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SUMMARY OF THE 1979 REPORT

The following annotated edition of the *1979 Report and Recommendations of the American and Canadian Bar Associations Joint Working Group on the Settlement of International Disputes* (1979 Report) is the product of a “demonstration research project” regarding dispute settlement between Canada and the United States. The Joint Working Group on the Settlement of International Disputes (JWG) provided in the 1979 Report an extensive historical survey of Canada-United States disputes and the mechanisms utilized to resolve the same. The 1979 Report provided two substantive recommendations: (1) the arbitration of disputes relating to the interpretation, application, or operation of any treaty in force between the United States and Canada and (2) the equalization of rights and remedies for private parties from both countries in cases of transfrontier pollution. The JWG presented its recommendation in the form of two draft treaties: (1) the Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution and (2) the Draft Treaty on Third Party Settlement of Disputes. The respective bar associations ultimately adopted these draft treaties as possible bases for the negotiation between the two governments.

Part I of the 1979 Report provided a survey of the six classes of disputes that traditionally confronted the Canada-United States relationship: (1) boundary delimitation; (2) trade and investment; (3) trade in energy resources and energy policy; (4) the impact of one country’s laws on the laws of the other; (5) transboundary environmental conditions; and (6) national defense. The 1979 Report’s examination demonstrated that the two countries shared a long history of peaceful dispute resolution through ad hoc bilateral negotiations. However, the 1979 Report also highlighted a number of unresolved disputes such as disagreements regarding the delimitation of maritime and fishing-zone boundaries; the United States’ imposition of countervailing duties on tire imports from Michelin plants in Nova Scotia, which the United States claimed was a legitimate response to Canada’s “unfair practice” of subsidizing Michelin; and concerns over the transboundary air pollution generated in the Detroit-Windsor and Sarnia-Port Huron corridors.

Part II of the 1979 Report analyzed the various mechanisms available to Canada and the United States for avoiding, managing, and settling these unresolved disputes. The JWG supported consultation between the two countries on matters that could potentially impact the other prior to implementation. The JWG recommended that the two countries consider the possibility of formalizing a prior consultation regime with legally enforceable mechanisms. For the purpose of coordinating the laws of both countries, the JWG also encouraged collaboration between the Uniform Law Conference of Can-

ada and the United States National Conference of Commissioners on Uniform State Laws.

In considering mechanisms for the management and settlement of disputes once they arise, the JWG recognized that the two countries' large federalist governments and complex administrative structures hampered efforts at negotiation. Accordingly, the JWG recommended the establishment of a binding dispute resolution mechanism in the event negotiations reached impasse. The 1979 Report examined existing dispute resolution mechanisms, such as Article X of the Boundary Waters Treaty of 1909, that provided for the binding resolution of disputes by the International Joint Commission, as well as the International Court of Justice at The Hague. However, as neither the United States nor Canada was obligated to submit disputes to these bodies for a binding resolution, the existing mechanisms were of little utility.

Part III of the 1979 Report provided the substantive recommendations of the JWG through two draft treaties: a Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution (Equal Access Treaty) and a Draft Treaty on Third Party Settlement of Disputes.

The JWG proposed the Equal Access Treaty to make it easier for Canadian and United States nationals to resolve transfrontier pollution cases. The hope was for the scope of equalization to eventually reach beyond just pollution cases.

After defining key terms, the Draft Treaty granted victims a remedy in the court of the country where the pollution originated so long as the victim would have a remedy in his or her home country. As a result, public and private environmental groups would be able to protect the environmental interests of their country in the courts of the other country. The Draft Treaty also ensured sufficient transfer of information so that citizens in the country affected by the transfrontier pollution would not be at a disadvantage to pursue the remedies available in the other country.

The JWG's proposed Draft Treaty on Third Party Settlement of Disputes established legal procedures to complement procedures already in place for the management and resolution of disputes between Canada and the United States. Article 1 granted compulsory jurisdiction only to questions regarding treaties between the two countries. Article 2 stated that when the issue is not a question addressed under Article 1, the two countries may agree to a third-party settlement. The JWG proposed eight categories where a settlement of this type would work well. Article 3 discussed procedures for forming a three-member tribunal and for submitting disputes to the International Court of Justice. Article 4 granted the tribunal or panel power to establish whether it has jurisdiction. Article 5 discussed the role and duties of the arbitral tribunals, including provisional measures that the tribunal may stipulate. Article 6 stipulated the location of proceedings. Article 7 established the conduct of proceedings. Article 8 discussed which law governs. Article 9 stated that

parties must comply with the tribunal or panel's decision. Finally, Article 10 enabled the tribunal to give an advisory opinion.

The JWG decided to confine its substantive recommendations to the presentation of these two draft treaties because it felt that these changes would be adopted in the near future. However, the JWG made clear in its conclusion that these changes were merely a starting point in improving dispute resolution procedures between Canada and the United States. The JWG suggested that the recommendations it made in the 1979 Report should eventually be expanded to accomplish the following: (1) provide each country's citizens with equality of access to the other country's courts and (2) establish a system whereby all cross-border disputes are resolved by compulsory jurisdiction of binding arbitration mechanisms. By taking steps in this direction, the JWG hoped that Canada and the United States might serve as a model for the resolution of disputes in other countries and regions.

