in a number of cases to hold to its original position. Nevertheless, many changes were made, and in a few cases, these alterations were of a quite fundamental nature.

A perusal of the report and recommendations will indicate that the entire area of disputes between the two countries was canvassed: historically, in terms of categories of disputes, and in terms of possible means of settlement. A number of issues were explored upon which no substantive recommendation was made by the Working Group. They included: dispute avoidance and prior consultation procedures, which the Group

³⁰ The listing of these individuals does not denote their endorsement of the report or any of its recommendations. Endorsements as such were not sought at this preliminary stage of drafting.

believes are essentially matters within the political and diplomatic domain; and the current and future role of the International Joint Commission, which the Group found to be a model of the effective use of a mixed commission as a fact-finding and advisory adjunct to settlement by negotiation. As to these subjects the Group's only recommendation is a procedural one: further examination of these topics by competent officials in both countries.

The Group decided to confine its substantive recommendations to two areas where it feels that new procedures ought to be considered. These areas are the arbitration of differences of a legal nature between the two Governments and the equalization of rights and remedies for private parties from both countries in cases of transfrontier pollution. For each area, the Group has prepared a draft treaty text which it offers as a possible basis for negotiation between the two Governments.

The thrust of the proposed transfrontier pollution regime is that persons in both countries should have equal access to judicial and administrative procedures for prevention of and compensation for pollution damage. It should not matter on which side of the border the polluter is located, where the person affected lives, or in which jurisdiction the judicial or administrative protection is sought. What is being proposed here is not a new legal system, but the adjustment of the two countries' existing municipal legal systems to accommodate equally residents of both in pollution matters, the implementation of which we recognize can involve difficulties.

Because the Group's proposal for an intergovernmental system of third-party settlement may be more conventional, it is desirable that the rationale for it be explained here. The main criticism of the proposal is that it rests on principles inconsistent with the historic nature of the relations between the two Governments. Why, runs the argument, graft a legal procedure onto a system of bilateral diplomatic and political negotiations that has worked so well? After a thorough reexamination of its assumptions, the Group concludes that the system of arbitration and adjudication offered is more than fully consistent with the fundamentals of the two Governments' present relationship; it will contribute to the completion of that relationship by involving into a defined area the precepts of the rule of law on which the relationship is built.

The burden of the Group's proposal is that a system for third-party settlement of legal disputes between the two Governments should be established and kept in place for use as and when required. The system offered has the simplicity and flexibility of arbitration and the permanence and consistency of judicial settlement. It is custom-designed for the legal backgrounds of our two countries, and for their situation as North American neighbors.

That the proposed system involves legal procedures to complement the structures in place should not surprise, the Group being representative of two bar associations and being composed entirely of lawyers.³¹ We work in judicial systems. Despite weaknesses, we believe in the basic utility of those systems. The availability of judicial recourse has not resulted in a deterioration of day-to-day judicial relations domestically or in excessive litigiousness. Parties to a dispute, whether they be private individuals, corporations, or governments normally prefer to settle a dispute rather than “go to court.” Even within the context of litigation, the preponderant majority of cases are never tried; they are settled between the litigants prior to trial. Nevertheless, the availability of a third-party decision to the process is crucial. It provides a solution in that small percentage of cases where mutual accommodation cannot be had and forces accommodation in others by its very existence.

Further, there are questions on which, as with individuals, the two States may reasonably disagree. Sometimes a genuine reconciliation of legally supportable conflicting positions cannot be had through negotiations, and each side continues to emphasize the legal availability of its claim. At other times, difficult and unsettling negotiations do lead to a solution, but it may not be a genuine accommodation. Instead, it can be merely a patching over of the fundamental disagreement, or a solution based on political advantage or bargaining power.

Finally, negotiations cannot, by themselves, continue to constitute an adequate dispute settlement system for two countries with a relationship which continues to grow in extent and complexity. What has worked reasonably well in the past may be inadequate in the future. Third-party settlement can ensure that, in appropriate cases, issues are kept self-contained and are dealt with on their own merits, without “linkage” to other bilateral issues. It therefore accommodates the widely held view that in complex bilateral relations it may frequently be unwise to “trade off” the interests of different groups and regions.

In consequence, the Group has suggested that where a dispute is a legal one or has legal aspects, obligatory arbitration or adjudication may be the most efficient and equitable means of settlement. Where a dispute is wholly legal, the prospect of compulsory arbitration encourages negotiators to find a solution. Where a dispute is partially legal, arbitration of the legal questions can reduce the dimensions of the dispute and provide

³¹ In fact, recognition of its special competence led the Group to avoid making recommendations on non-legal matters. Therefore, although the Group viewed with great interest the possibilities of prior consultation, legislative coordination, and increased use of mixed commissions, it refrained, as noted above, from making any substantive recommendations in these areas.

a framework which will simplify the resolution of the remaining issues. The Group recognizes that in the abstract, the line between legal and non-legal may be difficult to draw. However, whenever courts, including the International Court of Justice, have been faced with this problem, they have always been able to make the distinction.

While the Group sees its proposal as framed and limited by the basic pattern of negotiation, it does not pretend that it is suggesting a minor improvement, a mere adjustment of the pattern. It recognizes that a genuine commitment to compulsory jurisdiction, even in an area as restricted as treaty questions, is a departure. Notwithstanding the acceptance by both States of the Jurisdiction of the International Court of Justice under the Optional Clause of its Statute, and Article 10 of the Boundary Waters Treaty of 1909, neither these nor any of the other existing commitments of the two Governments to each other amount to genuine compulsory jurisdiction; all require an ad hoc, after-the-fact agreement to go to arbitration.

In this regard, it has also been suggested that a compulsory system is superfluous because the two Governments have always found it easy to agree ad hoc on an arbitral procedure when it was necessary. History does not bear out this assertion. As noted, the two States have an extraordinarily multifaceted and intense relationship. The Group's survey shows that there have been many disputes over the last eighty years. Yet only four or five have gone to arbitration. Without reviewing the diplomatic history of the relationship, it may safely be stated that a number of other disputes might have been referred to arbitration but for want of an agreement to do so.

Finally, we feel that general compulsory jurisdiction is especially appropriate for Canada and the United States in large part because their mutual treaties are many and varied. If arbitration or adjudication is permitted to range over this entire field, the favor which either State may find in any particular decision will be balanced by favor to the other State in other decisions. The net result over a period of time will then properly reflect the equality and fairness inherent in genuine third-party proceedings.

In summary, the Group believes that the automatic availability of third-party settlement should not create acrimony or mistrust. Rather it should reduce tension and diminish frustration by assuring that a genuine and impartial solution can be had if negotiations will not produce one. The members of the Group feel that it is legitimate to hope that the Governments may, as between themselves, have the same faith in the judicial process as they expect from their citizens. If any two States should be able to settle their legal disputes through legal procedures, it is the United States and Canada.

As Co-Chairmen of the Working Group, we wish to thank all the members for their active participation in its work. In addition, on behalf of the Working Group we wish to express our thanks for financial assistance in the preparation of the report to TRW Foundation, K-Mart, the Johnson Foundation, the A B Dick Co., and the International Peace Academy which made available to the co-rapporteurs the invaluable assistance of Paul C. Irwin, the Ruth Forbes Young International Peace Academy Fellow at the Harvard Law School. We extend special thanks to our co-rapporteurs, Professors Alexandrowicz and Sohn, without whose untiring efforts this report could not have been produced.

Henry T. King, Jr.,
Co-Chairman,

T. Bradbrooke Smith, Q.C.,
Co-Chairman.

PART I. A SURVEY OF DISPUTES BETWEEN CANADA AND THE UNITED STATES

The 5000-mile boundary between the United States and Canada is the longest between two States in the world. It was drawn originally through uninhabited wilderness, and now much of it passes through the middle of a highly industrialized metropolitan area. From the beginning, there were problems about the actual location of the boundary lines, and some of these problems have persisted to this very day. Most of the current problems relate, however, to the numerous economic, political, and cultural activities which constantly cross or have effects across the boundary lines, raising a variety of jurisdictional issues.³² Because of the many transnational links, what happens in one country is likely to affect the other one, and very few matters are so domestic that they are of no concern to the neighboring country. As the relationships are on many levels, the disputes which have arisen are not purely intergovernmental but have involved both local interests of various states and provinces and claims of individuals and corporations.

The history of peaceful settlement in North America begins with boundary delimitation. Periodically from 1794 to 1903, different portions of the common boundary were submitted to mixed commissions or to arbitration. Several disputes over marine boundaries are still extant. Ownership of Machias Seal Island and North Rock in the Gulf of Maine is in question, and it was suggested in 1973 that the dispute be referred to the International Court of Justice. Also unresolved is a dispute as to whether a line drawn by a 1903 joint commission at the northern end of the Dixon Entrance between Alaska and British Columbia separates only land areas of the two countries or constitutes a maritime boundary. Canada has proposed that this matter be considered in the light of state practice of the two parties, as well as on the basis of international law as it developed over the years. Canada and the United States also continue to discuss questions relating to the delimitation of their continental shelf boundaries.³³ The marine boundaries in the Gulf of Maine, the Arctic,

³² In the wake of ongoing problems with the United States-Mexico border, the Obama Administration is determined to treat the United States-Canada issues with the same attentiveness because "you can't go light on one and heavy on the other." To the disappointment of many proponents of economic development, it appears political pressure is forcing the Obama administration into supporting a border plan that will hamper trade between Canada and the United States. See Janet Napolitano, U.S. Homeland Security Secretary, Keynote Address at the Brookings Institute Conference: Toward a Better Border: The United States and Canada (Mar. 25, 2009) (transcript available at http://www.brookings.edu/events/2009/0325_us_canada.aspx).

³³ The United Nations Convention on the Law of the Sea was completed and open for

and the Pacific have not been definitively determined; nor has the boundary in the Pacific, off the west coasts of the two countries.

These delimitation questions have become more complex in the last couple of years because of declarations by the two countries of 200-mile fishing zones, the boundaries of which overlap. Other disputes have arisen with respect to particular fisheries practices. For instance, in 1975, as a result of United States court decisions relating to Indian fishing rights, the United States withdrew its approval of certain regulations of the bilateral International Pacific Salmon Fisheries Commission. Canada claimed that this action was not consistent with the terms of the relevant convention. Since 1964, the drawing of various fishing lines by Canada has led to United States protests.

These maritime boundaries and marine resources questions are not likely to be resolved automatically by any convention which might come out of the current United Nations Conference on the Law of the Sea. The recent Cadieux-Cutler negotiations have encountered great difficulties in trying to settle both sets of problems.

Various economic, trade, and investment questions continue to arise between the two countries.³⁴ Until World War II, these questions primarily related to import or export restrictions enacted by one country or the other. A recent example of such a problem is the 1973 United States imposition of countervailing duties on tire imports from Michelin plants in Nova Scotia. Although no international determination of the point was ever made, United States officials, relating their action to the General Agreement on Tariffs and Trade, took the position that Canadian federal and provincial subsidies to Michelin constituted "bounties" which are "unfair practices" by the terms of United States tariff laws.

Since World War II, the principal mutual economic concerns of the two States have been those relating to investment and other activities in

signature in 1982. The Convention contains 320 articles and 9 annexes, governing all aspects of ocean space, such as delimitation, environmental control, marine scientific research, economic and commercial activities, transfer of technology, and the settlement of disputes relating to ocean matters. United Nations, United Nations Convention on the Law of the Sea of 10 December 1982 Overview and Full Text, http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (last visited Aug. 15, 2009).

³⁴ The NAFTA was created in 1994 to remove tariffs and trade barriers between the United States, Canada, and Mexico; however, NAFTA may have created more questions than answers. Some commentators suggest that NAFTA has had a negative effect on the distribution of income, wealth, and political power within these countries. ROBERT E. SCOTT, CARLOS SALAS, & BRUCE CAMPBELL, *REVISITING NAFTA: STILL NOT WORKING FOR NORTH AMERICA'S WORKERS* (2006), available at <http://www.epi.org/publications/entry/bp173/>.

Canada by United States-based corporations. A well-known example of Canadian problems with such activities is the "auto pact" case.

The auto pact case began with the institution by Canada in 1962 and 1963 of a duty remission scheme to encourage United States car manufacturers to increase parts production and assembly in their Canadian facilities. The United States Government, in response to a petition by a private United States company, considered countervailing duties to raise the cost of importing Canadian parts benefitting from these remissions. Negotiations, begun under the auspices of the Joint Ministerial Committee on Trade and Economic Affairs, a cabinet-level body established in 1953, resulted in the conclusion in 1965 of the so-called Auto Pact, a type of free trade agreement, in which Canada was guaranteed ratable participation in increased production. The economic effects of the agreement are debatable. The agreement continues in effect, although demands have been made for its renegotiation.

Another example of a problem related to United States economic presence in Canada is the "magazine tax" case. Since 1956, the Canadian Government has made various attempts to encourage advertising in domestically-owned periodicals. In 1965, the Canadian business tax deduction was eliminated for advertising in Canadian editions of *Time* and *Reader's Digest*, which enjoyed a very high readership in Canada and overshadowed Canadian competitors. An exemption from this legislation was later obtained as a result of United States governmental and private representations, but when the exemption was tightened up in 1975, *Time* decided to discontinue its Canadian edition as it found it uneconomical to try to comply with the new conditions. *Reader's Digest*, however, was able to qualify for the exemption. Somewhat similar problems have arisen in connection with Canadian advertising on United States television programs broadcast over the border into Canada or re-broadcast by Canadian cable companies. Restrictions designed to discourage these practices were adopted by the Canadian Government; a permanent solution satisfactory to both sides is still being sought. In these cases, the cultural impact of the United States activities may perhaps have been as important as the economic considerations in determining the Canadian response.

For the United States, private investment in Canada has been a source of concern since the early 1960s when the United States balance of payments position began to erode. An unexpected 1963 presidential proposal for an interest equalization tax caused some difficulty in Canada because it would have encouraged withdrawal of United States funds from Canada. Arrangements were made for prior consultations in the future, and as a result of such consultation an exemption for Canada was built into United States payment guidelines promulgated in mid-1965.

Lack of such consultations produced some problems later in 1965 and again in 1968 when mandatory guidelines were imposed; a Canadian exemption, however, was eventually negotiated. Canadian concern in the last few years over the level of foreign investment led to the passage of the Foreign Investment Review Act. At the moment, this provides for the survey and assessment of foreign investment in Canada, and also for limited federal control over new investment and over expatriation of the benefits of such investment. The Canadian Government's efforts in this direction are still in the tentative and experimental stage. While the legislation has been criticized as both too strong and as too weak, there has been a widespread tendency to reserve judgment on it until practice and policy develop further.³⁵

The two countries have become increasingly concerned with trade in energy resources and energy policy.³⁶ In the late 1970s, oil transmission was a significant problem. With natural gas, the changing supply situation is the principal difficulty. This was not always so. Throughout the 1950s and 1960s, United States oil producers pressed the federal government, successively, for guidelines, voluntary quotas, and, in 1959, mandatory quotas on imports, invoking various national security grounds. Canadian officials, with the *de facto* alliance of the so-called "northern tier" United States refineries, successfully worked throughout this period to maintain a preferential position for oil imports from Canada, including exemption from quotas. Natural gas imports are handled by a licensing system administered through the Federal Power Commission (FPC) in the United States and the National Energy Board (NEB) in Canada. Through the 1950s and 1960s, northern United States users seeking long-term Canadian import contracts combined with Canadian companies who sought market penetration. On the other hand, United States producers, wishing to establish their own subsidiaries in Canada, joined forces with the FPC, which was concerned about the uncertainty of supplies controlled by Canadian companies.

In 1970, the positions of the two countries with respect to trade in energy resources began to reverse. In that year, the NEB began for the first time to limit licenses for export of natural gas. In 1973, the Minister of Energy announced that both oil and gas exports would be restricted through that winter, and an export tax was imposed. Friction over this

³⁵ The NAFTA Chapter Eleven contains provisions protecting cross-border investors through non-discrimination policies, such as national treatment and most favored nation. See generally NAFTA, *supra* note 4, at ch. 11.

³⁶ The NAFTA Chapter Six essentially incorporates the GATT energy provisions, which prohibit minimum or maximum export price requirements and minimum or maximum import price requirements. *Id.* at ch. 6.

action was apparently minimal, partly because of prior notification by the Canadian Government. Continued increases in prices of both oil and gas, as well as further export restrictions, led to diminishing Canadian exports to the United States beginning in 1974, and Canadian officials announced that all exports of oil and gas would probably be cut off by the end of the decade. However, changes in technical estimates of reserves, as well as of supply and demand, occur periodically. These, as well as sudden dramatic events elsewhere in the world, can have significant effects on the policies of both countries. The situation is, therefore, in a constant state of flux. In any event, there are more or less continuous negotiations between the two countries to mitigate the effects of any cut-off which might occur.

In the late 1970s, the United States is primarily concerned with continued supplies to northern United States refineries and coordination of the cut-off with the bringing on stream of Arctic petroleum resources. Recently, the proposed shipment of oil from the terminal of the Alaska pipeline at Valdez to Cherry Point, Washington, elicited a Canadian proposal that the question of protection against maritime pollution be referred to the International Joint Commission. The United States rejected this but agreed to refer the matter to a joint committee on transborder environmental problems, which led to an agreement on joint contingency plans for spills of oil and other noxious substances in boundary waters off the Pacific and Atlantic coasts.³⁷

In January 1977, the United States and Canada concluded the Transit Pipeline Treaty specifying the principles which should govern the transmission of hydrocarbons between different parts of the territory of one country across the territory of the other. This treaty contains a provision for arbitration of disputes concerning its interpretation, application, or operation. The actual implementation of these principles in pipeline construction and operation has yet to be worked out. Although an agreement on the building of a gas pipeline was concluded in September 1977, difficulties arose about its implementation. Some of them were due to the complicating effects of a federal system in bilateral relations. For instance, the agreed principles prohibit discriminatory treatment in pipeline taxation, and it has been warned that some of the affected taxing power is

³⁷ The Canadian oil sands brings up memories of other "dirty oil" because of the heavy clean-up costs associated with that type of crude and the additional greenhouse gasses emitted. To ensure that the oil sands extractions are environmentally friendly, the government has agreed to place a cap on CO₂ emissions in order to lessen the impact on the environment. Hon. Michael Wilson, Proceedings of the Canada-United States Law Institute Conference on the World's Longest Undefended Border: Gateway or Check-point? The Post-9/11 "Safe and Secure" Canada-United States Border in the Era of Global Supply Chains (Apr. 18, 2008).

within provincial instead of federal jurisdiction. In addition, there are problems of apportionment among the states of the gas piped into the United States and of the assignment of regulatory power.

Difficulties occasionally arise because of the impact of one country's laws on the other, including, among other specific matters, attempts to exercise extraterritorial jurisdiction. Although it is a two-way street, most commonly, problems have occurred with respect to United States antitrust or export control laws which impose obligations or restrictions, backed up by civil and criminal sanctions, upon United States citizens abroad, or even non-citizens, concerning activities abroad which are not illegal where conducted but have an "illegal" effect in the United States.

Prior consultation has sometimes alleviated problems arising from the transnational impact of laws. For instance, in the mid-1950s, a United States court terminated a radio patent pool, which protected manufacturing in Canada by several subsidiaries of United States companies and which had previously been declared legal by Canadian authorities. Canadian dissatisfaction led to the 1959 Fulton-Rogers agreement for prior consultations on antitrust problems. Later the two countries agreed to be guided by a recommendation on the subject by the Organization for Economic Cooperation and Development. The Basford-Bell memorandum of 1976-1977 reaffirmed the governments' commitment to prior consultation in this area. While this consultation machinery has helped to remove many of the difficulties, some problems have continued. In recent years, there have been, for instance, problems with respect to the application of antitrust laws in the uranium and potash industries. The area is a complex one, involving not only governmental investigations and interaction, but also private litigation. Recently, controversial United States judicial orders have sought the production of corporate records held in Canada and elsewhere; the records were to some extent protected from disclosure by specific Canadian legislation.

A summit agreement in 1958 (the Diefenbaker-Eisenhower or Smith-Dulles agreement of 9 July) provided for future consultations on the applicability of United States export controls to Canadian subsidiaries of United States companies and for possible exemptions for Canadian companies. Major problems arose in the early 1970s with respect to United States export controls relating to communist States, but negotiations, including ministerial consultations, have resulted in accommodations which have alleviated much of the difficulty.

Examples of non-extraterritorial impact of laws are provided by the existence of antipollution and vessel traffic management laws applicable to marine areas near the border. In narrow passages, such as the Strait of Juan de Fuca and the Grand Manan Channel, where one State's vessels

pass routinely through the waters of the other, the question of waiver of the applicability of these laws can be a source of difficulty.

The need to deal jointly with certain environmental conditions has been recognized by Canada and the United States since well before the present era of environmental action. Their concern with conditions and uses of the waters adjacent to the boundary led to the establishment in 1905 of the International Waterways Commission. As that commission did not have sufficient authority to deal with the complex problems presented to it, the two governments agreed in the 1909 Boundary Waters Treaty to establish the International Joint Commission to consider applications for the use, obstruction, or diversion of boundary waters which might affect the natural level or flow of these waters. This treaty is significant also because thereby the two Governments have agreed to substantial alteration of their basic riparian rights. Under the treaty, the two Governments may also refer to the Commission, for report and recommendations, differences between them involving their rights or those of their inhabitants along the boundary. Altogether the Commission has dealt with more than one hundred applications and references, involving a large variety of issues, not only relating to water levels but also to water and air pollution. Its recommendations, based on careful technical studies and consultations with all the interests involved, have usually been accepted. On the other hand, no cases have ever been submitted to the Commission for "decision" under a broad clause in Article X of the Treaty; the consent of both governments (including in the United States prior advice and consent of the United States Senate) is required for each such submission.³⁸

More recently established cooperative projects include the Great Lakes Water Quality Agreements of 1972 and 1978, a committee on water quality, also set up in 1972, for the St. John River and its international tributaries, and the Poplar River Water Quality study started in 1977. In 1975, Canada and the United States referred to the International Joint Commission the question of the transboundary water pollution effects and other implications of the proposed Garrison Diversion Unit in North Dakota. The record of these endeavors is a positive one, but much remains to be done as the process is a continuing one. The deferment of

³⁸ The International Joint Commission (IJC), founded as part of the Boundary Waters Treaty of 1909 is celebrating its 100th anniversary. For 100 years, the IJC has helped Canada and the United States find common interest in regards to common water usage. Notable examples of IJC-fostered American and Canadian Cooperation include: Pollution of Boundary Waters, Trail Smelter, Columbia River, Great Lakes Water Quality Agreement, and many others. *See generally* Welcome Page of the International Joint Commission, http://www.ijc.org/en/home/main_accueil.htm (last visited Apr. 15, 2009).

the Garrison project may prove to be significant, but a final solution has yet to be found. The Great Lakes Water Quality Agreements of 1972 and 1978 were important achievements for the Commission, but they have proved difficult for the Governments to put into practice. Although progress has been made, in several instances further implementing action is required, not only by the federal governments, but also by those of states and provinces.

Following, and partly because of the Arctic voyage of the United States ship "Manhattan" in 1969, the Canadian government passed legislation for the establishment of 100-mile marine pollution control zones in the Arctic. A contemporaneous revision of the Canadian declaration of acceptance of the jurisdiction of the International Court of Justice excluded from the Court's jurisdiction disputes relating to "the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada." In justifying this revision, concern was expressed over the limitations within which the Court must operate and the deficiencies of the law which it must interpret and apply. The establishment of marine pollution control zones in areas off the East and West coasts to coincide with expanded fisheries jurisdiction has also caused friction with the United States.

The classical case on transfrontier air pollution arose in connection with a smelter at Trail, British Columbia, fumes from which caused damage in the State of Washington. The matter went to the International Joint Commission in 1928, but the United States rejected its findings. The dispute was submitted in 1935 to a three-member arbitral tribunal, which rendered decisions in 1938 and 1941. It awarded damages to the United States, imposed a regime for control of fumes, and arranged for future compulsory arbitration by a commission of scientists.

The question of transboundary air pollution in the Detroit-Windsor and Sarnia-Port Huron areas was referred to the International Joint Commission in 1966. On the basis of the Commission's report, the two Governments asked the Commission in 1975 to monitor air quality in that area and others. Currently, concern is being generated as a result of new scientific studies which indicate that pollutants may be transported by air currents over distances of many hundreds of miles from sources deep within one country to the territory of the other.

Finally, the history of the relation between the two countries in matters of defense is an essentially cooperative one, with only occasional and minor friction. Cooperation began in earnest with the Ogdensburg Agreement of 1940, which inter alia established the Permanent Joint Board on Defense. This body, which is still functioning, consists of military personnel from both countries who consult and advise on various technical and operational issues of common concern.

Since the 1950s, Canada has been periodically concerned about the relatively small proportion of Canadian contractors and personnel employed in the construction and manning of joint facilities, most of which are located in Canada. Negotiations have resulted in increasing the opportunities for greater Canadian participation.

In the early 1960s, a disagreement arose over the United States' desire that Canada undertake the nuclear arming of its weapons systems committed to NATO and the North American Air Defense Command (NORAD). After several years of resistance, it did so in the mid-1960s.³⁹

The foregoing is a very brief survey of some of the major common concerns of the two countries which have produced difficulties in recent years. A few, such as economics and pollution of the environment, seem to have generated a steady stream of issues over the decades.⁴⁰ Others

³⁹ In the early 1960s, Canada and the United States had a diplomatic row due to the Canadian Prime Minister refusing to arm Canada's NORAD Bomarc missiles with nuclear warheads during the Cuban Missile Crisis. However, in 1963 under a new Prime Minister, Canada agreed to host NORAD nuclear warheads. Hosting of nuclear warheads continued until Canada's complete divestment of nuclear warheads in 1984. In 2006, both Canada and the United States fully renewed their commitment to NORAD. Ronald G. Haycock & Michael Hennessy, *The Road from Innocence: Canada and the Cold War, 1945 to 1963*, in *THE CANADIAN WAY OF WAR* 235, 254-5 (Bernd Horn ed., 2006); see JOHN CLEARWATER, *CANADIAN NUCLEAR WEAPONS* 241-45 (1998); see also Agreement On The North American Aerospace Defense Command, U.S.-Can., Apr. 28, 2006, Temp. State Dep't. No. 06-134, 2006 WL 4099834.

⁴⁰ The economic-based disputes of the last three decades are varied and include concerns such as bovine spongiform encephalopathy ("mad-cow" disease), oil sands, wheat trade, and the decade-spanning softwood lumber dispute. Therefore, trade protectionism, perceived or real, results in very real damage to bilateral trade, each issue having the possibility to become cyclical and recurring, very much like the softwood issue. The last few decades have also brought a host of environmental-based disputes including, the export of Canadian trash into the United States, development in the Arctic National Wildlife Refuge, and issues relating to Alberta's oil sands. See Ryan Clements & Moin A. Yahya, *Private Interests, Public Borders, and the NAFTA's Chapter 11: Lessons from the Mad-Cow Saga*, 45 ALTA. L. REV. 381, 383-93 (2007) (discussing mad-cow disease); Alastair R. Lucas, *Canada's Role in the United State's Oil and Gas Supply Security: Oil Sands, Arctic Gas, NAFTA, and Canadian Kyoto Protocol Impacts*, 25 ENERGY L. J. 403, 422-23 (2004) (discussing Alberta's oil sands); Gary C. Hufbauer and Yee Wong, *The Canada/U.S. Economic Relationship: From FTA to NAFTA to ???: Security and the Economy in the North American Context: The Road Ahead for NAFTA*, 29 CAN.-U.S. L.J. 53, 65-67 (2003) (discussing the wheat trade). See generally *Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions*, 30 BROOK. J. INT'L L. 67, 96-104 (2004) (noting the damage of trade protectionism). See generally Sarah E. Lysons, *Resolving the Softwood Lumber Dispute*, 32 SEATTLE U. L. REV. 407, 439-40 (2009) (discussing the reasons for the recurrence of the softwood lumber dispute); Matthew D. Budds, *No Canada: Analyzing Efforts to Keep Canadian Waste in its Home and Native Land*, 39 U. TOL. L. REV. 693 (2008) (discussing the concerns related to importing garbage). See Michael T. Delcomyn, *Arctic National Wildlife Ref-*

have come to the fore only lately, after having lain dormant for a period. These include boundary delimitation, made relevant by the worldwide expansion of marine jurisdiction, and energy issues arising out of the last few years' changes in prices, markets, and supplies. Other concerns are less troublesome in the 1970s than they were in earlier decades. Defense, as noted, has caused relatively few disagreements in the immediate past. However, this issue and many others—transit, border crossing, tourism, air transport, internal security, and extradition, to name a few—are always in the wings. Rapidly unfolding events, in the two countries or elsewhere, may suddenly and unexpectedly bring any of them to the center of the stage.⁴¹

The solution of many of these problems has been made more difficult by the federal nature of the constitutional systems of both countries. Having more governmental units involved tends to delay and complicate issues. Any strain in the relations within one country between the federal government and the governments of one or more constituent units can also have repercussions on international issues. A system of dispute settlement for the two countries must reflect a realistic appreciation of federal complexities. Past experience, as in the case of the Great Lakes Water Quality Agreements, has shown that the constituent units can and will cooperate. And these complications should not lead one to the conclusion that nothing can or should be done. On the contrary, they make it even more important for the international system to be well-developed and complete. It should be able to function in coordination with the two internal federal systems, and prevent international difficulties from magnifying or exacerbating domestic issues.

uge Oil: Canadian and Gwich'in Indian Legal Responses to 1002 Area Development, 24 N. ILL. U. L. REV. 789, 800-10 (2004) (noting the Canadian environmental concerns over ANWR).

⁴¹ The coordinated response to the September 11, 2001 terrorist attacks and the bi-national cooperation in fighting terrorism and securing the borders has ushered in a new era of defense cooperation between Canada and the United States. See, e.g., David Charters, "Defence Against Help": *Canadian-American Cooperation in the War on Terrorism*, Paper Presented at the Annual Meeting of the International Studies Association (Mar. 17, 2004), available at http://www.allacademic.com/meta/p73619_index.html.

PART II. CANADIAN-UNITED STATES PRACTICE IN DISPUTE SETTLEMENT

This portion of the report presents a brief analytical survey of the types of dispute settlement procedures which are available for the resolution of disagreements between independent States, indicating for each type the extent to which this method has been or is currently being used by the United States and Canada.

The various mechanisms for settlement may be broadly divided into two categories: those which produce a result or decision which binds the parties and those which do not. The non-binding procedures may in turn be divided into two groups: (1) strictly bilateral methods of settlement, such as negotiation and the mixed commission; and (2) procedures which make use of third parties in some intermediary capacity, such as good offices, mediation, and conciliation. In a certain sense, non-binding procedures may also be considered as methods of dispute management. Although they often do lead to a binding agreement which solves the problem, these procedures do not automatically lead to a binding result and thus do not ensure a settlement of the dispute. The principal binding methods of settlement are arbitration and reference to a permanent judicial tribunal. A third device, reference to an international political or administrative organ such as the United Nations Security Council or the Council of the International Civil Aviation Organization, has not been used in the North American context, and there is no need to consider it here.

Negotiation is the rule in United States-Canadian dispute settlement. In general, however, this is a matter of practice and habit rather than legal obligation. There are very few areas in which the two countries are bound by a bilateral instrument to negotiation in the event of a dispute. A number of the two countries' agreements do provide for the use of a mixed commission, which is to some extent a specialized form of negotiation. But even in these agreements, referral to the commission is nearly always optional. Furthermore, it is dependent upon agreement between the Governments after a dispute has already arisen. This is true, for instance, of a large part of the work of the International Joint Commission.

The crucial point about United States-Canadian practice in dispute settlement is that it makes almost exclusive use of some form of strictly bilateral settlement. However, not all negotiations or mixed commissions are successful. Indeed, in many of the most difficult disputes between the two countries, unproductive negotiations have dragged on for years while the problem actually becomes aggravated or more complex. In other cases, negotiations may be suspended when the issue under discussion loses its immediacy. The problem, left unsolved, may resurface,

and then efforts at solution will have to start from the beginning all over again. Negotiations cannot, by themselves, constitute an adequate dispute settlement system for two countries with a relationship as close, extensive, and complicated as that of the United States and Canada. There need to be a number of mechanisms to supply a definitive answer where negotiations fail. They should be capable of aiding and directing the negotiating process, of increasing the effectiveness of that process. Fact-finding, through the International Joint Commission and other mixed committees, can help. Indeed, the collegial or shared nature of the International Joint Commission's fact-finding is itself a contribution to mutual understanding. Once the facts are agreed within the group, the dispute is usually resolved very quickly. Unfortunately, as has already been noted, use of these procedures is only optional; they cannot be effective if they are not used.

Where a dispute is a legal one or has legal aspects, obligatory arbitration may be the most efficient and equitable means of settlement. Where a dispute is wholly legal, the prospect of compulsory arbitration encourages negotiators to find a solution. Where a dispute is partially legal, arbitration of the legal questions can reduce the dimensions of the dispute and provide a framework, which will simplify resolution of the remaining issues.

The Group recognizes that the question of what constitutes a "legal" issue has been the subject of learned debate, and that in the abstract the line between legal and non-legal may be difficult to draw. It must be noted, however, that whenever courts have been faced with this problem, they have always been able to make the distinction. It is the practical, not the theoretical, distinction which is important. Domestic courts regularly have to deal with the problem, and it has not hindered the municipal judicial system. The International Court of Justice has faced and solved it several times. There is no cause to believe that a bilateral international arbitral system could not handle the matter as well.

Whatever the precise nature of these arbitrable issues, the important point is that there are questions on which the two States may reasonably disagree. Sometimes, a genuine reconciliation of legally supportable conflicting positions cannot be had through negotiations, and each side continues to emphasize the legal validity or the equity of its claim. At other times, difficult and unsettling negotiations do lead to a solution, but it is not a genuine accommodation. Instead, it is a patching over of the fundamental disagreement, or a solution based on political advantage or bargaining power. Such results are not the makings of solid foundations for any relationship. The Group believes that in these cases the automatic availability of arbitration will not create acrimony or mistrust. Rather it will reduce tension and diminish frustration; it will assure that a genu-

ine and impartial solution can be had if negotiations will not produce one.

Dispute Avoidance

Before surveying methods of dealing with disputes, the Group wishes to note two dispute avoidance procedures which it considered: 1) executive or administrative prior consultation and 2) legislative or regulatory coordination and cooperation. Both are examples of the use of negotiations to keep disputes from arising, rather than using them to manage already existing disputes.

Government officials in each country are likely to have some idea, prior to making a policy decision or taking implementing action, whether it may have an adverse effect in the other. In such a case, prior consultation with the appropriate officials of the other government may lead to minor adjustments or accommodations which can minimize the adverse effects and thus prevent a dispute. Lack of such consultation, or at least a timely notice, may lead to needless friction, especially if public positions are taken before compromise is attempted. When this happens, adjustments which could have solved problems before the fact may no longer be sufficient.

Thus, as pointed out in Part I, prior consultation has in a few cases—by Canada on energy plans and by the United States on balance of payments plans and some antitrust enforcement matters—contributed to the accomplishment of policy shifts which attenuated the discomfort of the other Party. The absence of such prior consultation in other situations seems to have aggravated matters even though settlements were eventually reached. An exchange of letters in 1976 between the International Joint Commission and the two Governments clarified the duty of the Commission to “alert” both Governments to any problems it sees looming ahead. Thus the Commission provides a form of prior consultation, but it is limited in fact by the amount of information available to the Commission from Boards and public sources, and this necessarily presents problems. Apart from these examples, there has been little serious or sustained effort to regularize prior consultations between the two Governments. The decision as to whether or not to consult has been left to be made ad hoc by the responsible department or bureau officials.

The Group discussed the possibility of recommending that the two governments mutually commit themselves to consultations prior to the adoption of measures that might adversely affect the other party. The Group examined several draft texts of treaty articles to this effect. These are attached as Annex A. Study of these drafts made it apparent that a commitment to prior consultation would require detailed study of a num-

ber of very difficult problems. For the consultation to have meaning, it must be more than a simple notice requirement, devoid of any obligation to pay attention to the other party's response. On the other hand, any fixed obligation to heed the response of the other party might appear to compromise the sovereign independence or discretion of the consulting party. In order to make the requirement unambiguous, it would be necessary to specify with some precision both which persons or institutions would have to be affected and the significance and nature of the effect necessary to give rise to the obligation. Since governmental activity is so often a continuous flow of small decisions, it would also be important to specify the kinds of measures which might precipitate the consultation requirement. In addition, there was some feeling that a list of appropriate subject areas for consultation might also be an important part of any recommendation. The Group concluded that all of these determinations involved political, diplomatic, and technical considerations, as well as legal ones. Although the Group decided not to make substantive recommendations on the matter, it does feel that the possibility of a prior consultation regime, founded on a legal obligation, should be given serious attention by the competent officials of the two Governments.

Legislative and regulatory decision-making processes do not lend themselves to the kind of prior consultation described above for avoiding disputes concerning executive and related administrative decisions. Legislative and regulatory processes are more rigidly structured. At the same time, they are more diffuse; final authority is usually vested in a committee or series of them rather than in an individual. The Group considered that one way to avoid having disputes result from such decisions was to involve the other Government in the process of making them. That is, each Government should enhance the possibilities for the other to put its position before the legislative or administrative agencies preparing the laws or regulations. The Group recognizes and applauds the fact that this does occur in some cases. Presentation by Canadian officials of factual information to Congressional Committees and administrative bodies, appearances of United States gas importers before Canada's National Energy Board, lobbying in legislatures, and speeches by governmental officials are all examples of such interchange. The Group realizes that there are in some areas, such as legislative testimony, substantial impediments to these procedures, but it recommends a comprehensive survey of the possibilities with a view to expansion and regularization of this kind of cooperation.

A second method of avoiding legislative or regulatory disagreements would be the actual coordination of measures—clarification of standards or meshing of laws. In certain areas, environmental regulation, for example, uniformity or at least compatibility would be particularly appro-

appropriate. The Group notes with interest the continuing work of the Inter-parliamentary Group, through which representatives of the two federal legislatures consult regularly. Great potential for coordination is also offered by the existence of the Uniform Law Conference of Canada and the United States National Conference of Commissioners on Uniform State Laws. Noting the present cooperation between these two bodies, the Group would encourage a more regular coordination of their activities.

Obviously, complexity and difficulty will be attendant upon any attempt at either cooperation or coordination. Tremendous quantities of information would have to be assembled, digested, and analyzed before any system for either could be created. Most-favored-nation obligations and other multilateral commitments could intervene. The autonomy of federal subdivisions could frustrate efforts or render them meaningless. Nevertheless, the value and long-term effects of any successful endeavor would be considerable and would, in the Group's view, justify the substantial undertaking which would be required. In the final analysis, dispute avoidance is preferable to any system of settlement.

Dispute Management

The most fundamental and most common method of dispute management is negotiation—direct bilateral consultation between Governments. At the same time, it can be the most complex and difficult, particularly when the countries involved are large industrialized States such as the United States and Canada. Each has a multifaceted executive, divided into many departments and agencies. Not only may several departments or agencies in each government be concerned with a particular question in dispute, those on one side may differ among themselves on the question. In addition, there are legislative chambers which may have prerogatives or interests which must be protected or considered in structuring the negotiation. Both Canada and the United States are federal States whose constituent members must often be consulted or actually involved in the discussions. Sometimes there arise problems where a United States federal state and a Canadian province are on one side and the two central Governments are on the other. An example was the *de facto* alliance between some “northern tier” states and some Canadian provinces in certain questions of gas and oil transmission and allocation in the 1960s. Finally, well-organized or large-scale private interests sometimes play a role in negotiations. This was true, for example, in the Auto Pact case, where letters of intent from the companies to the Canadian Government were an essential part of the agreement. In another example, an American company and the Canadian Government combined

in support of a common interest. In the late 1950s, the United States planned to curtail development of the BOMARC missile. Canada wanted the procurement program for the missile to be maintained. It seems that efforts in the United States by Boeing Aircraft Corporation, the United States manufacturer of the missile, contributed to the attainment of Canada's goal.

The classical form of negotiations is through so-called "normal diplomatic channels"; the countries' respective Foreign Offices and diplomatic representatives either conduct all of the discussions themselves, or they preside over complex delegations representing various parts of the Governments.

Increasingly, negotiations take place directly between what treaty clauses refer to as the "competent authorities" of each party. Double taxation questions, for instance, might be considered at meetings between officials of the United States Treasury Department and the Canadian Department of Finance; or conservation questions, at meetings between Interior and Environment representatives. In such negotiations, Department of State or Department of External Affairs involvement is often either nominal or completely absent. In recent years, this form of negotiation has become common in United States-Canadian relations. The two countries cooperate on a daily basis in so many areas that informal contact becomes routine. As a result, a substantial network of personal and professional relationships between corresponding officials in all areas of government has come into being.

At the other end of the spectrum from these quiet, unpublicized communications are "summit" discussions. The BOMARC question mentioned above, as well as such issues as the magazine tax, sales to communist States, and the nuclear arming of Canadian weapon systems, which were referred to in Part I, are all examples of disagreements where summit diplomacy contributed to a resolution. These highly visible meetings between Heads of State or Foreign Ministers usually concern particularly important or difficult problems and are typically the culmination of extensive negotiation at lower levels. Such meetings have been a regular part of the Canadian-United States dispute settlement pattern.

Where a problem is recurrent or where a situation, particularly a technical one, requires continuous oversight, negotiations may be institutionalized in the form of a mixed commission. Mixed or joint commissions typically comprise an equal, often fixed, number of representatives from each Government who meet to consider problems, frequently at specified alternate locations, either on a regular schedule or ad hoc as crises arise. They are usually composed of representatives of the two Governments or of administrative specialists in a field, and are sometimes authorized to include technical experts or diplomatic or legal per-

sonnel in their deliberations. Such commissions are frequently authorized to act by consensus, but they are not normally empowered to settle definitively a dispute, and there is in any case no impartial member to cast a deciding vote in case of a deadlock. Nevertheless, a body with a fairly constant membership may over time begin to function as an organic unit, without regular adherence to divisions by country. Such a body can thus become a very useful means of fact-finding. A conclusion on the facts of a dispute can, like a legal opinion, simplify the case and provide a framework which makes it easier for the Governments to resolve the remaining issues by negotiation.

After simple negotiation, the mixed commission is the device most commonly employed to handle Canadian-United States disputes. As a numerical proposition, without reference to the varying significance of different disputes, all but a small handful of difficulties between the two countries in this century have been dealt with through one of these two means or a combination of them. Numerous standing commissions have operated in a variety of areas. High-level bodies of general competence include the Interparliamentary Group, which meets annually, and the Joint Ministerial Committee on Trade and Economic Affairs, which met frequently during the 1950s and 1960s. Among specialized bodies noted in Part I are the International Pacific Salmon Fisheries Commission and the Permanent Joint Board on Defense. Others not previously mentioned include, for example, the Balance of Payments Committee, the Columbia River Commission, several international bridge commissions, and the Roosevelt-Campobello International Park Commission.

Foremost among Canadian-United States mixed commissions is the International Joint Commission (IJC). The Group considered in some detail the structure and operation of this body, and met with both Chairmen and some of the Commission's members and staff. It has already been noted that the IJC has dealt with more than 100 references since its creation in 1909, and that its recommendations concerning boundary water questions have in most cases been adopted by the Governments. Its six commissioners represent political, legal, technical, and administrative viewpoints; in addition, its smooth functioning bespeaks a successful amalgamation of these diversities. A very small permanent staff, divided into United States and Canadian sections, assists the IJC in the performance of its functions. The sections, each of which consists of legal, administrative, and technical personnel, work separately in Washington and Ottawa, while maintaining the closest consultation with each other. The existence of such a secretariat facilitates the commission's work in a variety of ways. It provides human continuity as members of the Commission change over the years. The regular personal contact between the United States and Canadian staff members promotes understanding and

helps to set the generally conciliatory tone of Commission meetings. By thorough preparatory work, the staff helps to avoid misunderstandings based on faulty or inadequate information and thus contributes to the efficient dispatch of business and to informed and sound recommendations.

Although the IJC has limited quasi-judicial power with respect to applications for use, obstruction, or diversion of boundary waters, its great distinction is its signal success in technical fact-finding and advice to the Governments in response to references of questions on a growing range of other boundary water questions. The Commission refers each question to an expert study group, composed of nationals of both countries, which attempts to agree on a technical assessment of the question. It draws heavily on existing governmental expertise, borrowing especially qualified personnel from various government departments. But ascertaining the facts is not enough. As one Commissioner pointed out, the difficulty is not in finding the facts, but in agreeing on the interpretation of them. This requires a blend of technical and political knowledge, and the mixed composition of the Commission is well suited for this purpose. On the basis of the study group's report and hearings, the IJC makes a recommendation. Eighty percent of the time they are accepted by the Governments and used to resolve the dispute.

For some time the scope of the IJC's activity has been growing slowly and now includes substantial jurisdiction over water and even air pollution, as well as over industrial development. At the study-group level, this expansion of workload and broadened competence can be accommodated by appointing more study groups of differing expertise. However, the Commission itself remains fixed at six members, four of whom are part time. Thus, the members report, its workload is becoming increasingly burdensome. But perceived advantages of the present structure would be lost if the Commissioners were made full time or if their numbers were expanded. The six-member IJC allows for the informality and cordiality which permit it to function as a unit and to achieve consensus relatively easily. The part-time Commissioners are able to maintain genuine links with the constituencies which they represent. Other possibilities for handling an increased load or investigation of new areas might be the appointment of teams of deputy Commissioners or of new Commissions. New Commissions, although they might be custom-designed to be competent in other technical areas, would not have the tradition of the original IJC behind them. Teams of deputy Commissioners would have. In any case, if the work of the Commission is to continue to expand and diversify, at some point this dilemma will have to be faced.

In certain areas of dispute, too few questions may arise to warrant the intervention of the International Joint Commission or the creation of a new permanent commission. If, however, in some area there are likely to be a number of occasions for ad hoc negotiations over the years, the governments may wish to consider the establishment of a permanent joint secretariat to assist in those negotiations.

In three methods of international accommodation, third parties are employed in intermediary capacities to assist the disputants in reaching an agreement. These are good offices, mediation, and conciliation. The third parties have no power to bind the parties to a particular solution, or indeed to any solution at all. Their function is merely to advise, accommodate, and reconcile so that the parties may come to a bilateral settlement. These procedures are on the borderline between dispute management and dispute settlement. While these procedures do not bind the parties, they do, especially in the case of conciliation, offer the possibility of an impartial opinion which can form the basis of a settlement.

Both the United States and Canada are parties to the 1899 Hague Convention on the Pacific Settlement of International Disputes, which contains, among other things, provisions on good offices, mediation, and international commissions of inquiry. In 1914, the United Kingdom and the United States concluded an agreement which provided for an international conciliation commission of five members, to which disputes, including Canadian-United States disputes, could be submitted for investigation and report. In 1940, Canada and the United States amended this treaty as between them to provide directly for Canadian appointment of its members of the Commission.

Although all of these procedures remain available to Canada and the United States, there has been no instance to date of any of them being used. This is perhaps to be expected. These non-legal third party procedures are used primarily where non-binding settlement is appropriate but the disputants have difficulty with direct bilateral contact because of strained relations or fundamental difference of background, approach, or point of view. The United States and Canada have not found it necessary to use intermediaries to get bilateral negotiations started.

Dispute Settlement

Only where a binding procedure can be easily triggered by either party if no settlement is reached through non-binding procedures are the parties assured that the dispute will actually be settled. For the resolution of legal disputes, two binding methods of settlement are available: (1) ad hoc arbitration and (2) a permanent judicial tribunal. Arbitration is more commonly used.

Arbitral bodies are distinguished by ad hoc appointment of members, at least one of whom must be independent of the control of either disputant. Four forms of arbitration have been in more or less common use over the past half-century. These are the single neutral arbitrator, the three-member tribunal, and two types of five-member tribunals. In the five-member tribunal, there may be one arbitrator selected by each side and three neutral members, or there may be two arbitrators selected by each side (one or both of which may be its citizens) and only one impartial member.

The differences in composition among these four models may produce important differences in the conduct of the proceedings and in the nature of the result reached. Although the value of such latitude is debatable, the single arbitrator is obviously free to arrive at a decision which does not wholly favor either disputant. The independent member of tribunals of three (or five where there is only one neutral) does not necessarily have this freedom, since he must obtain the concurrent vote of a national member (or two members) in order to reach a decision. Where there are three neutral members on a panel of five the influence of the national members is minimized, as the independent arbitrators may decide without the agreement of either national arbitrator. Such a tribunal has thus the same freedom as the sole arbitrator, and like him may be appropriate where bilateral negotiations between the parties are or have been particularly difficult or acrimonious.

Because it is an ad hoc procedure, arbitration carries with it the problem of selecting the panel for each case. Numerous selection methods are employed, all directed to the reconciliation of two somewhat conflicting purposes: (1) giving the parties maximum control over the selection process; and (2) ensuring that neither of them can frustrate or sabotage it. Most of those provisions which do protect against the parties' default employ the services of a neutral third party. If one party does not make its appointment or the parties cannot agree on an independent member or members, this neutral party is empowered to do so, usually at the request of one of the parties.

The 1899 and 1907 Hague Conventions for Pacific Settlement both contain provisions on international arbitration. But the text of the 1907 Convention is more detailed, especially with respect to the structure, powers, and procedure of the Permanent Court of Arbitration, which is, however, not a court in a true sense but primarily a panel from which parties may select members of an arbitral tribunal. Though the United Kingdom has become a party to the 1907 Convention on that subject, Canada does not seem to consider itself bound by it but has accepted the 1899 one. The United States ratified the 1907 Convention with reservations. These specify that recourse to the Permanent Court of Arbitration

at The Hague could be had only by agreement thereto through general or special treaties of arbitration. They also rejected the power of the Court to formulate a compromise in the absence of agreement thereon between the disputing parties.

As between the United States and Canada, one must therefore look to the procedures under the 1899 Convention. These may be resorted to only through a general or special agreement between the parties. Such a special agreement was concluded by the United Kingdom and the United States in 1910 with respect to a large number of pecuniary claims outstanding between the parties, including a considerable number of Canadian claims, one of which involved the Cayuga Indians and led to a decision based on equity which became a landmark in international law.

In 1908, the United Kingdom and the United States entered into a general arbitration convention, agreeing to submit to the Permanent Court of Arbitration at The Hague "differences which may arise of a legal nature or relating to the interpretation of treaties," but excepting disputes affecting the vital interests, the independence, or the honor of the two parties. It also excepted disputes concerning the interests of third parties. A special agreement had to be concluded in each case, requiring on the part of the United Kingdom in cases involving one of the Dominions the concurrence of the Government of the Dominion concerned. The 1908 Convention was concluded for a period of five years only, but was extended for similar periods by agreements of 1913, 1918, and 1923. While Canada agreed in 1927 to further extension of the 1908 Convention, the United States suggested replacement of the old reservations by new ones. The discussion of a revised text was later postponed in order to not interfere with the concurrent negotiations on the Briand-Kellogg Treaty for the Renunciation of War, and it does not appear that it has been resumed after the completion of these negotiations.

A provision is also contained in Article X of the Boundary Waters Treaty of 1909 for reference of particular questions or matters of difference to the International Joint Commission acting as an arbitral tribunal, with the addition in certain circumstances of a neutral umpire. Such reference requires, however, in each case the consent of the two parties, and no reference has yet been made under this provision. Moreover, it is not a judicial body; in particular, it is composed mostly of non-lawyers.

Besides arbitrations under a 1910 claims agreement, there have been four prominent ad hoc arbitrations between the United States and Canada in this century. The first was the famous North Atlantic Fisheries controversy, which was referred to the Permanent Court of Arbitration at The Hague. The tribunal decided the crucial issue of fishing in certain bays in favor of the United Kingdom (i.e., Canada).

The second case arose in 1929 when a United States Government revenue cutter fired upon and sank a Canadian private vessel known as the *I'm Alone* in the course of pursuit for suspected smuggling of liquor. Several of the crew were lost. The question was referred to two commissioners appointed under the 1924 Convention relating to the prevention of smuggling of intoxicating liquors. The commissioners agreed and gave reports in 1933 and 1935, the latter granting compensation to Canada for the unlawful act of sinking and for damage to the captain and the crew.

The dispute settlement procedure employed in the *I'm Alone* case is an example of the sequential use of the mixed commission and arbitration. If the two national commissioners had not been able to agree, the treaty would have required the appointment of a third commissioner. This neutral member would, as umpire, have had the exclusive power to settle the dispute. Thus, he would have been the functional equivalent of a sole arbitrator, despite the appearance of a three-member tribunal. An earlier example of the actual use of such a neutral arbitrator was the United States-British claims commission of 1853. Umpire Bates settled claims between 1853 and 1855.

The third case was the Trail Smelter arbitration, resulting in the awards of 1938 and 1941. These decisions, which awarded transfrontier pollution damages to the United States, are detailed in Part I.

Fourthly, there was the 1967-1968 arbitration concerning the Gut Dam by the three-member Lake Ontario Claims Tribunal constituted pursuant to a 1965 compromise. This case involved many claims by United States owners of property on Lake Ontario that the placement of the dam, a Canadian navigational aid, contributed to water damage which these properties suffered in the early 1950s. After the tribunal determined the basis and scope of liability, damage payments pursuant to a 1968 lump sum agreement finally settled the matter.

A fifth case, the Alaska Boundary "arbitration" of 1903, was not really an arbitration. It was a mixed commission of six with no neutral members: three United States representatives, two Canadian, and one British. In a controversial decision, it drew the boundary between British Columbia and Alaska in a way favorable to the United States position. Deadlock was avoided because the British commissioner, Lord Alverstone, did not vote with the Canadian members.

The second, and more formal method of binding settlement of legal questions is by reference to a permanent judicial tribunal. Although in some parts of the world, notably Western Europe, there are regional or special purpose courts, the only general international judicial body to which the United States and Canada both have access is the International Court of Justice at The Hague.

Both Canada and the United States have accepted the compulsory jurisdiction of the Court, but their acceptances are limited by substantial reservations. Canada first accepted the World Court's jurisdiction in 1929, excluding *inter alia* "disputes with regard to questions which by international law fall exclusively within the jurisdiction of the Dominion of Canada." In 1939, Canada added a reservation covering disputes arising out of events occurring during World War II. As noted in Part I, another reservation was made by Canada in 1970, excluding "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management, or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada."

The declaration by the United States accepting the jurisdiction of the Court, made in 1946, excludes *inter alia* "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America," and "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court or (2) the United States of America specifically agrees to jurisdiction." In the first instance, the United States can itself determine in each case whether the matter is essentially within its domestic jurisdiction, and any such unilateral determination automatically deprives the Court of its jurisdiction.

As any acceptance of the jurisdiction of the Court is subject to the condition of reciprocity, Canada can invoke not only the reservations in her own declaration but also those in the United States declaration; similarly the United States can avail itself of the Canadian exclusions. Consequently, for all practical purposes, the two countries have at present no obligation to submit disputes to the International Court of Justice, and despite some proposals that certain disputes between them be submitted to the Court, none has been submitted. As noted in Part I, Canada justifies its reluctance to submit disputes to the Court by "the deficiencies of the law which it must interpret and apply."

While there is no Canadian at present on the Court, in any case in which it is involved, Canada can appoint a judge *ad hoc*, having equal rights with other members of the Court. To facilitate submission of cases to the International Court of Justice, the Court has recently modified its rules, making it easier to establish special small "chambers," increasing the role which the parties to a case may play in the selection of judges who would be the members of such a chamber and thereby bringing the method of their establishment closer to that of an arbitral tribunal. Such

chamber could also sit in North America, thus making it more easily accessible to the parties.

Follow-up Arrangements

Monitoring of the System

There is presently no systematic procedure available for following up on the results obtained by recourse to the various methods. By monitoring the individual cases which go through the settlement process, it would be possible to evaluate the entire system of settlement and to adjust it periodically as needed. Any decision by the two Governments to improve and complete their dispute settlement apparatus along the lines elaborated in Part III should include a commitment to keep the entire structure under scrutiny.

Follow-up on Particular Disputes

This sort of follow-up is to be distinguished from continuing supervision of a particular situation following the resolution of a dispute. This may be done by the deciding body on its own initiative, as did the Trail Smelter tribunal, which set up a procedure for monitoring local environmental conditions. The parties themselves may arrange for further supervision, either on their own initiative or at the suggestion of a joint advisory body. An example of the latter is the Great Lakes Water Quality Board, established on the recommendation of the International Joint Commission. That Commission itself often watches over the implementation of its recommendations. Monitoring the operation of a settlement of a dispute, where appropriate, is another means of avoiding further disputes.

PART III. RECOMMENDED PROCEDURES FOR SETTLING LEGAL DISPUTES

The preceding survey of the existing means for dealing with disputes between Canada and the United States shows that more or less informal channels of diplomatic, ministerial or parliamentary consultations for dispute avoidance are being used quite successfully in a number of areas. Various political and technical dispute settlement mechanisms continue to be successful in certain other areas. But at present there are no procedures readily available for resolving disagreements of a legal nature between the two countries or their nationals.

The shared legal and judicial traditions of the two countries constitute a firm basis for cooperation in legal settlement of international disputes. Certain disputes can best be solved by legal means; in others, the resolution of the legal issues facilitates the settlement of other aspects of a dispute. The first steps in this direction might be relatively simple; however, only if they are successful will more institutionalized methods follow. In addition, early proposals should focus sharply on problems for which international legal solutions are likely to be most appropriate. Initial success in limited areas might lead to the application of these proposals to a wider range of questions.

Accordingly, we suggest that our two Governments might at first adopt just two new procedures, one to assist in their solution of private disputes, the other to accommodate intergovernmental problems. The first would deal with cases of transfrontier pollution. The second would provide a compulsory third-party settlement system for treaty interpretation disputes.

1. Private Remedies in Each Other's Courts: Transfrontier Pollution – A Beginning

The private citizens and companies of our two countries have regular contact in virtually every area of economic and human endeavor. Disputes arise between them over all of the same matters which trouble relations between persons of the same nationality. As in domestic life and commerce, some in each area cannot always be resolved amicably. Therefore, our two countries' citizens and businesses have, as a practical matter, the same comprehensive need for recourse to civil litigation against each other as they do with respect to their fellow nationals. For a variety of reasons—judicial requirements of standing, problems of execution of judgments, and the rule of stare decisis, among others—nationals of the two countries either do not have the same rights of ac-

cess to each other's courts as do the country's own nationals or they have the same right of access but not the same remedies.

The two governments could, by a single agreement, bind themselves to make changes in their judicial procedures which would grant equality of access and remedies to nationals of either country in the courts of the other for all types of litigation. However, the Group feels that this course would be unwise, even if the goal is desirable. Such action would require bringing into working union the extremely complex bodies of local and federal statutory and common law of the two countries. It would also effectively add another facet to the already intricate judicial systems required by the federal style of government. The confusion and contradictions which could result from the complicating effects of these two facts might be worse than the frustrations of the present impediments to trans-frontier litigation. Even if an agreement were reached, there would be no guarantee that the necessary provincial and state legislation would be obtained.

A growing number of statutory rights, rules, and remedies supplement and limit or expand the substantive common law in virtually every possible area of litigation, from consumer protection to commercial codes and antitrust or monopoly law. In turn, case law elaborates and modifies the basic statutory language.

A preliminary step in dealing with these problems might be the establishment of a liaison group between the Uniform Law Conference of Canada and the United States National Conference of Commissioners on Uniform State Laws to provide for continuous review and coordination of legislation on matters of common interest. Such a group might even draft model uniform legislation for the two Governments and their subdivisions.⁴² This eventuality is probably not in the near future; however, in a few instances, such cooperation was possible in the past. Even if it were, the two countries' pre-existing legislation would still have to be minutely examined and compared in each possible subject area of litigation between nationals of the two States before equal remedies could be made available in the courts of both countries. In the short run, the magnitude of this task is forbidding.

⁴² This was done for transfrontier pollution through the *Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution*, drawn up by a joint working group of the American Bar Association and the Canadian Bar Association and recommended to the respective national governments by vote of the two organizations in 1979. Uniform Law Conference of Canada, *Transboundary Pollution Reciprocal Access*, <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1t4> (last visited Apr. 14, 2009); see also Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85 (1991).

Judicial structures in both countries, as well as the laws applied in their courts, reflect the over all federal structure of both governments. The proper court of first instance for a foreign plaintiff may be a federal or a state or provincial court; in some cases of concurrent jurisdiction, it may be either. Each federal subdivision of each country has its own judicial traditions and rules of procedure, which may or may not be similar to those of the central national judiciary. The applicable substantive law in one state or province may differ from that of a neighboring state or province on the same side of the border. Sometimes, because of overlapping legislative power, a combination of national and local laws must be applied by a court. This complexity occasionally even works to frustrate litigation across federal divisions within one country.

A considerable effort would obviously be required not only to identify and analyze problems resulting from these complications, but also to devise means of controlling them so that international civil litigation might proceed in a regular and predictable fashion. A certain amount of trial and error development would be necessary. Effective management of the experiment is really possible only if the first attempt at equalizing court access and remedies is limited to a single area of substantive law. The Group proposes that this area be transfrontier pollution.

A number of reasons suggest themselves in support of this selection. In general, transfrontier pollution cases will primarily affect only those living or working near the borders of the two countries. Such persons will be likely already to have experience in transfrontier dealings in a variety of areas, and therefore should be most able to work effectively and efficiently in such cases. Most of the comparatively few common-law precedents which recognize the availability of remedies to foreign plaintiffs relate to pollution or related nuisance cases. In a similar situation, the group of four Scandinavian States has entered into an agreement which provides, among other things, for reciprocal private and public remedies in pollution cases. Their experience can provide a model for study and improvement by our two governments. Environmental matters are prominent current concerns of the public in both States. Therefore, our populations would be likely to support the adoption and implementation of a mutual equal remedies regime. Finally, the problem of transfrontier pollution is rooted in the reality of the natural world. As a physical proposition, there is no difference between international and internal pollution.

In May 1977, the Council of the Organization for Economic Cooperation and Development (OECD) made a detailed recommendation for the implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution. The text of this recommendation has been set out as Annex B to the present report. This

action by the OECD is the culmination of several years' study of the problem in member states. Both the United States and Canada are members of OECD. They are unusual among the members in that, for them, transfrontier pollution is essentially a bilateral problem. Therefore, it is particularly appropriate that our two governments should be the ones to take the lead in putting the council's recommendations into practice.

The OECD decision is in the form of a general recommendation elaborated in particular detail by an annexed list of ten principles. Several of these advocate advance consultation and coordination along the lines already noted in this Part and in Part II of policy and legislative and administrative action on pollution matters. Among the goals of such concerted action are uniform environmental quality standards, non-discrimination between the domestic and international effects of pollution, and compatible land use planning. The recommendation proposes an obligation to exchange all information which may be relevant to trans-frontier pollution or to cooperation for its prevention.

The Group endorses the principles represented in these portions of the OECD recommendation. As noted, exchange of information is probably a precondition to effective private remedies. The Group also notes, however, that most of these matters are problems of executive and legislative policy, and relate partly to economic development programs. Therefore, the Group has refrained from commenting on these points in detail.

The remainder of the OECD principles relates to making the remedies existing in the judicial system of each country available to residents of others. The Group has modified these principles to conform to the bilateral situation of the two countries, and recast them in the form of draft treaty articles. Recognizing that implementation of these principles will entail a complex and perhaps extended program of legislative, administrative, and judicial change at several levels, the Group has nevertheless chosen the treaty form over other less formal types of agreement. It is hoped that the solemnity of treaty obligations would provide the stimulus and the political incentive to generate promptly the necessary changes on a comprehensive and coordinated basis at all levels.

The Group concedes that there are other approaches, some of which are certainly less attractive. The Governments might make a joint statement of intent embodying the principles, or come to some other non-treaty understanding. Another possibility is a treaty providing for implementation on a gradual or staged basis. An example of such a staged approach already exists, in the form of the arrangement relating to the

Dome-Canmar drilling project in the Beaufort Sea.⁴³ Because Canada decided that its Arctic Waters Pollution Prevention Act would probably not provide a remedy for damage sustained in Alaska as a result of a spill on the Canadian side, an arrangement was entered into with the permittees and their insurers to provide a remedy for United States claimants equivalent to that provided for in the Act.

There is also a possibility which is actually within the general treaty framework. Since 1972, the Hague Conventions on private international law have contained a federal State clause which, in the opinion of the Group, might be usable in the present situation. For instance, Article 35 in the Convention on international administration of the estates of deceased persons, adopted on 21 October 1972, reads as follows:

If a Contracting State has two or more territorial units in which different systems of law apply in relation to matters of estate administration, it may declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

These declarations shall state expressly the territorial units to which the Convention applies.

Other Contracting States may decline to recognize a certificate if, at the date on which recognition is sought, the Convention is not applicable to the territorial unit in which the certificate was issued.

Such a clause allows full ratification of a treaty by a federal State and its immediate application to so much of the subject matter of the treaty as is within the federal jurisdiction. Simultaneous or subsequent declarations of applicability to particular states or provinces can be added as and when the practice of the various constituent units is brought into conformity with the treaty.

⁴³ In 1976 and 1977, Dome Petroleum wanted to engage in exploratory drilling in the Beaufort Sea and sought authorization from the Canadian Government to initiate offshore oil and gas operations. Neighboring Alaska was concerned about the adequacy of safety measures and the availability of funds to potential pollution victims outside of Canada due to the risk of a significant oil spill. After discussions, the Governments of Canada and the United States reached a settlement, whereby Dome Petroleum was required to post bond to secure compensation to potential United States pollution victims, and the Canadian Government guaranteed the sums of money involved. Gunther Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 AM. J. INT'L. L. 525, 547-8 (1980).

In offering the following articles as a possible basis for negotiation, the Group wishes to emphasize that it is the principles which are important, rather than the particular formulations presented. Above all, the Group offers the proposition that equality of access and remedy in these areas is a matter of essential justice. Regardless of the route chosen, it commends to all the governments concerned the goal of achieving this equality with as great dispatch as may be possible.

Article 1: Definitions

For the purposes of this Treaty:

- (a) "Pollution" means any introduction by man, directly or indirectly, of substance or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living⁴⁴ resources or eco-systems, impair amenities or interfere with other legitimate uses of the environment.
- (b) "Domestic pollution" means any intentional or unintentional pollution, the physical origin of which is situated wholly within the area under the jurisdiction of one Party and which has effects within that area only.
- (c) "Transfrontier pollution" means any intentional or unintentional pollution whose physical origin is subject to, and situated wholly or in part within the area under the jurisdiction of one Party and which has effects in the area under the jurisdiction of the other Party.
- (d) "Country of origin" means the Country within which, and subject to the jurisdiction of which, trans-frontier pollution originates or could originate in connection with activities carried on or contemplated in that Country.

⁴⁴ The Group has, as noted above, followed the OECD language adapting it only insofar as is necessary to accommodate a bilateral situation. It observes, however, that if the term "natural" were substituted for "living" the definition of pollution would be considerably broadened. This broadening might be desirable, given the importance to the two States of their natural resources, such as national parks and monuments, which might be affected by various polluting activities. Though it probably considered such possibilities, on balance the OECD Council chose the narrower term. Here, as elsewhere, the Working Group has deferred, in presenting language, to the expertise of the OECD.

(e) "Exposed Country" means the Country affected by transfrontier pollution or exposed to a significant risk of transfrontier pollution.

(f) "Persons" means any natural or legal person, either private or public.

Comment. This Article defines the critical descriptive terms to be used in the remainder of the treaty. It has already been noted that the federal nature of the two countries complicates the coordination of laws. Apart from the substantive differences between the legal systems of the two countries, it could be that the various legislatures of each country will use different definitions of operative terms in pollution legislation. These divergent usages themselves could become subjects of disputes and litigation, thus compounding the complications. Therefore, it is essential that the treaty should contain an agreed, neutral set of definitions of all important words and phrases which would offer an effective guide for legislation.

The use in subparagraph (a) of the term "effects" without further modification is broad enough to permit recovery even in cases where the original pollution is remote from the common border. For example, migratory birds or fish that summer in Canada might be harmed by a winter oil spill off the coast of the southern United States near Mexico. It was the understanding of the Group that the concept of equality of treatment was not to be limited by geographical proximity to the common border, and that recovery in such a situation would be appropriate, assuming, of course, the injury were significant and could be directly traced to the pollution. Thus, if a citizen of North Dakota has an action against a citizen of Texas, so also should a citizen of Manitoba who has been similarly injured. It must be noted, however, that the regime being proposed here would not expand substantive remedies, for foreign nationals or for domestic citizens. The proposed regime is strictly procedural; it has no effect whatever on substantive rights or remedies in either country. It would simply equalize the availability of the rights and remedies already in existence or which may be established, for domestic purposes, in the future.

Article 2: Rights of Persons Affected

(a) The Country of origin shall ensure that any natural or legal person resident in the exposed Country, who has suffered transfrontier pollution damage or is exposed to a risk of transfrontier pollution, shall at least receive equivalent treatment to that af-

forded in the Country of origin, in cases of domestic pollution or the risk thereof and in comparable circumstances, to persons of equivalent condition or status resident in the Country of origin.

(b) From a procedural standpoint, this treatment shall include but shall not be limited to the right to take part in, or have resort to, all administrative and judicial procedures⁴⁵ existing within the Country of origin, in order to prevent domestic pollution, to have it abated, and/or to obtain compensation for the damage caused.

(c) In the case of requirements for security of cost, this treatment shall at least be equivalent to that accorded to a non-resident national of the Country of origin.

Comment. This is the main operative provision of the Treaty. It ensures that the actual or potential victim of transfrontier pollution will have a remedy in the courts of the polluter's residence, if a victim residing in the country of origin would have had a remedy in the case of domestic pollution. Paragraph (a) sets out the principle. It is so phrased that the guarantee applies to remedies in state and provincial courts as well as in federal ones. Paragraph (b) is a non-exhaustive enumeration of the means through which and forms in which redress may be sought. It subsumes injunctive and restorative relief insofar as such may be available.

It should be noted that quasi-judicial administrative remedies are included. Primary domestic recourse is often by this route, particularly where the issue is not existing pollution, but the approval of some proposed activity which may cause pollution in the future. In the long run, the right to prevent harmful activity, through participation in such proceedings as administrative hearings on construction permits, is probably a more important power than the right to after-the-fact recompense. A grant of the latter but not the former would produce only illusory equality.

A connected issue that was considered by the Group, but not further dealt with in this context, was the responsibility or immunity of international regulatory bodies such as the International Joint Commission,

⁴⁵ Once again, the Group has followed the OECD text despite certain concerns about its wording. As the Group understands the language, it is broad enough to include access to proceedings for execution of a judgment, or for injunctive relief, if either were necessary. If there should be any doubt on these points, it might be desirable to add to this text explicit language to ensure that such matters would be covered.

when their decisions impinge on private rights. Proper arrangements should be developed to take care of this problem.

Article 3: Rights of Public and Private Organizations

(a) (1) Where the domestic law of either Party or a political subdivision thereof permits persons who are resident or incorporated within its own territory, such as environmental defense associations, to commence or to participate in administrative and judicial procedures⁴⁶ to safeguard general environmental interests, that Party or subdivision shall grant the same rights for comparable matters to similar persons resident or incorporated in the territory of the other Party, provided that these persons satisfy the conditions laid down for persons resident or incorporated in the Country of origin.

(2) When some of the conditions concerning matters of form laid down in the Country of origin cannot reasonably be imposed on persons resident or incorporated in the exposed Country, these latter should be entitled to commence proceedings in the Country of origin if they satisfy comparable conditions.

(b) When the law of a Party or a political subdivision thereof permits a public authority to participate in administrative or judicial procedures in order to safeguard general environmental interests, that Party shall provide competent public authorities of the exposed Country with equivalent access to such procedures.

Comment. This Article enables public and private environmental groups in one country to have the same right to protect the general environmental interests of their country in the courts or administrative chambers of the other as comparable groups in the latter have. The establishment of this principle is especially important for the avoidance of inter-

⁴⁶ Here, and throughout the text, the term "procedures" has been substituted for "proceedings" in the OECD text, on the ground that "procedures" is more inclusive and therefore preferable.

governmental disputes. The sort of case with which an environmental group will be concerned is likely to be damage to wilderness areas, or pervasive pollution whose effect on any given individual is small, subtle, or very long term. Such a case is often the kind where, if relief is not sought or forthcoming early on, increasing damage can escalate the matter into a major public issue, which then becomes a dispute between the governments themselves. Had present-day substantive rights existed at the time these cases arose, the situations in the Trail Smelter, Gut Dam, and Garrison Diversion cases might have been alleviated at earlier stages or avoided entirely by the existence of an agreement along the lines of the present article.

Moreover, the knowledge, vigilance, and foresight of public interest groups make them likely candidates to take advantage of the opportunity to be heard at inquiries into the environmental impact of, for example, proposed new land development or changes in existing land use. Thus, planners and policy makers in both countries will be encouraged to give equal consideration to transfrontier and domestic effects of pollution-causing activities. The more this is done, the less use will need to be made of the private remedies for pollution damage provided in this treaty.

The rights of access for foreign public bodies granted by paragraph (b) may be additionally useful to ensure that suits in one country's courts are not used to further peculiar and unrepresentative interests of a foreign plaintiff, which interests may be inimical to his or its own country's general interests. In other words, among other purposes, this paragraph is directed at countering an attempt by a person in one country to use the other Party's courts to further his interests to the disadvantage of others in his own country.

Many legislative provisions giving standing to environmental organizations contain formal requirements specifying the type or characteristics of the organization, its by-laws, finances, and membership. These are usually designed to ensure the genuineness and responsibility of the organization. These requirements are commonly in terms of that jurisdiction's own corporation and tax laws. Sub-paragraph (a)(2) of this Article requires each Party to take account of variation in such formal laws, and to permit a foreign group to have standing if it meets substantively equivalent standards of good faith and representation in the jurisdiction of its origin.

Article 4: Notice to Persons in the Exposed Country

- (a) The Country of origin shall take any appropriate measures to provide persons exposed to a significant risk of transfrontier pol-

lution with notice sufficient in form and content to enable them to exercise in a timely manner the rights referred to in this Treaty. As far as possible, such notice should be at least equivalent to that provided in the Country of origin in cases of comparable domestic pollution. It shall be sent also to any authority designated for this purpose by the exposed Country.

(b) The exposed Country may designate one or more authorities which will have the duty to receive and the responsibility to disseminate such notice within limits of time compatible with the exercise of existing procedures in the Country of origin.

(c) Where such an authority has been designated, notification to it shall constitute fulfillment of the obligation of the Country of origin under paragraph (a). Failure of the exposed Country to designate an authority under paragraph (b) in no way affects the obligation of the Country of origin under paragraph (a).

Comment. This Article ensures that each Party will have sufficient information from the other so that the residents of the exposed country may make full and effective use of all remedies available. Although the article does not require notice for every risk of pollution, no matter how small, the term "significant" is meant to modify the entire phrase, "risk of transfrontier pollution," not just the word "risk." Thus, notice would be required of a small risk of significant pollution (e.g., from nuclear reactors), as well as a significant risk of relatively little pollution.

Notices of hearings on discharge permits, construction proposals, and zoning variances are often given in government releases of limited distribution or in periodicals of local circulation. In the United States, the environmental impact statement has become an important source of advance information on proposed projects. The form and content of notice is usually prescribed by statute to ensure that the domestic persons concerned will know that they have a chance to be heard. In particular, domestic environmental groups have become skilled at keeping abreast of opportunities for action. Persons and groups across the border, however, may not have access to this news network. This article requires that they be given special notice sufficient to allow them an equal opportunity to act.

Statutory and common-law remedies sometimes are conditioned on certain actions by the plaintiff to perfect his rights or to prevent them from lapsing. Finally, unusual or innovative rights and remedies are sometimes not used because the public is unfamiliar with them.

Article 5: Limitation of Rights Granted

In no event shall the provisions of this Treaty be construed as granting, per se, any greater rights to persons resident or incorporated in the exposed Country than those enjoyed by persons of equivalent condition or status resident or incorporated in the Country of origin.

Comment. This provision is designed to ensure that the Treaty does not inadvertently put the nationals of the other State in a better position to enforce pollution laws than the citizens of the first State. It should be noted, however, that this limitation applies only within the confines of the Treaty. The Group has already alluded to the fact that its proposals are not in any way addressed to the substantive law to be applied in transfrontier cases. The proposed regime is not intended to have any effect whatever on relevant private international law or common law rules or to increase or decrease in any way rights which foreign nationals have under existing law. In particular, the Group notes that there may be situations where the transfrontier effects of pollution are greater than the domestic ones. In these cases, the parties may wish to come to some special ad hoc agreement.

The regime of access and equality of remedy described in the preceding articles would put all persons in both countries on a level footing in any pollution proceeding in either country. However, if the standard in the forum jurisdiction is considerably lower than those in surrounding jurisdictions, the equality may be of limited value. In the long run, the judicial regime suggested here would be more valuable if a common minimum standard could be agreed on, one which would give substantive meaning in all situations to the principle of equality. Thus, the legislative and regulatory coordination discussed at the beginning of Part II might be able to contribute to the avoidance of private as well as public disputes.

2. Inter-Governmental Arbitration

The domestic courts of the two countries are thus seen to be systems in place for the resolution of private transfrontier disputes. All that is required is some adjustment and coordination to build upon and improve those systems. But for public or inter-Governmental disputes there is no system in place which can assure a definitive resolution. One may well ask, why is any system for binding settlement of such questions necessary, or even appropriate. The preceding sections have shown the relationship of the two nations to be among the most cordial in the world. The give and take of negotiation and consultation, of offer and bargain

proceed almost constantly, sometimes supplemented by mixed or fact-finding commissions. These processes have served the two countries well in most instances. But they do not always work. When they do not, there is no effective recourse. Disputes which will not yield to negotiation, often the most difficult or troubling ones, are usually left to heal or fester on their own. In simpler times, this neglect might have been acceptable. But today, United States-Canadian relations are extremely complex and become ever more convoluted and interwoven.⁴⁷ If the relationship is to be kept manageable, there must be a way of getting definitive answers to these difficult problems. Only a binding third-party settlement procedure can provide this assurance. Because of the two countries' success in negotiations, binding procedures are possible. Because of their negotiating failures, binding procedures are necessary.

The Group proposes that an arbitration system be created to fill the need for an available mechanism for binding settlement. This proposal is not a call to litigation or an endorsement of litigiousness. It calls for compulsory arbitration in a single but important category of fundamental legal disputes: those relating to treaty interpretation. The proposal is thus an appeal for a mutual commitment to the final authority of law in the government of the two countries' affairs. A common legal and political heritage and the basic trust of which unguarded common borders are evidence make such a commitment uniquely appropriate. A functioning system of settlement can provide a model for other countries which are not able to resolve differences amicably.⁴⁸ It can provide an objective affirmation of the vitality of North American governmental traditions and a refutation of those who are skeptical of their continued validity.

It was noted in Part II that arbitration and judicial settlement are the two techniques available for the definitive resolution of legal disputes

⁴⁷ The increasing complexity in Canada-United States relations has most recently been evidenced by Canada's refusal to join the United Kingdom in the Iraq War, revealing fundamental differences in international outlook and foreign policy. This divergence is not unprecedented. For example, following the Clinton administration's enactment of the Helms-Burton Law, strengthening the United States embargo against Cuba, Canada passed the Foreign Extraterritorial Measures Act to counter the effects of the United States law. John Herd Thompson, *Playing by the New Washington Rules: the U.S.-Canada Relationship, 1994-2003*, 33 AM. REV. CANADIAN STUD. 5 (2003).

⁴⁸ The NAFTA's dispute resolution provisions in Chapter 20 have been regarded as models for other free trade agreements. See generally Erik B. Wang, *Adjudication of Canada-United States Disputes*, 19 CANADIAN Y.B. INT'L L. 158 (1981) (discussing the Report of the American and Canadian Bar Associations' Joint Working Group 1979 and its purpose and importance); see also American Bar Association Section of International Law, <http://www.abanet.org/intlaw/intlproj/home.html> (last visited Apr. 15, 2009) (stating the American Bar Associations eighth institutional goal is "to promote the rule of law in the world").

between States. Because arbitration is an ad hoc procedure, the parties retain control over the composition and procedure of the panel for each case, thus giving it the advantages of flexibility and relative informality. The structure of an arbitral tribunal can be designed to suit the needs of a particular case. Its procedure can be as simple and uncluttered as the facts of the case permit. Arbitration is a procedure that guarantees that issues are kept self-contained and are dealt with on their own merits, without "linkage" to other bilateral issues. It therefore accommodates the widely held view that in complex bilateral relations it is unwise to "trade off" the interests of different groups and regions. Judicial settlement on the other hand has the advantages of ease of reference and of relative predictability. Since the court is already in existence, proceedings may go forward rapidly once the court is seized of a dispute. Over time, a permanent court will develop its own jurisprudence, and the details of its procedure will become regularized. The parties will therefore be able to have some idea prior to submission of the way the court will treat a given question.

Considering the history of informal, ad hoc contacts between the United States and Canada and the multitude of questions of potential common concern, the arbitral style seems best suited to their needs. However, since the procedure is for the sole use of two nations with a common legal tradition, it may be possible to build into it also some advantages of a judicial system, without its rigidity. This has been done by the careful specification of applicable law based on explicitly shared values, by offering a custom-designed judicial chamber as a secondary alternative to arbitration, and by giving the parties the option to use arbitration to obtain legal advice to aid them in negotiating settlements.

Even in simpler times, the two countries have found it difficult to agree on a settlement procedure after a dispute has arisen. Even though a procedure has been available in the International Joint Commission for dealing with certain categories of disputes, no agreement was ever reached on utilizing the arbitral powers of the Commission in a concrete case. In several cases, when they agreed to resort to arbitration, it usually required complex negotiations to design from scratch the desired arbitral procedure. The *I'm Alone*, Trail Smelter, and Gut Dam cases are three comparatively recent examples. As relations become more complicated it becomes ever more important that a fully elaborated arbitration system be put in place, for use as and when it is required.

Although an arbitration system, once created, may simplify relations, we recognize that different perceptions of the problems involved in establishing it bear upon the very decision to adopt it. It is our belief that contemplation of such a decision will be made easier by the availability

of a concrete proposal. In this spirit, the Group offers articles to the two Governments as a possible basis for joint consideration and negotiation.

Article 1: Compulsory Jurisdiction

In any dispute between the States Parties, any question of interpretation, application or operation of a treaty in force between them, which has not been settled within a reasonable time by direct negotiations or referred by agreement of the Parties to the International Court of Justice or to some other third-party procedure, shall be submitted to third-party settlement at the written request of either Party addressed to the other's cabinet officer in charge of foreign affairs, or by an exchange of notes between the two.

Comment. This is the main jurisdictional clause. It provides that a certain category of questions (those which relate to the interpretation or application of a treaty) may be submitted to arbitration by the unilateral request of one of the two Parties, without the advance agreement of the other. This compulsory jurisdiction is strictly limited to that one category: treaty interpretation, application, and operation. It can be invoked only when the question relates to a treaty binding on both countries. As of 1 January 1979, there were some 200 treaties in force between them, counting both multilateral and bilateral instruments. They cover subjects from aeronautical research to zoology; and the number and variety grow annually.

The article has been carefully worded so that the arbitral jurisdiction is compulsory only as to the treaty question itself. In mixed disputes involving non-treaty legal questions or non-legal questions, compulsory jurisdiction will not extend to these other matters. The tribunal should be able to deal with non-treaty legal issues only to the extent that they are essential to a proper resolution of the treaty issues; the Group understands this to be implied in the draft provision on applicable law (Article 8, *infra*). It must be noted further that Article 4(2) follows the normal practice, both international and domestic, of leaving the precise limits of the tribunal's jurisdiction for the tribunal itself to decide. International tribunals have developed a fairly substantial and consistent jurisprudence in reference to similar jurisdictional clauses.

The Group recognizes that, as in the case of the legal/non-legal distinction already discussed, it may often be difficult to excise the treaty question from the rest of the dispute for separate analysis. But here again the Group believes that the problem is more theoretical than real. Municipal tribunals, especially appellate courts with constitutional jurisdiction, are often asked to consider matters of statutory interpretation in

isolation from the central issues of a dispute. And the International Court of Justice and the Court of Justice of the European Communities are among international tribunals which have performed similar functions. Moreover, the Group has drawn a definite line around treaty questions in an attempt to be modest in its proposals, to suggest something that is politically feasible. There is no juristic or other legal reason why such a line would have to be held in practice, were it not for the parties' likely concern about keeping compulsory jurisdiction tightly circumscribed.

It is a matter of long-standing and widespread agreement among States that treaty interpretation or application is an especially apt subject for international adjudication. The Hague Convention of 1899 for the Pacific Settlement of International Disputes stated in Article 16 that arbitration was the most equitable means of settling "questions of a legal nature, [especially those relating to] the interpretation or application of international conventions" (Article 38 of the 1907 Hague Convention is identical in this respect). The "interpretation of a treaty" was one of the main categories of legal disputes listed as suitable for arbitration and judicial settlement in Article 13 of the Covenant of the League of Nations and is given a prominent position in the optional clause contained in Article 36 of the Statute of the International Court of Justice.

The term "treaty" is to be taken in the broad sense used by the Vienna Convention on the Law of Treaties, including any kind of international agreement. On the other hand, it does not apply to agreements not involving the Governments of the two countries, excluding therefore compacts between states and provinces, or agreements involving public corporations or government-owned entities.

The terms "interpretation" and "application" are those customarily used in special compromissory clauses to describe the types of questions which arise under treaties. The intent of using both is to make sure that jurisdictional objections cannot be raised on the ground either that a question is too connected with the actual working of the treaty to be regarded simply as a matter of interpretation, or that it is so abstract as not to be one of application. The difference between them in practice may be quite small, however, as most disputes involve both interpretation and application. To indicate emphasis of the fact that jurisdiction extends to any problem which may arise with respect to treaty language, the term "operation" is added here as well. Most recently, this wording has been incorporated into Article 9 of the 1977 United States-Canadian Transit Pipeline Treaty.

This special position of treaty interpretation is probably due in part to the fact that a treaty contains only rules which have been agreed upon by the parties. Compulsory jurisdiction over its interpretation does not ex-

pose a party to prejudice through the submission of domestic issues, of questions which it has not considered as governed by international law, or of those for which international law provides only obscure or ambiguous answers. It merely provides an impartial and authoritative way of ascertaining the meaning and effect of terms to which both parties have already subscribed.

Treaties, particularly bilateral agreements, between Canada and the United States comprise the law for the two countries. Some commentators liken treaties to international "statutes." Others see them as interstate contracts. In either case, the two countries are both committed to the binding force of their provisions. And they have a strong tradition of judicial recourse in the case of domestic differences over statutory or contractual interpretation.

Through historical development or implicit common understanding, some treaties or treaty provisions may no longer be properly given strict legal effect. The Rush-Bagot Agreement of 1817 is perhaps the classic example of an extant treaty with more symbolic value than literal enforceability. Article IV of the 1909 Boundary Waters Treaty, containing a broad antipollution provision, may be another example. But such instruments are not, therefore, necessarily inappropriate for international adjudication. The precepts of international jurisprudence require an arbitral panel to interpret any treaty in light of all the relevant circumstances, including historical development and implicit understandings. The Parties are thus protected from an overly "legalistic" reading of a treaty. Nevertheless, there may be instruments or parts thereof which the Parties may not wish to have made subject to the general grant of compulsory jurisdiction. If this proves to be the case, excluded provisions could be listed in an annex to which Article 1 could refer. Accordingly, Article 1 could be revised to add after "in force between them," the clause "except those treaties or parts thereof listed in Annex A to the present Treaty." Alternatively, such an annex might list the treaties to be covered by Article 1. In this case, the words "in force between them" could be replaced by "listed in Annex A to the present Convention."

If it does prove necessary to restrict the generality of Article 1, the Group would recommend the first alternative. Moreover, it would recommend keeping the list of excluded instruments as short as possible. Regardless of initial commitments, the ultimate success of a third-party settlement system will depend upon its ability to build governmental and public confidence, to show that the system is even-handed and that the Parties are on a footing of equality. While arbitration or adjudication does not by any means always produce a "winner" and a "loser," any given decision may be more favorable to one side's position than the other. If the range of arbitral or judicial jurisdiction is severely limited,

the net effect will be very few decisions on a restricted set of instruments. In this situation, the arbitral record may look one-sided, due not to the nature of the system, but rather to the limited subject matters of the chosen instruments. Thus, an excessively modest grant of jurisdiction may result in the apparent confirmation of the concerns which prompted the caution in the first place. General compulsory jurisdiction is especially appropriate for Canada and the United States in large part because their mutual treaties are many and varied. If arbitration or adjudication is permitted to range over this entire field, the favor which either State may find in any particular decision will be balanced by favor to the other State in other decisions. The net result will then properly reflect the equality and fairness inherent in genuine third-party proceedings.

It is worth emphasizing that the article does specify arbitration only as a last resort. Negotiation is explicitly recognized as a normal first step. Moreover, the parties are required to devote a reasonable time to these negotiations in a serious attempt to resolve the matter bilaterally. The two States can also agree to refer the dispute at any time to any special fact-finding or other procedure, such as the International Joint Commission. Even in treaty interpretation, arbitration is to be reserved for those cases where other procedures cannot bring the parties all the way to settlement.

The Group considered the possibility of limiting jurisdiction under Article 1 to bilateral treaties. It decided, however, to include multilateral treaties as well, particularly having regard to the fact that an increasing number of essentially bilateral questions are regulated by general international agreements of a codificatory nature. Examples include the Vienna Conventions on the Law of Diplomatic and Consular Relations and on the Law of Treaties, and the 1958 Law of the Sea Conventions. Presumably, if a case under such an instrument should involve third parties, the United States and Canada would go to some other procedure or make some ad hoc arrangement for the adaptation of the presently proposed system to accommodate others.

It must be noted, however, that the provisions of some multilateral treaties may effectively preclude use of the present procedure. Some multilateral treaties to which both Canada and the United States are parties specify exclusive means of compulsory settlement of disputes concerning the interpretation and application of these treaties. This is done to ensure consistent interpretation of the instrument where different pairs of parties to the treaty may be involved in essentially the same dispute at different times. In the case of such a treaty, provided that the procedure specified therein is genuinely compulsory and results in a binding decision, the two governments must have recourse to it through the multilateral jurisdictional clause, rather than to arbitration through the present

article. Examples of such treaties are the Bretton Woods Agreements on the World Bank and International Monetary Fund, and the various international commodity agreements, where the international organization constituted by the document has sole authority over its interpretation. There might also be certain bilateral agreements which would fall into this group. The 1909 Boundary Waters Treaty might be an example.

Other multilateral treaties specify a binding procedure for interpretation but allow the parties to resort to another procedure at their option. An example is the Universal Copyright Convention, calling for reference to the International Court of Justice absent agreement to the contrary. In disputes between Canada and the United States over such a treaty, Article 1 of the present treaty can be considered as an exercise of this option, and the Plaintiff would be obliged to resort in such a case to arbitration in accordance with the present treaty. Other provisions of multilateral treaties may be interpreted as granting the "plaintiff" the choice of resorting to the jurisdictional clause in these treaties or to arbitration under the present treaty. The Convention establishing the International Maritime Consultative Organization allows reference either to the Assembly of that organization or to an agreed procedure.

Compulsory settlement in regard to still other multilateral instruments is provided for in a separate optional protocol to which only one of our two States is a party. This category would include the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations. In such a case, the complaining government would have to seek redress under the present treaty.

Article 1 should be read in light of Article 10 concerning advisory opinions. The comment to that article notes that the governments may wish to use the advisory procedure when a treaty interpretation question is involved in private litigation in one of the two countries.

Article 2: Optional Jurisdiction

(1) Any other dispute between the States Parties relating to a question or principle of international law may be submitted to third-party settlement by special agreement between the Parties. Without limiting the generality of this principle, the Parties regard disputes concerning the following matters as particularly appropriate subjects for such special agreements:

- (a) pecuniary claims in respect of losses or damage sustained by one of the Parties or its nationals as a result of acts or omissions of, or attributable to, the other Party;

- (b) immunities of States and of their agencies and subdivisions;
 - (c) privileges and immunities of Heads of States, Foreign Ministers and other high officials;
 - (d) diplomatic and consular privileges and immunities;
 - (e) treatment of the other Party's nationals;
 - (f) environmental issues;
 - (g) the management of natural resources of common interest; and
 - (h) transnational application of civil and criminal laws.
- (2) The special agreements referred to in the previous paragraph shall, for each case or group of cases, become effective through an exchange of diplomatic notes without any legislative action.

Comment. Paragraph 1 makes clear that all legal disputes not subject to compulsory jurisdiction under Article 1 may be submitted to third-party settlement only through an ad hoc agreement of both countries. On the other hand, the first sentence of the paragraph also makes clear that any legal dispute is an appropriate subject for arbitration or adjudication by agreement.

It seems useful to include in the paragraph a non-exhaustive list of international legal questions, in order to give some idea of the range of cases where third-party settlement might be employed. The subjects listed are some of those which have often been submitted to arbitration or adjudication in the past. For the most part, they are areas where customary or conventional international law is relatively well settled and easily ascertainable. In addition, a reference has been made to environmental issues, which are of particular concern to citizens on both sides of the boundary.

The Group considered that the outstanding maritime boundary questions between the two countries might also be added to the list. This has not been done for the moment, however, in deference to any procedure that might be proposed as a result of the Cutler-Cadieux negotiations, which were under way while the present draft was being developed.

The first item listed is pecuniary claims by the citizens of one State against the other; Claims "attributable to" a State will include those against any of its constituent federal subdivisions. The periodic refer-

ence of a large number of claims to a special bilateral commission has for many years been one of the most common uses of international arbitration. Despite the fact that both States have done so several times in the past, there has not been a mutual submission of United States and Canadian claims to a general commission since 1910. The only recent group of claims submitted to arbitration were the special claims connected with the Gut Dam.

Submission of claims such as those described in paragraph 1(a) would be made only after exhaustion by each claimant of the local remedies in the other State, if appropriate remedies are available. Indeed, a regime of equality of remedies such as that proposed for transfrontier pollution cases in the previous section would do much to reduce the number of claims being lodged. Exhaustion of local remedies is a generally recognized rule of international law, covering all cases which may properly be resolved by reference to domestic courts. Absent explicit agreement to the contrary between the Parties, an international tribunal will automatically apply this rule in any dispute involving private claims.

The second paragraph of Article 2 is addressed to the fact that the timing of the agreement to arbitrate may be crucial. There often comes a time in the life of a dispute when it seems "ripe" for settlement. If, at such a point, arbitration appears to be the best method of resolution, the submission should proceed as expeditiously as possible. To facilitate that, it is specified that an exchange of diplomatic notes will be sufficient to make the submission. No legislative action is required. There are precedents for this sort of legislative authorization of further executive agreements in situations like GATT where it is anticipated that implementation of general principles will take place through numerous small agreements.

Article 3: Organization of Third-Party Settlement

Unless the Parties otherwise agree in a particular case, third-party settlement pursuant to Article 1 or Article 2 above shall be organized in each case as follows:

- (a) Within 60 days either of the receipt by the other Party of the request for third-party settlement or of the date of signature of a special agreement, as the case may be, each of the Parties shall appoint one member of the arbitral tribunal. Within a further period of sixty days the Parties shall, by common agreement, select a third person who shall be the Chairman of the tribunal. If no agreement is reached on the selection of a Chairman

within this period, either Party may request the President of the International Court of Justice to make the appointment. If the latter is prevented from acting or is a national of one of the Parties, the nomination shall be made by the Vice-president of the Court. If the latter is prevented from acting or is a national of one of the Parties, the appointment shall be made by the senior judge of the Court who is not a national of either Party. The time limits specified in this paragraph may be extended or shortened by agreement of the Parties.

(b) If, for any reason, a tribunal is not constituted pursuant to the previous paragraph within 120 days of the receipt of the request for arbitration or of the date of signature of the arbitral agreement, either Party may, by written application, submit the dispute to the International Court of Justice, to be decided by a Chamber thereof composed in accordance with the following paragraph. The acceptance by the Parties of the jurisdiction of the Court and its special Chamber is subject to the condition that the Chamber has been established in accordance with that paragraph.

(c) The Parties agree that either of them will be authorized to request, at the time of submitting a dispute to the Court, that the Court form a Chamber for consideration of the case pursuant to Article 26(2) of the court's Statute and Articles 17 and 18 of its Rules, consisting of three judges, one national of Canada, one of the United States, and one of another State to be agreed upon by the Parties. If, at the time of application, one of the States Parties does not have a national on the Court, it shall, pursuant to Article 31(2) of the court's Statute, nominate a person to sit as judge. If there is no agreement between the Parties on the third member of the Chamber within thirty days of the submission to the Court of an application pursuant to the previous paragraph, or if a Party with no national on the Court does not nominate a person to sit as judge within such time, that member or those members shall be elected by the Court from among its members. In any such case the Parties may jointly request that any election be made from among judges

coming from a particular geographical region or representing a particular legal system or tradition.

(d) Vacancies which may occur in an arbitral tribunal composed according to paragraph (a) above shall be filled in such manner as provided for original appointments. Vacancies occurring in the Chamber of the Court established pursuant to paragraphs (b) and (c) above shall be filled in accordance with the Statute and Rules of the Court.

Comment. This article provides for the constitution of the arbitral or judicial panel to be used to resolve disputes submitted either under Article 1 or Article 2. By including disputes under Article 2 (absent other provision in the compromis), it is hoped that the conclusion of special agreements will be simplified and thus encouraged. The availability of a pre-established appointment procedure should eliminate one possible subject of contention which would otherwise have to be discussed after the dispute had already arisen.

In the typical case, a dispute will be submitted to a three-member ad hoc arbitral tribunal. This configuration was seen as well suited to the situation of the two countries and the nature of many of their differences. The two countries' history of friendly settlement in good faith and their cultural, legal, and political similarity would seem to make it unnecessary in most cases to have the majority of neutral members so often required as a buffer in less cordial situations. In certain instances, however, the Parties may wish to establish bodies of different sizes. For example, a complex dispute which involves differing regional and national interests on both sides may call for a five-member tribunal so that the various positions could properly be represented. Indeed, the Group notes that the five-member panel with three neutral members seems to have been enjoying considerable favor recently. While the Group still feels that one neutral will usually be sufficient (and less expensive), it also finds the five-member panel with three neutrals to be quite an acceptable alternative. If the governments chose this form as the normal mode, minor drafting changes in the proposed texts will be required.

Reference of a large number and broad range of disputes to a single panel might justify an even larger membership: seven or perhaps even nine.

In making the appointments to tribunals, the Parties may wish to involve senior members of their domestic judiciaries, either on a consultative basis or by actually giving them the power of selection. Certain cases might call for advice from other officials, e.g., cabinet officers or ap-

propriate representatives of state or provincial governments. The ad hoc selection process makes it possible for concerned constituencies to play a role. They should be encouraged to do so, as such participation will broaden support for the use of arbitration, and at the same time increase the likelihood that decisions of the tribunals will be acceptable to those most affected.

It will usually be a great advantage to have a body of ad hoc judges composed of persons who have special familiarity with the facts or background of a given case or who possess expertise uniquely relevant to its solution. However, there may be situations where the Parties will wish to have a problem considered by a panel with more distance and detachment from the development of the dispute. In response to this eventuality, paragraphs (b) and (c) of Article 3 offer the possibility of submission to a specially constituted three-member Chamber of the International Court of Justice. By letting either Party resort to this standing body after a certain period, this alternative ensures that the dispute settlement process will not be frustrated by the failure to complete an ad hoc tribunal.

One national of each Party shall serve as a judge in the Chamber. The identification of the third judge has been left to the ad hoc agreement of the two governments. They may wish to have a common law expert. On the other hand, a dispute might concern questions of civil law, which prevails in certain areas of the two countries. In such a case, the Parties might designate a judge from a civil law State as the third member. There may even be special cases where the Parties would prefer the perspective or expertise of a representative of a non-European legal tradition.

Where the Parties cannot agree on the choice of a third judge, the appointment will be made by the Court in accordance with its rules. Even where a specific judge cannot be agreed upon, the governments will probably be able to designate generally the geographic areas or legal systems which should or should not be represented. Paragraph (c) encourages the governments to pass on such a general agreement to the Court.

This Chamber of the Court, as it is used periodically over the years, might develop what could be considered a "North American jurisprudence." Such a body of law would give the Parties a common frame of reference, encouraging further resort to the legal method of settlement of disputes between them.

The court's Rules of Procedure, as adopted on 14 April 1978, make it possible for the parties to a dispute to exercise virtually complete control over the size and composition of a Chamber for a given case. One is, of course, limited to the membership of the Court, except for the possibility of ad hoc national judges; and the final decisions on the makeup of

the Chamber are with the Court itself pursuant to Article 18 of the Rules. Therefore, paragraph (b) of Article 3 makes it clear that the compulsory jurisdiction of the Court will not come into being if it does not assemble the Chamber according to the Parties' request. It may be noted in passing that Article 32(1) of the Rules of Court, when read with Article 18(2) and (3), effectively seems to imply neither of the national judges of the Parties may be elected to preside over the Chamber.

Paragraph (d) ensures that an unexpected vacancy on the tribunal or Chamber will not affect its balance.

Article 4: Competence

(1) The arbitral tribunal or the Chamber of the Court constituted in accordance with Article 3 shall have jurisdiction in any question or dispute submitted to it in accordance with the provisions of this Treaty.

(2) Any disagreement (a) as to whether such tribunal or Chamber has jurisdiction under this Treaty or any agreement concluded pursuant thereto, or (b) as to the extent of such jurisdiction, shall be settled by the decision of that tribunal or Chamber.

Comment. This is a routine provision in arbitration treaties although one of considerable importance. Paragraph 1 merely articulates the fact that any properly constituted body has the competence to decide any properly submitted questions. Paragraph 2 gives the arbitral body the power of decision when its competence to decide is the very point in issue. In fact, this power probably flows by operation of law from the fact that this instrument and compromis concluded under it are treaties themselves. Thus, jurisdictional questions under them—such as whether or not there was a treaty on a particular subject or whether the question submitted properly related to its interpretation, application, or operation—would themselves be questions of treaty interpretation. Therefore, for all the reasons set out in the comment on Article 1 above, they are quite properly objects of compulsory jurisdiction. Paragraph 2 is inserted here just to make doubly sure that this point is clear. In the opinion of the Group, this jurisdiction over jurisdiction, so-called *competence de la competence*, is essential to the effective operation of the third-party settlement system.

As is always true where jurisdiction is limited or circumscribed by an agreement, there are going to be borderline cases, situations where the Parties will disagree about whether a problem is within or outside of those limits. Considering the particular limits of the jurisdictional claus-

es proposed above, such a disagreement may concern the question of whether a dispute has or has not been settled by direct negotiations, whether a given instrument is or is not a treaty, whether it is or is not in force, or whether an issue is within the terms of the special agreement to arbitrate. Unless the final settlement of such points is left to the tribunal itself, resolution of the substantive dispute can be delayed, sometimes indefinitely, by jurisdictional disagreements between the Parties.

Article 5: Provisional Measures

(1) An arbitral tribunal which considers *prima facie* that it has jurisdiction under this Treaty or an agreement concluded pursuant thereto shall have the power to prescribe, by order, any provisional measures which it considers appropriate to preserve the respective rights of the Parties pending final adjudication.

(2) Such provisional measures may only be prescribed, modified or revoked upon the request of a Party and after giving both an opportunity to be heard.

(3) Each order issued pursuant to this Article shall specify the time during which it is to be in effect, which in no case shall be longer than six months. Either Party may apply to the tribunal for renewal of an order issued pursuant to this Article.

(4) Any order prescribing, modifying or revoking provisional measures shall be notified forthwith to Parties who shall promptly comply therewith.

Comment. Once again, this is a routine provision, found in almost all statutes of international tribunals or codes of arbitral procedure. The necessity of the power to grant provisional relief is implicit in the initial decision of the Parties to submit to binding settlement. By this decision, they have agreed that their actions with respect to the matter in question will ultimately be regulated by the decision of the tribunal. For such a commitment to have meaning, the Parties must in the meantime be willing to have the tribunal indicate what acts of forbearance are necessary to avoid foreclosing an effective decision on the merits of the case.

Paragraph 3 ensures that provisional orders of indefinite duration are not made, as such orders might have the effect of encouraging one of the parties to delay the movement of the case toward judgment. Every six months, the tribunal must completely reconsider the advisability of provisional measures, in light of then current circumstances and the expeditious conduct of the case.

The Article applies only to ad hoc tribunals formed under paragraph (a) of Article 3. The Chamber of the International Court of Justice would have a similar power under Article 41 of the Statute of the Court.

Article 6: Location of Proceedings

- (1) Arbitration proceedings commenced at the request of one Party shall take place in the capital of the other Party, unless the Parties otherwise agree.
- (2) Arbitration proceedings commenced by agreement of the Parties shall take place at a location determined either (a) by the Parties' agreement, or (b) in default thereof by the tribunal itself.
- (3) Where a dispute is submitted to a Chamber of the Court pursuant to paragraphs (b) and (c) of Article 3, the Parties may request that the Chamber sit at the capital of one of the Parties.
- (4) The tribunal hearing a case may hold proceedings at locations other than its principal seat as and when the circumstances of the case make it desirable.

Comment. The first paragraph of this Article provides in effect that the Party which submits a dispute to arbitration should grant the "defendant" the advantage of having the proceedings conducted on its territory. Articles 22(1) and 28 of the Statute of the Court would permit its Chamber to sit in either of the two countries.

Because the two countries are located on the North American continent, a neutral venue in another part of the world would be neither economical nor efficient. In the typical case, both personnel and evidentiary material will be available most easily in one of the two capitals. It seems most equitable, where other things are equal, to require the Party who is initiating proceedings to take its case to the capital of the other. The Parties can, of course, override the rule of paragraph 1 if the circumstances of a case make some other venue advisable. It has been suggested, for example, that the North American headquarters of international organizations to which both countries belong, such as the World Bank's Center for the Settlement of Disputes or the International Civil Aviation Organization, might fill the need for a neutral venue. Or the Parties may wish to have the proceedings held alternately in each capital. In cases of arbitration by agreement, the Parties would presumably settle the question of venue as a routine part of the compromis.

Paragraph 4 is a standard provision which flows from the prerogative of a tribunal to make orders during a case concerning its conduct. One can easily imagine situations where it would be desirable for special hearings to be held somewhere other than at the regular seat of the tribunal. It could happen, for example, that the tribunal would be called upon to take testimony from numerous residents of a given locale. In another case, the tribunal might find it necessary to inspect first hand some geographic conditions or other local situations.

Article 7: Conduct of Proceedings

(1) An arbitral tribunal constituted in accordance with paragraph (a) of Article 3 shall function in accordance with the Rules of Procedure annexed to this Treaty, unless the Parties should otherwise agree.

(2) At the request of a Party, the tribunal may call upon any agency, subdivision or national of either Party to appear to give evidence or testimony, provided that the tribunal may not hear or receive evidence or testimony pursuant to this paragraph without the consent of the Party whose agency, subdivision or national is being called.

(3) A Chamber of the Court formed pursuant to paragraphs (b) and (c) of Article 3 shall function in accordance with the applicable provisions of the Statute and Rules of the Court, unless the Parties should, by common agreement, request otherwise.

Comment. This article incorporates by reference the relevant procedural and administrative provisions for the organization and conduct of arbitration. These provisions, which are for the most part formal and uncontroversial, provide for such matters as a registry to record proceedings and to facilitate the following: communications between Parties and tribunal; schedule and format of written and oral pleadings; remuneration of arbitrators and division of expenses of the tribunal, quorum, and required majority for decision; form and content of judgments and separate, dissenting opinions.

Where specially designed permanent or ad hoc bodies are contemplated, as in the present Treaty, these procedural matters are usually covered by a set of rules annexed to the main instrument. A set of such rules is included as Annex C to this report. These rules provide an ample opportunity for both parties to raise issues of concern to them. One unusual provision in those rules, relating to the method of reaching a decision, should be noted here. Paragraph 2 of Article 3 of the annexed draft spec-

ifies that decisions of an arbitral tribunal "shall ordinarily be reached by consensus." According to current United Nations practice, a consensus exists with respect to a particular decision when no member of the deciding body has objections serious enough to force a vote. Thus, only where no consensus can be achieved is a vote to be taken. This preliminary effort at consensus may be expected in most cases to avoid a divisive vote. If the experience of such bodies as the International Joint Commission is any indication, the members of a small, well-qualified group appointed by the two governments will often be able to agree among themselves. Thus, while a binding decision is still guaranteed, it will be made in as amicable a fashion as possible. While the Group notes that these consensus decisions may be somewhat less rigorous legally than a majority decision and may not be good precedents for others to follow, it considers that wherever it can be achieved mutual satisfaction is paramount.

One other important procedural point is set out as paragraph 2 of the present Article itself. It was noted in Parts I and II that states, provinces, municipalities, or local populations may sometimes have important interests in a case distinct from those of two governments. Although such entities or persons obviously have no standing to initiate or pursue proceedings before an arbitral tribunal, paragraph 2 allows the tribunal to obtain their views where they may be considered necessary by one of the Parties. On the other hand, the paragraph ensures that, without its consent, a Party's own subdivision or national cannot be brought into the case.

It is expected that if a request is made by the tribunal to the parties to arrange for the procuring of evidence or attendance of witnesses, the party or parties requested will take the necessary steps to ensure the presentation of such evidence or the attendance of witnesses.

Where use is made of an established tribunal, such as the Chamber of the Court provided for in Article 3 (b) and (c), that body brings with it its own statute and rules. Articles 90 to 93 of the Rules of the Court outline a streamlined procedure to be used by Chambers. These are attached as Annex D.

The present Article notes once again the preemptive power of a special agreement between the Parties. Paragraph 4 permits the Parties to request that the Chamber of the Court function in accordance with some special rules. The power of the Court to make such ad hoc procedures is found in Articles 31 and 101 of its Rules.

Article 8: Applicable Law

(1) In deciding any question or dispute submitted to it pursuant to this Treaty, a tribunal or Chamber shall apply the principles and rules of international law, especially as reflected in the treaties and practice of Canada and of the United States, as well as other relevant principles of substantive law in force in either of the two countries, particularly those manifesting their common legal traditions.

(2) If a case requires the application of the principles of substantive law in force in either of the two countries, but in the opinion of the tribunal there exists such a divergence between the relevant principles in force in Canada and in the United States that it is not possible to make a final decision on that basis, the tribunal shall apply such other common legal principles referred to in paragraph 1 as it considers appropriate, having regard to the desire of the Parties to reach a solution just to all interests concerned.

(3) The Parties may agree on particular principles or rules to be applied by the tribunal.

Comment. This provision of the law to be applied is somewhat unusual; it is one of the central features of the proposal. An arbitration system designed for the sole use of the two countries presents a unique opportunity for the development of the “North American jurisprudence” referred to earlier. With a common legal background and many common rules and practices, it should be possible over time to elaborate a detailed system of international law which will be addressed to the special problems of North America, and which will eventually avoid or obviate many disputes. Therefore, this article enjoins the tribunal to look for guidance to the common principles of the two legal systems, rather than to proceed deductively from more general universal principles which must accommodate the world’s diversity of systems.

It should be understood nevertheless that the basic guide is international law. Reference to the Parties’ practice, while it would include domestic judicial decisions and foreign relations practice, is meant to cover only common practice. The idea is that when the two countries both follow a rule of international law on which there is divergence in international practice, one of them should not be able to refer to this divergent practice of third parties in order to call into question the rule generally followed by both of them. Where, on the other hand, Canadian and United States international practices differ, the prime reference would be to general international law. If an answer cannot be found

there, the tribunal would turn next to the internal (as distinct from international) practice of the two countries.

Paragraph 2 is modeled on paragraph 3 of Article 2 of the Gut Dam compromis. Considering that there are no international conflict of laws rules, paragraph 2 provides guidance for the tribunal in cases where there are irreconcilable differences between applicable domestic laws of the two countries. Where it is likely that such conflicts will arise in a particular case, the Parties may wish to specify choice of law rules in an ad hoc agreement. Paragraph 3 makes clear that the Parties themselves are the ultimate source of law applicable to them. They have the authority even to agree that no particular law will be applied, that the tribunal should decide *ex aequo et bono*. The Group expects, however, that an agreement to this effect would be exceptional.

Article 9: Finality, Binding Force, and Interpretation of Decisions

(1) Subject to Article 10, the decision of a tribunal or Chamber rendered pursuant to this Treaty is final and binding, and shall be complied with by both Parties. If the constitutional law of a Party does not permit or only partly permits a Party's compliance with the tribunal's decision, or if the necessary legislation has not been enacted, the Parties agree that the judgment of the tribunal shall specify pecuniary or other equitable satisfaction for the injured party.

(2) In the event of disagreement as to the meaning or scope of the decision, the tribunal or Chamber which rendered it shall construe it upon the request of either Party.

(3) The tribunal may, either *proprio motu* or on the request of one or both of the Parties, correct any manifest technical or clerical error in its judgment.

Comment. Paragraph 1 of this Article specifies that decisions rendered pursuant to this Treaty bind the Parties to compliance. Although the first sentence is standard, it is essential, as it gives the system its mandatory force. The second sentence is a variant of the so-called "Root Formula," developed with respect to the decisions of the International Prize Court, and later embodied in Article 32 of the Geneva General Act for the Pacific Settlement of International Disputes. In some cases, the tribunal might decide that, for example, a piece of legislation or a domestic judicial decision was contrary to international law. In such a case, the executive branch might not be able to ensure reversal of a decision or

enactment of new legislation by another branch of government or by a political subdivision. This clause, therefore, requires that where a tribunal comes to such a conclusion it will also specify alternative relief, such as damages.

Departments or branches of government and federal states or provinces are, from the perspective of international law, parts or subdivisions of the central government. As such, and in accordance with the constitutional provisions of each State, they are bound by the decision in all dealings with the other Party or its subdivisions. If a decision is not complied with, the other Party will have to be given pecuniary or other equitable satisfaction.

The second paragraph of this Article gives either Party the right to seek clarification of a decision from the tribunal which made it. In the case of the Chamber of the International Court of Justice, parallel authority is found in Articles 98 and 100 of its Rules. The right to seek such clarification is a further corollary of the justiciability of treaty interpretation questions. Since the judgment is an intended product of the agreement to arbitrate, and thus in one sense an addendum to that agreement, it follows that its meaning should be ascertained in the same way as that of the agreement itself. The third paragraph merely makes clear that the tribunal has the power to correct any obvious technical or clerical error in its judgment.

This right to obtain an interpretation does not include the right to seek revision of the judgment. The entire point of the proposed arbitral jurisdiction is to provide legal certainty as an aid to dispute settlement. Revisable judgments would not provide such certainty. The tribunal can, of course, decide that changed circumstances create a new case, distinguishable from the earlier one, and therefore raising new issues of treaty interpretation or application. This rubric should be sufficiently flexible to allow effective reopening of a case in the situation where a "decisive" fact comes to light only after judgment. In the opinion of the Group, it would be unnecessary to include the detailed elaboration required to provide expressly for such a situation, which is after all a highly contingent and speculative possibility. However, if the two Governments were to decide that such language was desirable, a model may be found in Article 61 of the Statute and Article 99 of the Rules of the Court. Or the Parties might agree to ask the tribunal to keep a situation under continuous supervision. The court in the Trail Smelter case provided for a possibility of future monitoring.

The Group considered and rejected as well a provision for enforcement of judgments in cases of noncompliance. Although such clauses are commonly found in arbitral treaties, such a provision was not deemed necessary in the case of the United States and Canada.

The Group also did not deem it necessary to include a provision for the voiding of decisions where the tribunal has exceeded its power or there has been impropriety within the panel. Since the constitution and operation of the procedure under the draft Treaty is so fully within the joint control of the parties, the possibility of such an occurrence would seem remote indeed. Nevertheless, there are examples of such clauses in other arbitral or judicial instruments. If the two governments were to decide that such a safeguard clause should be included, Article 35 of the International Law Commission's Model Rules of Arbitral Procedure provides an example.

Article 10: Advisory Opinions

In any particular case, the Parties may agree that, instead of a binding judgment, an arbitral tribunal constituted in accordance with paragraph (a) of Article 3 should render an advisory opinion.

Comment. This is another important feature of the plan for the settlement of disputes presented in this proposal. It is expected that the availability of advisory opinions will greatly increase the use of third-party procedures in a variety of subject areas, and make it much easier for the Parties to agree to submit difficult cases to such procedures.

In some cases, the Parties may be unwilling for political or other reasons to give final authority to a tribunal to make a binding decision. Nevertheless, they might find an advisory opinion in such a case an attractive means of reducing the dimensions of the dispute and of giving the Parties a basis for reconsideration of their negotiating positions.

Technical, economic, or other non-legal problems may sometimes involve one or two specific legal questions. The possibility of obtaining independent advice on such questions could make it easier for negotiators to focus on the technical or other problems central to the dispute. In such a case, the Parties might wish to agree on streamlined rules of procedure in order to expedite delivery of the opinion.

Questions of treaty interpretation may arise more often in the course of domestic litigation in one of the States than between the two governments. Obviously, questions arising in this way cannot be submitted to the compulsory and binding procedure outlined in Articles 1 to 9. However, when the concerned litigants and the domestic court should all desire an authoritative interpretation of the treaty by an international tribunal, and bring the issue to the attention of one of the governments, it may wish to consult with the other about the possibility of seeking arbitral advice through the present article. It would, of course, be for each State

to determine how the pendency of such a question would be brought to the government's attention and to decide what force the arbitral opinion would have in the referring court and in its domestic courts generally.

If, after a time, the Parties found this latter form of reference to be useful, they might wish to come to a general agreement on procedure, including the possibility of unilateral requests for advice, and the right of the other Party to intervene. Such a system would require some adjustment in the manner of establishing the tribunal. However, by then the Parties would have sufficient experience in the appointment of such bodies to guide them in devising the proper procedure.

It should be noted that the advisory procedure provided in Article 10 is available only through ad hoc arbitral tribunals. At present, the Statute of the International Court of Justice does not permit States to seek advisory opinions directly from the Court or a Chamber, though a procedure could be devised for obtaining them by utilizing appropriate United Nations channels.

CONCLUSION

The history of the relationship between Canada and the United States is one of growth: growing economies and political and social systems have led to growing cooperation and understanding.⁴⁹ At the same time, the relationship has grown in complexity. Canadians and Americans deal regularly with each other in almost every conceivable area of human endeavor—whether it be minting, fishing, magazine publishing, or producing nuclear power. Private dealings are carried on constantly, both between individuals and corporations. Public contracts are also made increasingly often, and at all levels. The President talks to the Prime Minister, the Secretary of State to the Secretary of State for Foreign Affairs; and competent officials in almost every government department and agency, both federal and state or provincial, work with their counterparts on the other side of the border.

Various steps are taken by the two countries to avoid disputes. Representatives of each of them do make their views known in the executive, legislative, and administrative bodies of the governments of the other. Links are established between various corresponding bodies on either side of the border. But present efforts are only tentative, and the devices employed are rudimentary. The two Governments should endeavor to improve their means of dispute avoidance.

⁴⁹ The U.S. Census Bureau has been tracking statistics on trade between Canada and the United States since 1985. We have seen continued growth in trade the past two decades.

Prior consultation systems could be regularized, and legislative and regulatory coordination could be improved. The Group has considered various alternative texts as possible bases for a prior consultation regime.

As might be expected of such an extensive and complicated relationship, numerous disputes do arise, and they are usually settled by the informal, ad hoc process of negotiation. In a small percentage of cases, a mixed commission is employed as a fact-finding or conciliatory device. Even this small percentage appears to be overburdening the existing commission mechanisms. The Group has noted that there may be ways in which the International Joint Commission and other similar groups could be restructured to accommodate the increasing load, without endangering the traditions and effectiveness of the original bodies.

A number of the most troubling issues are not settled by negotiations or by use of mixed commission. What is surprising is that there is presently no binding procedure to which the United States or Canada can refer for a definitive resolution of these otherwise intractable problems. A few acrimonious disputes can harden attitudes on other questions and thus threaten the general efficacy of the bilateral system of settlement by negotiation.

The threads of the relationship are thoroughly interwoven; the fabric is a whole. If loose ends are left unattended, because negotiations will not answer, the entire fabric might unravel. Only a system of arbitration or judicial settlement can, at the least, ensure that these ends will be bound up. Therefore, the possibility of compulsory reference to arbitration is actually essential to the maintenance of the ad hoc and informal system of negotiations.

The two Governments must have confidence in each other and faith in the legal systems of which they offer prime examples. If any two States in the world should be capable of making law the final arbiter of differences between them, it is the United States and Canada. With assurance that the necessary mutual trust does exist, the Working Group recommends that the two Governments should negotiate a Treaty of Arbitration and presents, for discussion purposes, a preliminary draft of such a treaty.

While it is the Group's belief that compulsory arbitration should eventually be made available for all legal disputes, it may be advisable to begin in a more limited fashion. The interpretation and application of treaties are the most basic of legal issues between States. A definitive reading of a treaty can often frame and focus a complex political or technical question and lead to a complete settlement by negotiation. Therefore, the Group encourages the Governments to agree at least to compulsory arbitral jurisdiction for these issues.

The domestic judicial systems of the two countries already offer considerable opportunity for satisfaction of private claims. Still, one country's citizens do not enjoy complete equality of access to the courts of the other or to remedies available in those courts. It would be equitable to establish such equality, given the extent and range of transborder contacts. But here again, the Group recognizes that complications—the countries' federal systems and lack of complete information, among others—may prevent the goal from being achieved all at once. Therefore, again the Group suggests beginning in a limited area, namely, transfrontier pollution.

If it should prove possible for the two countries to take at least these two steps, not only would this constitute an important improvement in the handling of disputes between the two countries but also might serve as a model for other countries and regions.

ANNEX A
ALTERNATIVE TEXTS FOR A PRIOR CONSULTATION REGIME

- A.1. If either Government should have decided to take any action which could reasonably be anticipated to have adverse effects in the other country, it shall notify the other Government before announcing or proceeding with such action.
- A.2. If either Government should be considering the adoption of measures which might adversely affect the other country, it should consult the other Government before proceeding with any such measures.
- A.3. If either Government should be considering the adoption of measures which might adversely affect the other country, it should notify the other Government before proceeding with any such measures and, whenever possible, consult with it prior to their implementation.
- A.4. If either Government should be considering an action or decision which, if taken, would be likely to have significant adverse effects in the other country it shall consult with the other Government prior to making the decision or proceeding with the action under consideration.
- B.1. The consultation described above shall be initiated in a timely fashion so that the Government of the affected country might have a reasonable period in which to respond.
- B.2. If a Government should find it impossible to consult the other before adopting a decision or taking action, such decision or action should not be applied to the other country for a six-month period, during which the Governments should consult about the modalities of applying the decision or action.
- C.1. Each Government shall endeavor to ensure that its federal subdivisions (1) comply with the obligations of the agreement with respect to decisions and actions within their jurisdiction and (2) enjoy the benefits of the agreement when a decision or action is likely to have adverse effects within their jurisdiction.

ANNEX B

ORGANISATION FOR ECONOMIC GENERAL DISTRIBUTION
COOPERATION AND DEVELOPMENT PARIS, 23RD MAY 1977
C(77)28(FINAL)

COUNCIL

RECOMMENDATION OF THE COUNCIL

FOR THE IMPLEMENTATION OF A REGIME OF EQUAL RIGHT OF ACCESS AND NON-DISCRIMINATION IN RELATION TO TRANSFRONTIER POLLUTION

(Adopted by the Council at its 442nd Meeting on 17th May, 1977)

The Council,

Having regard to Article 5(b) of the Convention on the Organisation for Economic Cooperation and Development of 14th December, 1960;

Having regard to the Declaration on the Human Environment adopted in Stockholm in June 1972 and in particular Principles 21, 22, 23, and 24 of that Declaration;

Having regard to the Recommendations of the Council of 14th November, 1974, on Principles concerning Transfrontier Pollution and of 11th May, 1976, on Equal Right of Access in relation to Transfrontier Pollution C(74)224 and C(76)55(Final) and without prejudice to such Recommendations;

Having regard to the Report by the Secretary-General of 18th March, 1977 on the Implementation of a Regime of Equal Right of Access and Non-discrimination in relation to Transfrontier Pollution Appendix I to C(77)287;

Considering that the protection and improvement of the environment are common objectives of Member countries;

Conscious that pollution originating in the area within the national jurisdiction of a State may have effects on the environment outside this jurisdiction;

Considering that the implementation of a regime of equal right of access and non-discrimination among Member countries should lead to

improved protection of the environment without prejudice to other channels available for the solution of transfrontier pollution problems;

On the proposal of the Environment Committee;

RECOMMENDS that Member countries, in regard to each other, take into account the principles concerning transfrontier pollution set forth in the Annex to this Recommendation, which is an integral part of it, in their domestic legislation, possibly on the basis of reciprocity, notably regarding individual rights, and in bilateral or multilateral international agreements.

ANNEX

INTRODUCTION

This Annex sets out a number of principles intended to promote the implementation between Member countries of a regime of equal right of access and non-discrimination in matters of transfrontier pollution, while maintaining a fair balance of rights and obligations between Countries concerned by such pollution.

These principles do not prejudice any more favorable measures for the protection of the environment and of persons whose property, rights, or interests are or could be affected by pollution the origin of which is situated within the area under the jurisdiction of a Member country.

For the purposes of this Recommendation:

- (a) "Pollution" means any introduction by man, directly or indirectly, of substance or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, impair amenities or interfere with other legitimate uses of the environment.
- (b) "Domestic pollution" means any intentional or unintentional pollution, the physical origin of which is situated wholly within the area under the national jurisdiction of one Country and which has effects within that area only.
- (c) "Transfrontier pollution" means any intentional or unintentional pollution whose physical origin is subject to, and situated wholly or in part within the area which has effects in the area under the national jurisdiction of another Country.

(d) “Country” means any Member country which participates in this Recommendation.

(e) “Country of origin” means any Country within which, and subject to the jurisdiction of which, transfrontier pollution originates or could originate in connection with activities carried on or contemplated in that Country.

(f) “Exposed Country” means any Country affected by transfrontier pollution or exposed to a significant risk of transfrontier pollution.

(g) “Countries concerned” means any Country of origin of transfrontier pollution and any Country exposed to such pollution.

(h) “Regions concerned by transfrontier pollution” means any region of origin of transfrontier pollution in the Country of origin and any regions of the Country of origin and of any exposed Country where such pollution produces or might produce its effects.

(i) “Persons” means any natural or legal person, either private or public.

(j) “Regime of environmental protection” means any set of statutory and administrative measures related to the protection of the environment, including those concerning the property rights or interests of persons.

TITLE A. PRINCIPLES TO FACILITATE THE SOLUTION AT INTERSTATE LEVEL OF TRANSFRONTIER POLLUTION PROBLEMS

(1) When preparing and giving effect to their policies affecting the environment, Countries should, consistent with their obligations and rights as regards the protection of the environment, take fully into consideration the effects of such policies on the environment of exposed Countries so as to protect such environment against transfrontier pollution.

(2) With a view to improved protection of the environment, Countries should attempt by common agreement to:

- (a) make their environmental policies mutually compatible, particularly those bearing on regions concerned by transfrontier pollution;
 - (b) bring closer together quality objectives and environmental standards adopted by Countries, apply them systematically to cases of transfrontier pollution and, where necessary, improve those already in force;
 - (c) work out additional rules of conduct of States to be applied in matters of transfrontier pollution.
- (3) (a) Pending the implementation of the objectives laid down in paragraph 2, and without prejudice to more favorable measures taken in accordance with paragraphs 1 and 2 above, each Country should ensure that its regime of environmental protection does not discriminate between pollution originating from it which affects or is likely to affect the area under its national jurisdiction and pollution originating from it which affects or is likely to affect an exposed Country.
- (b) Thus, transfrontier pollution problems should be treated by the Country of origin in an equivalent way to similar domestic pollution problems occurring under comparable conditions in the Country of origin.
- (c) In the event of difficulties arising between Countries concerned because the situations resulting from transfrontier pollution and domestic pollution are manifestly not comparable, for example as a result of uncoordinated land use policies in regions concerned by transfrontier pollution, those countries should strive to arrive at a mutually agreed arrangement which ensures to the largest extent possible the application of the principle referred to in subparagraph (a) of this paragraph.

TITLE B. LEGAL PROTECTION OF PERSONS

- (4) (a) Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution shall at least receive equivalent treatment to that afforded in the Country of origin,

in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition of status.

(b) From a procedural standpoint, this treatment includes the right to take part in, or have resort to, all administrative and judicial procedures existing within the Country of origin, in order to prevent domestic pollution, to have it abated and/or to obtain compensation for the damage caused.

(5) Where in spite of the existence of a liability ceiling instituted by an international agreement, there exists in a Country a system of additional compensation financed or administered by the public authorities, then such Country should not be required in the absence of reciprocal arrangements to grant entitlement to such additional compensation to victims of transfrontier pollution, but it should in advance inform the exposed Countries of the particular situation.

(6) (a) Where the domestic law of Countries permits private non-profit legal persons that are resident within their own territories, such as environmental defense associations, to commence proceedings to safeguard environmental interests which it is their aim to protect, those Countries should grant the same right for comparable matters to similar legal persons resident in exposed Countries, provided that the latter satisfy the conditions laid down for the former in the Country of origin.

(b) When some of the conditions concerning matters of form laid down in the Country of origin cannot reasonably be imposed on legal persons resident in an exposed Country, these latter should be entitled to commence proceedings in the Country of origin if they satisfy comparable conditions.

(7) When the law of a Country of origin permits a public authority to participate in administrative or judicial proceedings in order to safeguard general environmental interests, the Country of origin should consider, if its legal system allows it, providing, by means of international agreement if it deems it necessary, competent public authorities of exposed Countries with access to such proceedings.

TITLE C. EXCHANGE OF INFORMATION AND CONSULTATION

- (8) (a) The Country of origin, on its own initiative or at the request of an exposed Country, should communicate to the latter appropriate information concerning it in matters of trans-frontier pollution or significant risk of such pollution and enter into consultations with it.⁵⁰
- (b) In order to enable a Country of origin to implement adequately the principles set out in Title A of this Recommendation, each exposed Country should, on its own initiative or at the request of its Country of origin, supply appropriate information of mutual concern.
- (c) Each Country should designate one or more authorities entitled to receive directly information communicated under sub-paragraphs (a) and (b) of this paragraph.
- (9) (a) Countries of origin should take any appropriate measures to provide persons exposed to a significant risk of transfrontier pollution with sufficient information to enable them to exercise in a timely manner the rights referred to in this Recommendation. As far as possible, such information should be equivalent to that provided in the Country of origin in cases of comparable domestic pollution.
- (b) Exposed Countries should designate one or more authorities which will have the duty to receive and the responsibility to disseminate such information within limits of time compatible with the exercise of existing procedures in the Country of origin.
- (10) Countries should encourage and facilitate regular contacts between representatives designated by them at regional and/or local levels in order to examine such transfrontier pollution matters as may arise.

⁵⁰ The Delegate for Spain reserved his position on the last six words of paragraph 8(a).

ANNEX C

DRAFT RULES OF ARBITRAL PROCEDURE

The following provisions shall govern the functioning of arbitral tribunals constituted pursuant to the Treaty of Arbitration (the Treaty hereinafter) to which the present Rules are annexed and of which they form an integral part.

Article 1. Registrars

(1) Within six months of the date of signature of the Treaty the Government of the United States shall appoint a Registrar sitting in Washington, and the Government of Canada shall appoint a Registrar sitting in Ottawa, who shall serve for a term of seven years and may be reappointed.

(2) Each Registrar shall appoint such supporting officers and staff of the Registry as may be necessary from time to time, with the approval of the Parties or of an arbitral tribunal.

(3) The Registrars and the Registries shall perform the functions specified in the Rules and such other functions as may be assigned to them from time to time by the Parties or by an arbitral tribunal.

(4) Each Registrar shall primarily serve as the secretary of the arbitral tribunals sitting in the capital where his Registry is situated. The two Registrars shall cooperate with each other and assist each other to the extent necessary, including temporary assignments of their officers and staff to serve in the other capital. Should the volume of cases warrant it, binational staffs may be established in both capitals with approval of the Parties.

(5) The appropriate Registrar or Registry shall be available to the Chamber of the International Court of Justice to be constituted under this Treaty when sitting in Ottawa or Washington.

Article 2: Remuneration and Expenses

(1) Each member of an arbitral tribunal shall receive a fixed allowance for each day or portion thereof on which he exercises his functions.

(2) The Chairman of a tribunal shall receive a special additional daily allowance.

(3) These allowances shall be fixed from time to time by agreement of the Parties, taking into account the salaries of judges and chief judges

of the highest courts in each State. They may not be reduced for the members of a given tribunal during the period of its functioning.

(4) The salary of the Registrars and any supporting officers and staff shall be fixed by agreement of the Parties.

(5) Unless the Parties otherwise agree for a particular case, the expenses of each arbitral tribunal shall be borne by the Parties in equal shares. The administrative expenses of each Registry shall be borne by the Party in whose capital the Registry is situated.

Article 3: Quorum and Majority for Decision

(1) The arbitral tribunal shall ordinarily function with the presence of all its members. However, if this proves impossible, a majority of any arbitral tribunal shall constitute a quorum for the transaction of business.

(2) Decisions of a tribunal shall ordinarily be reached by consensus. Where no consensus can be reached, decisions shall be taken by a majority vote of tribunal members present. In the case of an equality of votes, the Chairman shall have the casting vote.

Article 4: Conduct of Proceedings

(1) An arbitral tribunal shall lay down its own procedure, shall make orders for the conduct of case before it, shall decide the form and time in which each Party must present its written pleadings and oral arguments, and shall make all arrangements connected with the receiving of evidence. In so doing, the tribunal shall assure to each Party a full opportunity to be heard and to present its case.

(2) Orders and decisions pursuant to the preceding paragraph shall be transmitted forthwith by the appropriate Registrar to each Party. The Registrar shall similarly transmit to both Parties certified copies of all pleadings and documents submitted pursuant to such orders and decisions, and transcripts of all hearings before the tribunal.

(3) The tribunal, with the consent of the Parties, may appoint such technical experts or assessors as are considered to the performance of its duties, on such terms and conditions as it may see fit, subject only to the availability of funds provided by the two Parties for the expenses of the tribunal.

(4) Hearings before a tribunal shall be public unless the tribunal should decide otherwise, on its own initiative or at the request of the Parties.

Article 5: Default of Appearance

When one of the Parties does not appear before a properly constituted tribunal or fails to defend its case, the other Party may request the tribunal to continue with the proceedings and to make its decision. Absence or default of a Party shall not be an impediment to the proceedings. Before making its decision in such a case the tribunal must satisfy itself not only that it has jurisdiction, but also that the decision is well founded in fact and law.

Article 6: Judgment

(1) The judgment of an arbitral tribunal shall be confined to the subject matter of the dispute, and state the reasons on which it is based.

(2) It shall contain the names of the members of the tribunal who participated in the decision and the date.

(3) Any member of the tribunal may attach a separate or dissenting opinion to the judgment.

(4) The judgment shall be signed by the Chairman and by the Registrar. It shall be read in open session, due notice having been given by the Registrar to both Parties. The original of the judgment shall be deposited in the Registry.

Article 7: Secrecy

The deliberations of the tribunal shall remain secret.

Article 8: Costs

Unless otherwise decided by a tribunal, each Party shall bear its own costs.

ANNEX D
RULES OF PROCEDURE OF THE INTERNATIONAL COURT OF
JUSTICE RELATING TO THE ESTABLISHMENT AND
OPERATION OF A CHAMBER

Adopted on 14 April 1978

ARTICLE 16

(1) When the Court decides to form one or more of the Chambers provided for in Article 26, paragraph 1, of the Statute, it shall determine the particular category of cases for which each Chamber is formed, the number of its members, the period for which they will serve, and the date at which they will enter upon their duties.

(2) The members of the Chambers shall be elected in accordance with Article 18, paragraph 1, of these Rules from among the Members of the Court, having regard to any special knowledge, expertise or previous experience which any of the Members of the Court may have in relation to the category of the case of the Chamber is being formed to deal with.

(3) The Court may decide upon the dissolution of a Chamber, but without prejudice to the duty or the Chamber concerned, to finish any cases pending before it.

ARTICLE 17

(1) A request for the formation of a Chamber to deal with a particular case, as provided for in Article 26, paragraph 2, of the Statute may be filed at any time until the closure of the written proceedings. Upon receipt of a request made by one party, the President shall ascertain whether the other party assents.

(2) When the parties have agreed, the President shall ascertain their views regarding the composition of the Chamber, and shall report to the Court accordingly. He shall also take such steps as may be necessary to give effect to the provisions of Article 31, paragraph 4, of the Statute.

(3) When the Court has determined, with the approval of the parties, the number of its Members who are to constitute the Chamber, it shall proceed to their election, in accordance with the provisions of Article 18, paragraph 1, of these Rules. The same procedure shall be followed as regards the filling of any vacancy that may occur on the Chamber.

(4) Members of a Chamber formed under this Article who have been replaced, in accordance with Article 13 of the Statute following the expi-

ration of their terms of office, shall continue to sit in all phases of the case, whatever the stage it has then reached.

ARTICLE 18

(1) Elections to all Chambers shall take place by secret ballot. The Members of the Court obtaining the largest number of votes constituting a majority of the Members of the Court composing it at the time of the election shall be declared elected. If necessary to fill vacancies, more than one ballot shall take place, such ballot being limited to the number of vacancies that remain to be filled.

(2) If a Chamber when formed includes the President or Vice-President of the Court, or both of them, the President or Vice-President, as the case may be, shall preside over that Chamber. In any other event, the Chamber shall elect its own president by secret ballot and by a majority of votes of its members. The Member of the Court who, under this paragraph, presides over the Chamber at the time of its formation shall continue to preside so long as he remains a member of that Chamber.

(3) The president of a Chamber shall exercise, in relation to cases being dealt with by that Chamber, all the functions of the President of the Court in relation to cases before the Court.

(4) If the president of Chamber is prevented from sitting or from acting as president, the function of the presidency shall be assumed by the member of the Chamber who is the senior in precedence and able to act.

ARTICLE 31

In every case submitted to the Court, the President shall ascertain the views of the parties with regard to questions of procedure. For this purpose he shall summon the agents of the parties to meet him as soon as possible after their appointment, and whenever necessary thereafter.

ARTICLE 90

Proceedings before the Chambers mentioned in Articles 16 and 29 of the Statute shall, subject to the provisions of the Statute and of these Rules relating specifically to the Chambers, be governed by the provisions of Parts I to III of these Rules applicable in contentious cases before the Court.

ARTICLE 91

(1) When it is desired that a case should be dealt with by one of the Chambers which has been formed in pursuance of Article 26 paragraph 1, or Article 29 of the Statute, a request to this effect shall either be made in the document instituting the proceeding or accompany it. Effect will be given to the request if the parties are in agreement.

(2) Upon receipt by the Registry of this request, the President of the Court shall communicate it to the members of the Chamber concerned. He shall take such steps that may be necessary to give effect to the provisions of Article 31, paragraph 4, of the Statute.

(3) The President of the Court shall convene the Chambers at the earliest date compatible with the requirements of the procedure.

ARTICLE 92

(1) Written proceedings in a case before a Chamber shall consist of a single pleading by each side. In proceedings begun by means of an application, the pleadings shall be delivered within successive time limits. In proceedings begun by the notification of a special agreement, the pleadings shall be delivered within the same time limits, unless the parties have agreed on successive delivery of their pleadings. The time limits referred to in this paragraph shall be fixed by the Court, or by the President if the Court is not sitting, in consultation with the Chamber concerned if it is already constituted.

(2) The Chamber may authorize or direct that further pleadings be filed if the parties are so agreed, or if the Chamber decides, *proprio motu* or at the request of one of the parties, that such pleadings are necessary.

(3) Oral proceedings shall take place unless the parties agree to dispense with them, and the Chamber consents. Even when no oral proceedings take place, the Chamber may call upon the parties to supply information or furnish explanations orally.

ARTICLE 93

Judgments given by a Chamber shall be read at a public sitting of that Chamber.

ARTICLE 101

The parties to a case may jointly propose particular modifications or additions to the rules contained in the present Part (with the exception of Articles 93 to 97 inclusive), which may be applied by the Court or by a Chamber if the Court or the Chamber considers them appropriate in the circumstances of the case.

APPENDIX

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