

## TENTH MEETING OF THE NAFTA ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES

March 7-8, 2001

The NAFTA Advisory Committee on Private Commercial Disputes (the Committee) convened its tenth meeting on March 7-8, 2001 in Mexico City. The meeting was co-chaired by Hugo Perezcano General Counselor and Ricardo Ramírez Hernández Deputy Counselor of the Secretary of Economy. The Mexican government welcomed four new alternate members: Cecilia Azar, Antonio Garza, Enrique Gonzalez Calvillo and Edgar Elías to the Committee. A list of participants at the 10th meeting is attached (appendix 1).

### **I GENERAL DISCUSSION**

The discussion began with an exchange on the future work of the Committee, and focused on the issue of a web site. It was agreed that this issue, should be explored by the Committee as a whole, as the web site would be relevant to the entire Committee.

Sub Committee III was tasked with preparing a draft proposal on a web site to be explored with the entire Committee in accordance with the following guidelines:

- Identify the needs of each of the outreach targets (small business, the judicial and legal community);
- Identify the ideal content for each outreach target: each target will likely require separate pages;
- Identify ways to develop a database for each outreach target to send information by email;
- The web site should make available useful information for each outreach target that could include statutes or relevant links; and
- Discuss the idea of having a listserv or Chat Room where outreach targets could ask questions regarding the benefits ADR and having experts on-line for those discussions.

The Members of the Committee noted several key issues such as:

- Determining who would host the web site, who would manage updating of documents and papers done by the Committee members and who would be in charge of gathering information. The Mexican co-chairs stated that this task should be easier if we take advantage of the available resources from the three countries.
- It was also noted that the establishment of a Committee web site could provide links to information about other types of claims under NAFTA. The Canadian government expressed that it should be very clear what the Committee expects from this web site

before deciding whether to have one or what should be included. The Committee agreed that the work regarding this issue should be completed in the near term.

It was also expressed that all subcommittees have connected issues and should undertake the task of deciding what the Committee could bring to the public by having a web-site or updating the brochures.

### FTAA

Members expressed that under the negotiations of the FTAA, the co-chairs should give some thought on soliciting input from the NAFTA private sector. This could be done by way of participation in the NAFTA delegation, with the goal of ensuring that any provisions on private commercial disputes are consistent with the experience in NAFTA, including in this Committee.

The Mexican co-chairs stated that the NAFTA delegations have presented the experience of the 2022 Committee and are discussing the establishment of provisions that deal with private commercial disputes. The Canadian co-chair noted that in the context of domestic outreach activities, input on this issue (and other issues) was actively sought from the private sector. The Mexican co-chairs concurred, and added that ADR provisions are also under discussion in FTAA negotiations.

### UNCITRAL

Members proposed that subcommittees IV and V should discuss the UNCITRAL report together.

## **II. REPORTS ON DEVELOPMENTS IN THE FIELD**

### NAFTA Chapter 11 ( Investor State)

A list of the cases under Chapter XI was presented by Doak Bishop and a paper entitled "Survey of Arbitration Awards Under Chapter XI of the North American Free Trade Agreement".

Members of subcommittee IV raised the issue of whether this Subcommittee should review what issues might be taken up from Chapter XI. The co- chairs expressed that this subject in particular is not under the Mandate of the Committee and the discussion of this point could lead to conflicts of interest since co-chairs and committee members are involved in various of the cases, including as parties, counsel, and arbitrators.

## UNCITRAL

Nancy Oretskin and Luis Miguel Díaz presented a document prepared for the Committee regarding the Thirty- third session UNCITRAL Working Group on Arbitration . There is still work to do on the following items:

- Requirement of written form for the arbitration agreement
- Enforcement of interim measures of protection
- Conciliation
- Enforceability of a mediation clause.
- Enforceability of a mediation agreement.
- A mediator should not act as an arbitrator

A discussion also was presented regarding model clauses of interim measures of protection. The discussion on the question of the written form of the agreement to arbitrate focused on whether model provisions should be included as a protocol to the New York Convention or as an interpretative statement, in order to avoid opening up the entire Convention.

The US co-chair noted that a draft for a Model Law of Conciliation will be presented by the UNCITRAL Secretariat for purposes of discussion at Working Group sessions in May and November.

### **III. SPECIAL SESSION**

Dr. José Luis González A. Carranca, Chief of the High Court of Justice of Mexico D.F. participated, sharing with the Committee the experience of national tribunals regarding arbitration and ADR. He expressed that judges have difficulty in recognizing and enforcing arbitral awards in Mexico because of a lack of knowledge on the subject, including arbitral institutions. It was also pointed out that conferences and seminars on ADR for judges and counselors will help to improve the recognition of arbitral awards and to reinforce the appreciation and use of ADR in Mexico. The Committee offered to contribute with its ongoing work to encourage a pro-arbitration culture in national tribunals.

### **IV. SUBCOMMITTEE'S REPORTS**

#### Subcommittee III - Communication/ Outreach

The subcommittee presented the web site development within the outlines of the last Work plan

## WEBSITE

All members should propose content for the website. By April 6, a request will be presented and by May 4th there should be a response by the co-chairs. If there is no response ~~to~~ by that date, the understanding will be that proposals were accepted.

The subcommittee will review the ADR brochure for updating and check which aspects need to be changed. Proposals for updating will be presented by April 6 and responded to by May 4<sup>th</sup>. Proposals for additional matters to be included in the brochure from Members should be sent by May 4th and responded to by June 1st. The subcommittee will review the existing web sites that deal with ADR.

The subcommittee will develop a request for proposals for institutions to host the web sites and identify the criteria for a suitable institution to do that considering:

- Content
- Links
- Publications
- Data bases/ updating
- Listserv/Chat rooms

The subcommittee will develop criteria for proposals in 3 months. The question raised here was whether the Committee wanted to review the proposals at the next meeting or whether they should be sent and reviewed by email. If there is a controversial issue it would be discussed at the 11th meeting.

The co-chairs will discuss if there is a problem with approaching any particular institutions for sponsoring. There should be an effort to look at all the credible institutions that could be linked. The co-chairs will also discuss the official languages of the web site. Government co-chairs by May 4th will establish more concrete views of the participation of Committee sponsors, and will look into hosting the web site on the existing NAFTA site or through NAFTA Secretariat auspices.

## SUBCOMMITTEE IV

Work plans for the next meeting:

Prepare a document regarding the UNCITRAL Working Group in order to recommend to the NAFTA parties, which are the best options and work together to develop a consensus approach. Under each issue there are several options. The working paper will deal with the best option for a declaration and recommend to NAFTA governments to hopefully have a consensus. The paper will be presented in May, and will consider which of all the options in every issue will be the best. The Mexican co-chair suggested identifying the key issues rather than trying to cover all of them due to the short deadline for presenting the paper to the Committee.

A report by Carolyn B. Lamm was presented regarding the Revised Uniform Arbitration Act. The paper also deals with the development of a revised ABA code of Ethics for international arbitrators. The AAA is working on the review of this code.

The subcommittee asked the governments for information about discussions that have occurred during the negotiations of the FTAA and whether the governments want input on the subject. Regarding the Chapter XI cases, the proposal is to pull together in one place as many of chapter XI awards and materials and publish such materials. The U.S. co-chair noted that the U.S. was about to initiate a website that will contain these materials as they are made public.

The US co-chairs expressed concerns as to whether the Committee could work on three levels: individual papers; recommendations of private parties to governments and endorsement by governments. The subcommittee undertook the challenge of summarizing the contents of the New York Convention and the Hague Convention, and presenting a paper in November to the Committee

#### SUBCOMMITTEE V

The subcommittee requested to work together with subcommittee IV on the UNCITRAL report and asked for guidelines from the people that represent the private members of the Committee, not only of on arbitration but also on mediation and conciliation. The subcommittee distributed a paper outlining the specific issues that require an outline.

Previous Work plan:

1. Monitoring and presenting comments to the work of the UNCITRAL Working group.
2. Examine the Draft Model Law on Mediation and present a working paper. (To be completed)
3. Hague conference: monitoring mediation and settlement transactions that have been approve by a Court.

The subcommittee will present: an inventory of achievements, comments and recommendations and the Work Plan for next meeting. The co-chairs will receive suggestions regarding the Uniform Mediation Act. The Report will be sent through email by Alejandro Ogarrio. The committee will also study the draft Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments. A document will be prepared on issues for the convention related to enforceability of settlement agreements, and the relationship of the convention rules to ADR. For submission at next meeting the subcommittee will present an analysis of E- ADR and undertook to have a list of providers in the three countries.

## Subcommittee VII

The subcommittee will focus on the need for a trilateral mechanism to resolve small and medium-size claims in the NAFTA region. There are very few rules or institutions that address small and simple claims and the subcommittee will address this issue.

### I Work Plan

1. Drafting of Model Rules for Arbitration for Small and Simple Claims in the NAFTA region
2. Proposed procedures on and off line.
3. Specific cases

For Next meeting:

1. Guidelines for administrative procedures
2. Model clause for small and simple claims in the NAFTA region.
3. A list of institutions prepared to administer with rules and procedures.
4. An info package for a **web** site.

### Pilot project:

The subcommittee believes that internet and E-ADR could be an ~~option~~ avenue for resolving small and simple disputes since not all the institutions or arbitrators are interested in arbitrating conflicts where small fees are involved. There is a pilot project, which needs to be updated, taking into account analysis and research of all E-ADR options in the three countries (i.e. on-line mediation). Currently, there is no familiarity with this kind of dispute resolution in Mexico.

The project involves two ADR institutions per jurisdiction, and will focus on:

- \_ Direct negotiations between business
- \_ Mediation techniques
- \_ Arbitration techniques

In this procedure, the submissions will be limited to essential documents. The arbitrator will be able to ask for additional data to be submitted. The Curriculum vitae of the arbitrator will be available on-line to give transparency to the procedure and participation of the parties in the selection of the arbitrator. Precedents of on-line awards will also be published.

### NEXT MEETING

The U.S. proposed to hold the next meeting in Denver, Colorado, and the co-chairs agreed to set a date after consulting with all Members.