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SUMMARY OF THE 1992 REPORT

The American Bar Association, Canadian Bar Association, and Barra Mexicana established a Joint Working Group (the Group) in 1992 to produce a report on the state of North American dispute settlement. The Group focused its efforts on assisting negotiators who were evaluating the then proposed North American Free Trade Agreement (NAFTA).

The Group canvassed existing dispute settlement processes and determined that the North American model would require three key components to be successful. First, any proposed dispute settlement process would require the active support of the participating governments in terms of financing and administration. Second, the dispute settlement process would require prescribed, uniform, and transparent rules of procedure. Finally, and perhaps of greatest significance, the dispute settlement mechanism would require private-party/investor access to the process.

While working to create a model that would incorporate these components, the Group ultimately concluded the existing Canada-United States Free Trade Agreement (CUSFTA) formula provided the best model for a successful approach. The Group recommended, however, that the Parties expand CUSFTA's consultation mechanisms in order to ensure that disagreements among the Parties would remain in the international legal realm rather than a political one. Further, the Group recommended instituting a monitoring process by which existing disputes would be evaluated and settled efficiently; this process would permit Parties to NAFTA to intervene, whether through mediation, conciliation, or arbitration.

In addition, the Group recommended that the Parties appoint a "tripartite tribunal," consisting of an equal number of representatives. This permanent, independent tribunal would hear and determine cases that would require interpretation and application of NAFTA. The Group advocated leaving the option open for the tribunal to hear cases from national tribunals in matters concerning NAFTA. While drawing on aspects of the CUSFTA panels, the Group essentially advocated for the elimination of the existing Chapter 18 panels. The Group supported the continuation of the Chapter 19 process with the necessary modifications for use in NAFTA, as well as extending the adjudication regime to tariff classification, sanitary/phytosanitary rules, and rules of origin.

Finally, the Group recommended the establishment of a well defined investor-state dispute resolution mechanism.

NAFTA's dispute resolution provisions have been largely effective due in part to the recommendations offered by the Group.

