

Report of the Fifteenth Meeting of the NAFTA Advisory Committee on Private Commercial Disputes in Ottawa Canada, October 24th and 25th, 2005

I. Welcome and Introduction

The NAFTA Advisory Committee on Private Commercial Disputes (Committee) convened its fifteenth meeting on October 24th and 25, 2005, in Ottawa, Ontario. The meeting was chaired by Kirsten Hillman, Deputy Director, Trade Law Bureau and Sylvie Tabet, Counsel, Trade Law Bureau.

Kirsten Hillman welcomed the members and the other government Co-chairs, Linda Pasquel Peart (Mexico) and the new U.S. Co-Chair, David P. Stewart, Assistant Legal Advisor at the U.S. Department of State.

The U.S. co-chair introduced Lucy Reed, who replaces John Townsend, and Harry Arkin.

Ms. Hillman expressed her appreciation that so many of the members were able to participate in this 15th meeting and noted that there was a full agenda before the Committee with a particular focus on mediation. In addition, the Committee would be faced with the important task during this meeting of considering and elaborating a report to Ministers.

II. Presentation by the Fruit and Vegetable Dispute Resolution Corporation

The first item on the agenda was a presentation by the Fruit and Vegetable Dispute Resolution Corporation (DRC) by Mr. Stephen Whitney, President and CEO of the Corporation, Mr. Fred Webber, Vice-president of the DRC and Ms. Patricia Rynn, counsel for the DRC.

Mr. Whitney started the presentation by briefly explaining how the DRC came into being. The DRC is a product of work undertaken by the NAFTA Advisory Committee on Private Commercial Disputes regarding Agriculture (the NAFTA 707 Committee) which was mandated with the creation of a private commercial dispute resolution system for disputes involving agricultural goods. The DRC was designed to build on existing dispute resolution services in the US and fill a gap that existed in Canada and Mexico. It was designed by the 707 Committee and then carried forward as an industry-led and government supported dispute settlement mechanism.

The DRC has now evolved to a fully self-sufficient organisation with an ever-increasing case load. Originally membership in the DRC was open to fruit and vegetable shippers and receivers whose place of business was in Canada, the U.S. or Mexico. In 2000 the DRC created associate membership for produce companies outside of North America who are doing business with members. In 2005 the DRC opened its membership to produce carriers and transport intermediaries.

Mr. Webber then explained that the mandate of the Corporation is to offer dispute resolution that is timely, effective and enforceable and to avoid litigation, enable business relationships to continue, and respect the confidentiality of the parties. To that end, the Corporation offers education, training, cooperative problem solving services and information dissemination to assist in the prevention of disputes. It also offers three levels of formal dispute resolution procedures. First, informal mediation carried out by DRC staff within a 21 day timeframe resulting in a voluntary settlement. Second, formal mediation by an independent third party mediator and third arbitration, either expedited, if the dollar value of the dispute is under U.S. \$50,000.00, or formal, if the dollar value of the dispute is over \$50,000.00. He noted that members of the NAFTA 2022 Committee had been involved in drafting the arbitration rules for the DRC.

Mr. Webber noted that the statistics surrounding these disputes illustrate the success of the organisation. The DRC has handled over 600 cases in 5 years, of which only 15% went to arbitration. The timeframe for these cases was, on average, a little over 6 months, from start to finish. The majority of the disputes (60%) are Canada/U.S. disputes and 93% of the awards have been respected.

Ms. Rynn, who has conducted a number of mediations and some arbitrations for the DRC, then addressed the members and described the work that she has done for the Corporation. She noted in particular that the roster of mediators and arbitrators for these disputes are lawyers who are familiar with the industry. She said that the reason that 85% of these disputes are solved through is that mediators and DRC staff are familiar with the particular needs and concerns of the industry and they have the confidence of the members.

Many committee members noted that the DRC is a clear success story for ADR in the NAFTA region. There was discussion of what other industries in the NAFTA region might benefit from the DRC model. Other agricultural commodities, such as seed potatoes, floral products and nursery stock were identified as likely candidates. In addition, some members commented that this model may be very useful for the sugar and swine industries in the NAFTA region.

III. Reports From Government Representatives On Recent Developments

1. Hague Convention Developments

David Stewart reported that the negotiations resulted in a more limited convention than what was originally foreseen and the text was adopted last June. The Hague Convention is analogous to the New York Convention. It provides that courts designated by parties in exclusive choice court agreement have jurisdiction and that other courts must decline to hear the case. It further provides that the resulting judgment must be recognized in contracting states. There is an optional provision that States can provide for the recognition of a judgement of a court in a non-exclusive agreement. The Convention essentially recognizes party autonomy over the application of the doctrine of *forum non conveniens*.

The Convention is now at the stage of consideration for signature and ratification. There are several texts in play in the U.S. for a model statute. In Canada, consultations are taking place across the country. The Uniform Law Commission is looking at implementation.

Professor Talpis raised some concerns about the limited scope of the Convention but noted on the positive side the contribution the Convention makes to international recognition of court decisions.

2. NAFTA Chapter 11 Developments

Mexico provided a brief update of the developments over the last year in NAFTA Chapter 11 cases.

In terms of cases against Mexico, the GAMI claim was dismissed in November 2004 and the proceedings in Thunderbird were completed in December 2004 and Parties are awaiting an award. Mexico has 5 ongoing cases.

There is one active case against Canada, namely the UPS case. A hearing is set for December 2005. The United States has just received the Award in Methanex, dismissing the claim with costs. The softwood lumber related cases, Tembec and Canfor and terminal products are being consolidated and over 100 notices of intent have been filed in BSE-related cases. It is likely that these cases will be consolidated and they raise interesting issues regarding the relationship between Chapters 11 and 19 of the NAFTA.

3. WTO Negotiations

Sylvie Tabet provided a brief overview of the state of the WTO negotiations. She noted that progress in the agriculture negotiations remained key to further progress in other areas like services and non agricultural market access. The recent offers by the U.S. and the EU on domestic subsidies and market access provided some basis for movement forward. Work on developing text that would be the basis of negotiations is continuing in the lead-up to Hong Kong.

4. Bilateral Trade and Investment Negotiations

Mexico indicated that it had no negotiations ongoing.

The U.S. indicated that they have ongoing investment negotiations with Pakistan and are also engaged in ongoing negotiations with Panama, Thailand, and the Andean community. The U.S. has concluded a free trade agreement with Australia that it is not yet in force and does not include provisions for investor-State dispute settlement. The U.S. also mentioned that the Central American free trade Agreement (CAFTA) has been ratified by some countries but that it is not yet in force.

Canada reported that it is engaged in the negotiation of a free trade agreement with Korea and that the proposal is to include an investment chapter and investor-State dispute

settlement in that agreement. In addition, Canada is engaged in the negotiation of bilateral investment agreements with China, India and Peru.

IV. Report On UNCITRAL Working Group On Arbitration

Report on UNCITRAL Working Group on Arbitration and Conciliation

A summary of the last meeting of the UNCITRAL Working Group on Arbitration and Conciliation which took place in Vienna on October 3-7, 2005 was presented to the Committee. The focus of the Working Group's work continues to be on the enforceability of interim measures of protection and the requirement that an arbitration agreement be in writing.

The issue of ex-parte interim measures continued to be contentious at the meeting and there was an attempt to reopen the discussion on this issue. Following lengthy discussions, the group agreed to proceed on the basis of the compromise text reached in New York: unless otherwise agreed by the parties, the arbitral tribunal could make protective preliminary orders in the nature of procedural orders - not awards - and these orders would not be subject to enforcement. The preliminary order would be granted where there is a risk of imminent harm and destruction of evidence before the tribunal has a chance to rule on interim measures but for a maximum period of 20 days. After the party against whom the preliminary order is directed has had an opportunity to present its case (which should be at the earliest practicable time) the arbitral tribunal may issue an interim order modifying or adopting the preliminary order.

Discussion of the draft provision on recognition and enforcement of interim measures issued by an arbitral tribunal also continued.

The group also recognized that further discussion was necessary with respect to the draft provision on court-ordered interim measures and in particular the relationship between the power of the arbitral tribunal and that of state courts to issue interim orders.

With respect to the form of the arbitral agreement, it was noted that the working group was considering two alternatives to address concerns relating to the form of the arbitral agreement: a proposal on how the writing requirement could be satisfied or a deletion of the writing requirement altogether. The group agreed to continue discussion of the two proposals.

V. Updates on Current Legal Developments in each Country

Legal updates

Professor Robert E. Lutz reported on 2004-2005 legal developments and trends regarding private commercial dispute resolution in the United States. His presentation focused on the following five areas of developments:

- (1) **expropriation law** as reflected in recent U.S. Supreme Court decisions;

(2) **arbitration developments** with respect to the New York Convention, increasing motions practice, the new U.S. Model Bilateral Investment Treaty (BIT) containing of investment arbitration provisions similar to NAFTA Chapter 11, the revised Uniform State Arbitration Code, and cases dealing with adhesion and unconscionable contract clauses;

(3) **codes of conduct**--for arbitrators, as indicated in the ABA House of Delegates' endorsement (Aug. 2004) of the AAA/ABA Code of Conduct for Arbitrators, the IBA's "Global Code of Conduct for Lawyers" and the UIA's consideration of a universal code; and for mediators, as indicated by the Model Standards of Conduct for Mediators adopted by the Association for Conflict Resolution, the AAA, and the ABA;

(4) **enforcement of foreign judgments**--especially related to the changing environment and content of the law as reflected by the Hague Convention on Choice of Court, the American Law Institute's Project on "Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute", the revised state uniform law ("Uniform Foreign-Country Money Judgments Recognition Act"), and the inclusion of provisions in free trade agreements; and

(5) **multijurisdictional practice (MJP) of lawyers**--especially regarding U.S. state adoptions of rules for "foreign legal consultants" and foreign lawyers engaged in "temporary practice", and the U.S. legal profession interest in access to certain foreign countries (via the ongoing GATS negotiations, plurilateral and bilateral arrangements).

Carlos Loperena reported on the legal development in Mexico. We indicated amongst other things that Mexico is in the process of adopting a model law on international conciliation.

Prof. Nabil Antaki reported on new legal development in Canada. His presentation focussed on the issue of class action and arbitration.

He indicated that class-wide arbitration is an issue of growing concern to consumers in Canada and in cross-borders' transactions and it raises important questions of access to justice at reasonable cost. Many businesses that used to fight arbitration clauses in consumer contracts have changed their policy and go now as far as imposing arbitration and forbidding consumers from participating in a class action against them. A judge dealing with a case in which the parties have agreed by contract to submit to arbitration must choose between referring the parties to arbitration or retaining his or her jurisdiction and eventually ordering a judicial class-action. In the United States, practitioners are developing, with the approval of the courts, a class-wide arbitration procedure that is intended to offer the advantages of a traditional class action and those of a bilateral consensual arbitration, without cumulating their respective irritants! Due to this new and spreading development, Prof. Antaki raised the question as to whether class-wide arbitration can be envisaged in the Free Trade region, if it is legally possible, and socially beneficial and whether judicial mediation may play a positive role at any particular stage of the process.

Members of the Sub-Committee on legal issues volunteered to study the matter and report to the Committee at the next meeting in Mexico.

VI. Report on Canada's implementation of the UNCITRAL Model Law on International Commercial Conciliation

Manon Dostie, counsel with Canada's department of Justice provided a presentation on Canada's implementation of the UNCITRAL Model Law on International Commercial Conciliation. She provided members with a draft of the implementing legislation that was adopted by the Uniform Law Commission of Canada in August 2005. Ms. Dostie explained that the federal department of Justice is now in the process of consulting with other federal departments, provincial governments and interested parties outside of government, on the best way in which to implement the Model Law.

Certain Canadian members of the Committee indicated that they were participating in these consultations.

VII. Canada's Strategy for National Mandatory Mediation

Peter Noonan, counsel with the Dispute Resolution Services at the federal Department of Justice provided a presentation on Canada's strategy for national mandatory mediation.

This policy initiative is designed to find solutions to the complex environment of claims against the federal government. The government is planning to enact a mandatory mediation regulation, the United Nations Model law on Commercial conciliation and increase its cooperation with provinces and territories.

The National Mandatory Mediation policy will attack the volume of litigation (currently over 45 000 cases against the federal government) by streaming filed claims into pre-trial mediation where settlement is possible.

VIII. The NAFTA 2022 Committee Web Site

Kevin O'Shea provided an update on the status of the Committee's web site. The NAFTA Secretariat went live with the website in April 2005, www.nafta-sec-alena.org

Certain areas need to be completed such as the addition of a discussion forum capacity between Members and the addition of contact points for public inquiry. The web site will be linked to the three NAFTA Government web sites. Other material will be added upon agreement by the Committee.

IX. Subcommittee Reports and Priorities

Subcommittee III Communication/Outreach

The subcommittee reported on its activities in the last year:

In pursuance of the outreach efforts of the NAFTA 2022 Advisory Committee on Private Commercial Disputes (the 2022 Committee), the Outreach Subcommittee and the National Law Center for Inter-American Free Trade (NLCIFT) have coordinated panel presentations on ADR in various fora. As previously advised in 2003 and 2004, presentations were held in: Washington, D.C. (two outreach sessions); Charlotte, North Carolina; Monterrey, Mexico; Calgary, Alberta; and Vancouver, British Columbia. In those presentations, government and private sector Committee members have addressed the benefits of resorting to alternative dispute resolution mechanisms.

In 2005, the NLCIFT organized two outreach sessions in Mexico City — one in October and a forthcoming one in November 2005, also in Mexico City.

The October 2005 presentation in Mexico City (was held in coordination with the Texas-Mexico Bar Association and The University of Texas School of Law, and their program on “Current Legal Developments in U.S.-Mexico Trade and Investment.” The Mexico City presentation continued a trend of ADR outreach to a wide audience (including judges, lawyers, business executives, logistics specialists, import-export specialists, trade association representatives and academics); this particular program attracted both Mexican and U.S. participants representing both the public and private sectors. The audience evidenced a deep understanding and knowledge of some of the legal challenges facing the use of ADR mechanisms vis-à-vis cross-border cases, and panelist presentations were followed by pointed questions by audience members and additional discussions and analysis by panel members. Audience members received a pragmatic presentation of ADR mechanisms (arbitration and mediation), their respective positives and negatives, cost issues, enforcement of judgment issues, etc. Special attention and consideration were paid to the importance of including ADR clauses in cross-border contracts (with attention being drawn to model language included on the NAFTA 2022 ADR website produced by the NLCIFT in collaboration with the 2022 outreach subcommittee and which can be tailored to industry specifics) — well before disputes arise. Participating as panelists from the 2022 Committee were U.S. member James Nelson (Denver, CO), Canadian member Jeffrey Talpis (Montreal, Quebec), and Mexican members José Luis Siqueiros, Carlos McCadden and Carlos Loperena (all from Mexico City). Also participating was Wayne Fagan (San Antonio, TX) of the Texas-Mexico Bar Association.

In connection with the presentation component devoted to the importance of inserting ADR clauses in business contracts, lively discussion ensued as to the desired degree of specificity in those clauses. All, of course, agreed as to the absolute importance of such clauses. At one end of the spectrum, James Nelson (wearing the hat of in-house corporate counsel) advocated the expenditure of considerable time and effort up front by

both parties to include (with as much specificity as possible) information and requirements within the clause (location, qualifications of arbitrators/mediators, selection process of arbitrators/mediators, etc.). At the other end of the spectrum, Professor Carlos McCadden (promoting institutional-based ADR, such as the ICC) encouraged the use of ADR clauses that were more general and standardized in nature – viewing overly specific clauses as sources of potential conflict themselves. Presentations also focused on the role and significance of mediation as an alternative dispute resolution mechanism, and provided examples of the use of mediation in cross-border disputes. Presenters noted that in most of the world, mediation is a rather recent phenomenon and, absent the UNCITRAL Model Law on International Commercial Conciliation, there are not many national laws that have addressed or regulated the area of mediation. In addition to a clear definition of the concept, there are other obstacles to the widespread use of mediation, including the perception that it is not a formal procedure, the lack of qualification or adequate training of mediators, and — most significantly — the absence of enforceability of an agreement to mediate, from an international perspective.

The subcommittee’s workplan includes:

1. Expand and Facilitate Use of Website:
 - a. Update SubCommittee lists with assistance of Government Chairs – Governments or Committee Chairs to provide details
 - b. Facilitate subscription and use by Working Committees of website distribution lists and communication facilities
 - c. Continue to receive updated factual information with respect to institutes identified on website
 - d. Develop links to institutional websites
 - e. Link website to Canadian Government International Trade and Department of Justice websites and U.S. and Mexican equivalent sites
 - f. Engage NAFTA country Governments update respective websites to cross link to NAFTA website (via Government representatives)
 - g. Submit website to google search engine
2. Judiciary outreach role now merged with Outreach Committee and Committee to consider outreach initiatives specifically focused on the judiciary
3. Enhance use of website chat room- matters previously identified as appropriate for internal site include
 - a. Agreed upon process for additional Identification of ADR Institutes on website (settled at Oaxaca meeting)
 - b. Agreed upon process for posting additional materials on the website (i.e. appropriate third party sites to add to ‘related links’) (settled at Oaxaca meeting)
 - c. Agreed upon principles with respect to materials that can be posted to the NAFTA 2022 website that do not require further review approval/review from the NAFTA 2022 committee as a whole (settled at Oaxaca meeting)

- d. Outreach programmes
 - e. Papers/Materials for consideration for inclusion on website
 - f. Work in progress of NAFTA 2022 subcommittees
 - g. Minutes of all prior meetings including most recent meeting
 - h. ADR conferences
4. Follow up with Nancy Oretskin re publication of the 1999 Mexico City Outreach materials and rights that Juris may have [on work program since Santa Fe]
 5. Recirculate to the outreach enforcement subcommittee (Doak Bishop, Robert Lutz, Carlos McFadden, Francisco de Cosio, Jeff Talpis, Pierre Bienvenue) consolidated paper and receive final comments of the enforcement have [on work program since Santa Fe]
 6. Work with webmaster to develop a layout for the enforcement text and proceed with same [on work program since Santa Fe]
 7. Receive materials from 2022 Committee members for inclusion in the ‘private’ section of the website such as work in progress of the 2022 Committee [continuing]
 8. Support inclusion of third party materials via the Initial Review Process for linkage to the website (settled at Oaxaca meeting)
 9. Continue to work with the National Law Center for Inter-American Free Trade on various educational and outreach initiatives and programs within the NAFTA region [continuing]
 10. Subcommittee to liase with all other subcommittees to expand materials to be included on the website, including for example mediation
 11. Committee to consider whether Code of Conduct for Arbitrators, Mediators be added to the website content, as related site or neither
 12. Committee to prepare draft text summarizing the work of the Committee since 1996 for inclusion in a report to the NAFTA Trade Ministers.

Subcommittee IV Legal Issues

The subcommittee reported on its discussion and its proposed workplan, which provides for a number of Work Groups (“WG”) of the subcommittee organized to address the following topics:

- Notes on Arbitrator Conduct in Arbitrating Private Commercial Disputes in the North American Region. Description of work: Finalize language of currently

proposed 2022 Draft “Code of Conduct” to emphasize guideline nature of provisions (ethical guidelines which could operate in the absence of contrary obligations under applicable rules); change title to do same to emphasize guideline nature; carefully review language of all provisions; propose making available on Committee’s website.

- Chapter 11 Arbitrator Conduct Notes, General and Preliminary Description: Consider appropriateness, utility and possible formulation of a Code of Conduct for Chapter 11 arbitrations. Review Canadian Model BIT (re: code of conduct) and the proposed FTAA Code of Conduct.
- Class actions Project: General and Preliminary Description: Examine and prepare report on the use, legality and procedure for class action arbitrations in the NAFTA countries.
- Case for Limited Role of 2022 Committee re: Investor State Arbitration Issues. General and Preliminary Description: Review mandate for 2022 Committee, language in NAFTA Article 2022, and history of 2022 Committee to determine whether a case may be made for 2022 Committee attention to legal issues arising in the context of private investor-State arbitration.
- Examination of Personal Jurisdictional Bases for Enforcing Foreign Arbitral Awards. General and Preliminary Description: Examine whether foreign arbitral awards may be enforceable in NAFTA countries (especially in U.S.) where the traditional bases of jurisdiction over the defendant are not present. Determine whether the Committee or some other entity might submit an amicus curia to USSC in case involving such question.
- Limiting the Expansion of Domestic Law Arbitral Award Enforcement Defences (e.g., manifest disregard of the law under public policy defense). General and Preliminary Description: Linked to WG # 5, this project is specifically directed at examining and recommending ways to limit what may be expanding domestic law defenses.
- Role of Arbitrators with respect to Anti-suit Injunctions: General and Preliminary Description: Examination of and report regarding suggested roles for arbitrators when faced with an anti-suit (arbitration) injunction.

Subcommittee V Dispute Avoidance and other Forms of ADR

The subcommittee reported on its discussions and its proposed workplan which includes:

- Conduct research on institutions providing alternative dispute resolution services (non-arbitration) within the NAFTA region (similar to the services provided by the Fruit and Vegetable Dispute Resolution Corporation, presented at the Ottawa meeting);

- Institute a regular report on legal developments at Committee meetings (including for the next meeting an analysis on how courts or even arbitral tribunals in the three countries are treating valid mediation agreements or other forms of ADR, especially when a party files for arbitration);
- Monitor implementation / application in the NAFTA countries of the UNICTRAL Model Law on International Commercial Conciliation;
- Identify the various methods of ADR and illustrate when the different procedures may be usefully employed in cross-border disputes;
- Continue analysis on usefulness of multi-tiered dispute resolution clauses (work in this regard with sub-committee on Resolution of Small Business and Consumer Reports). Identify common mistakes that may lead to the setting aside of arbitral awards.

Subcommittee VII Resolution of Small and Simple Disputes

The subcommittee reported on its discussions and its proposed workplan which includes:

- Uniform domain name – examine the possibility of deciding disputes without hearings for small & simple claims;
- Increase participation for importers/exporters in Mexico participate in Dispute Resolution Corporation and explore other areas where a similar model could be used;
- Work with the outreach committee to organize meetings with different sectors/industries might have need for ADR;
- Examine the issue of consolidation of claims;
- Monitor other on-line institutions for dispute resolution update survey.

X. Discussion of the Draft report to the NAFTA Commission

Canada circulated a draft report summarizing the major achievements of the Committee over the last five years. Members are to provide input and comments on the report before the next meeting.

The last report to Ministers dates back from 1996, therefore, it was agreed that it would be important for the Committee to report to NAFTA Ministers on its recent activities and inform them of the Committee's workplan. With that in mind the various sub-committees committed to providing promptly input regarding their workplan.

XI. Next Meeting

There was some discussion regarding the format of the Committee meetings and it was generally agreed that the Committee would try to meet every 9 months instead of every year and hold two day meetings which would allow more time for sub-committee meetings.

Mexico will be hosting the next meeting and have proposed that the next meeting be held in May or June.

XII. Closing Remarks

The Committee thanked David Haigh for his contribution and efforts in promoting the use and understanding of ADR in the NAFTA region.