

Report of the Twelfth Meeting of the NAFTA Advisory Committee on Private Commercial Disputes in Quebec City, October 31- November 1st, 2002

The NAFTA Advisory Committee on Private Commercial Disputes (Committee) convened its twelfth meeting on October 31-November 1st 2002, in Quebec City. The meeting was chaired by Denyse Mackenzie, Principal Counsel and Director General and Sylvie Tabet, Counsel, Trade Law Bureau, Department of Foreign Affairs and International Trade. The Committee applauded Pascal Paradis, Nabil Antaki and Pierre Bienvenue for their excellent work in organizing a very successful meeting and interesting outreach program in Quebec City. The members also extended their thanks to Linda Young for the organization of the meeting.

The first item on the agenda was a presentation on a mediation project in Mexico.

I - Mediation Project in Mexico

Macarena Calabrese, the American Bar Association (ABA) coordinator of the Mediation Project in Mexico, gave a presentation of the project. The aim of the project is to build mediation capacity and enhance effective mediation in Mexico. The project is to serve as a catalyst to move mediation in Mexico forward, and to create opportunities for learning, dialogue and enhancement. The project is focussed on mediation for individuals, and local business mediation, as well as court sponsored mediation. The project, which started with the participation of 3 - 4 states, now involves 11 states, 5 organisations, the Supreme Court, the Mexican Bar Association, CANACO, the Instituto de Mediacion de Mexico, the Instituto de la Juridicatura. Ms. Calabrese noted that the various participating states were at various levels of development (for example, some already have arbitration centers). The ABA Committee coordinates the national effort, brings together people involved in mediation and acts as a catalyst. Each state is responsible for creating its own plan to achieve these objectives. There is a need for technical legal assistance, such as the creation of arbitration/mediation centers, training of mediators, assistance with the administration of centers, and drafting legislation to support mediation. For example, some judges will go on a study tour to Washington, D.C. to look at the functioning of the Multi Door Program and to Puerto Rico to see a working mediation center. Ms. Calabrese remarked that there was still some confusion surrounding the concepts of mediation, arbitration and negotiation and the difference between them. To address this, a paper on general principles was developed by the ABA Committee and will be distributed throughout Mexico. Many members of the NAFTA 2002 Committee are involved in the project, particularly Mexican members. The Dispute Resolution Section of the ABA is meeting March 20 - 22 in San Antonio and will be discussing the project. A description of the project was distributed to members.

II - Reports From Government Representatives On Recent Developments

DOHA Negotiations: The Canadian government representative, Denyse Mackenzie, summarized the status of the negotiations. The Ministerial Declaration of November

2001 launched negotiations in agriculture, services, market access, investment, competition and intellectual property. The next ministerial meeting will take place in December in Mexico. The negotiations on the Dispute Settlement Understanding were identified by Ministers for early completion. By May of 2003, Member countries are mandated to clarify and improve upon the DSU rules. Key issues in the negotiations to date are that are being discussed include the development of a permanent panel, the improvement of third parties' rights (in particular at the appeal stage), greater transparency (including access to submission and public hearings), non-member participation and sequencing. Developing countries' needs, such as access to advisory services, will have to be addressed in the negotiations.

FTAA Negotiations: The Mexican government representative, Hugo Perezcano, updated the Members on the discussions in the FTAA. With respect to dispute settlement, a state to state dispute settlement mechanism (similar to the WTO dispute settlement mechanism and the mechanism in NAFTA Chapter 20) is being considered. There is agreement in principle on the concept, but disagreement on the details and certain aspects of the dispute resolution provisions. The bigger debate, however, is on the issue of whether to include an investor-state mechanism. There is no unanimity on this issue. Mr. Perezcano noted that many countries throughout Latin America have bilateral investment treaties that include investor-state mechanisms. Including such a mechanism in the FTAA would serve harmonization objectives. Finally, a provision similar to that in NAFTA Article 2022 is also being discussed in the FTAA context, so as to encourage ADR in the FTAA countries.

Hague Conference On Private International Law: The U.S. government representative, Jeff Kovar, reported that the negotiation for a convention on international jurisdiction and foreign judgments in civil and commercial matters was now in its tenth year. The last major negotiation was held in June 2001. Relevant documents, draft texts and summaries of the negotiations can be found on the web site of the Hague Conference at www.hcch.net. The negotiations are at a roadblock. A last chance process was initiated at the last meeting: a working group was created to try to reduce the number of grounds of jurisdiction. The group is planning to hold four meetings to reduce the number of brackets in the negotiating text. The working group's first meeting will be held in late November and they will meet again the second week of January in The Hague. As a result, negotiations may resume on a convention with a reduced scope. Many issues have yet to be resolved (for example, whether to include specific rules with respect to choice of forum agreements, whether a reference to the chosen court be required, whether to include copyright claims, and whether there must be a relationship with the chosen country). There were a number of follow-up questions from members, including a discussion as to the usefulness of a reduced scope convention.

III - Report On UNCITRAL Working Group On Arbitration

Mexican member, Jose Maria Abascal, reported on the discussions in the UNCITRAL Working Group on Arbitration with respect to written requirements and interim

measures. He noted that tribunals have not been consistent in their interpretation of the written requirements for arbitration agreements under Article 2 of the New York Convention. One solution would be to amend Article 7 of the UNCITRAL Model Law to broaden the definition of the written agreement to arbitrate (such as to include oral agreements to arbitrate if there is a reference to a written document). But even if these modifications were made to the countries' implementing legislation, it would still conflict with some countries' interpretation of the written requirement in the New York Convention. It might still be necessary to amend the New York Convention and this would have to be done through a protocol to the Convention, which would take time. The Working Group is therefore considering the possibility of issuing an interpretative declaration that would provide that, in certain circumstances, courts could interpret the writing requirement in the New York Convention in a flexible manner. These various options are under consideration.

The Working Group will devote more time at its next meeting in May next year to the issue of interim measures. Three issues will be considered: 1) the extent and power of courts to issue interim measures of protection in support of arbitral tribunals, 2) the extent and power of arbitral tribunal to issue interim measures of protection and 3) the extent and power of a third court (not the court of the place of arbitration) to issue interim measures of protection. The Working Group will consider whether to amend Article 17 of the Model law to provide for the power of arbitral tribunals to issue interim measures. There is generally support within the Working Group for this. As well, there is agreement in principle on the definition of what constitutes interim measures. However certain issues will need to be resolved. For example, should certain conditions be satisfied for the arbitral tribunal to issue interim measures? Can the arbitral tribunal issue *ex-parte* interim measures (and if so, subject to what safeguards)? The Group will also examine the question of court enforcement of interim measures issued by arbitral tribunals.

IV - Report on UNCITRAL Model Law on Conciliation

Jose Maria Abascal, Luis Miguel Diaz, Nancy Oretskin and Jeff Talpis reported on the completion of the UNCITRAL Model Law on Conciliation. The Model Law on Conciliation took two years to complete. It covers international commercial conciliation. Countries can also make it applicable to domestic conciliation. There was lively debate within the Working Group on the question of the enforceability of mediation clauses. Jeff Talpis commented on the debate within the Working Group and posed the question as to whether mediation of international disputes was advanced by the Model Law. In his view, there should be a further discussion on whether the Model Law has enough "teeth" in terms of providing for the enforcement of mediated settlement agreements. Many Committee members intervened on this issue.

The National Association of Law Commissioners is convening a meeting to consider whether to adopt the Model Law in the U.S. Uniform State Law. It was proposed by certain members that the NAFTA 2022 Committee recommend to ministers the adoption of the UNCITRAL Model Law on Conciliation. Others felt that the Committee should

first examine the changes to the Model Law to enhance enforcement. Jeff Kovar agreed with the suggestion to recommend adoption of the Model Law, however he cautioned against re-opening the debate and the consensus reached within the UNCITRAL Working Group. The group discussed the appropriate procedure to make a recommendation to the NAFTA Commission. It was noted that the NAFTA 2022 Committee has a mandate to make recommendations to trade ministers. It was agreed that further discussions on additional issues to consider could also continue within Subcommittee V. In conclusion, Hugo Perezcano proposed the following motion:

The NAFTA 2022 Committee through Subcommittee V will work on the text of a recommendation to the NAFTA Free Trade Commission encouraging the adoption and implementation of the UNCITRAL Model Law on Conciliation in each NAFTA country.

It was agreed that the recommendation would be presented to the Committee for consideration at the next meeting of the Committee. The Motion was adopted.

V - NAFTA 2022 Web Site Presentation

Denyse Mackenzie recalled that the Committee at its last meeting had indicated its interest in developing a web site that could be hosted on the NAFTA Secretariat web site. In light of the recommendations made at the last meeting, an initial presentation was provided to Committee Members on what a site might look like and where it would be located. The presentation highlighted some of the key aspects (disclaimers, update of ADR brochure, whether to include other links, possible chat room for the Committee members). Further to discussions with the Committee, Subcommittee III undertook to make further recommendations to the Committee on the content of the web site and presentation. Once the Committee as a whole agreed on content, presentation as well as modalities for future changes to the web site, the Canadian Section of the NAFTA Secretariat will provide the technical support to post the material on its web site.

VI - Subcommittee Reports and Priorities

Subcommittee IV Legal Issues

The Subcommittee reported on four issues that were discussed during their meeting 1) the Uniform Arbitration Act, 2) codes of ethics for arbitrators, 3) Inventory of cases and 4) a project of training for judges.

With respect to the UAA, Carolyn Lamm will distribute a copy of the UAA and comments on issues arising under it, for consideration and discussion amongst members of the Committee prior to the next meeting.

The discussion on codes of ethics for arbitrators continued from the last meeting. There are two models: the existing IBA code of ethics for arbitrators and the current draft of the ABA/AAA code of ethics, which is a revision of the 1977 code (in the ABA case the process is near completion and the document is being considered). Bob Lutz will re-submit these two models to the Subcommittee for discussion in advance of the next meeting. The Subcommittee will consider whether there should be a code of ethics for arbitrators and if so, they will look at the various models.

The Subcommittee considered compiling an inventory of existing case law on international arbitration in the three countries. After further reflection, it concluded that it was not a good use of its time. However, it noted the importance of having a presentation on current developments in ADR in the three NAFTA countries at every meeting of the Committee. Committee members discussed potentially posting these presentations on the Committee's website.

Finally, the Subcommittee suggested considering using the next meeting in Mexico as an opportunity for outreach and training in particular training of the judiciary.

Subcommittee III Communication/Outreach

The Subcommittee commented that its focus of outreach activities should be on smaller law firms, organizations and businesses. It thanked the Government of Canada for the initial work on the website. Members of the Subcommittee were each assigned responsibilities with respect to the website (drafting the content, updating the brochure, gathering laws on arbitration, criteria for looking at publication, criteria for links, developing a checklist for arbitration users, drafting arbitration clauses). There is interest in exploring the possibility for a chat room to facilitate communication between members. The website could also include a list of upcoming conferences on arbitration. Hugo Perezcano mentioned that on the FTAA website (www.ftaa-alca.org) the three NAFTA countries have listed their arbitration laws. The Subcommittee will circulate to all the members of the Committee a draft of the website 2 - 3 months before the next meeting.

Subcommittee V Dispute Avoidance and other Forms of ADR

The Subcommittee indicated it could be useful to have a session at a future meeting on dispute avoidance. In addition, a small workshop on inter-cultural communication might be another interesting project. With respect to the various forms of mediation, the Subcommittee referred to the presentation by The Honourable Pierre Michaud to the Committee at lunch and noted the importance of not becoming too formalistic as to terminology and engage more on process issues. Finally, the Subcommittee indicated it would work on the text of a recommendation for the Committee to the NAFTA Commission that each country implement the UNCITRAL Model Law on Conciliation. In this respect, it will also examine the areas of the Model Law that contain some flexibility as to implementation with a view to bringing these issues to the Committee for

consideration. Hugo Perezcano will circulate the text of a draft recommendation and attached draft decision for the FTC for decision at the next meeting.

Subcommittee VII Resolution of Small and Simple Disputes

The Subcommittee will work on completing a list of available service providers for e-ADR (including by examining the existing ICC links in the U.S.). It discussed the issue of the pilot project presented at last meeting by Dana Haviland. There is some indication that the company who developed the project may be spun off into a non-profit company. There are some issues that relate to the ownership and licensing of the software (proprietary vs. non-proprietary). The Subcommittee indicated that members of the Committee could act as mediators / arbitrators pro-bono. It also raised possible options to promote the project. The question of the Committee's approval, which was discussed at the last meeting, was raised again. Government representatives indicated that more information on the project and the company owning/operating the software was required before the governments could give a final view as to the Committee's ability to approve such projects. Scott Donahey undertook to send more information on the project to everyone before the end of the year and that Government representatives would then respond by the next meeting.

The Subcommittee spokespersons undertook to provide their work plan within two weeks

VII – Outreach

The Quebec National and International Commercial Arbitration Centre hosted a breakfast for the Committee members and members of the local bar. In this context, Fabien Gélinas, *Professor, McGill University, Senior Counsel, CACNIQ* presented CACNIQ's new international arbitration rules. At lunch, Marc Busch Associate Professor, Queens School of Business presented to the Committee members the result of his research on early settlement in GATT/WTO disputes. A cocktail at the Quebec City Hall was held in honor of the members of the Committee. On November 1st, the outreach event started off with a Breakfast hosted by McCarthy Tétrault LLP. For the first panel, there were three presentations: 1) Structuring Cross-Border Transactions in the NAFTA Area: Marc Barbeau (*Stikeman, Elliot, Montreal*), 2) Planning Efficient Resolution Mechanisms for Private Commercial Disputes in the NAFTA Area: Carolyn B. Lamm (*White & Case*) and 3) International Arbitration - A User's Perspective: Daniel Desjardins, *Vice President, Legal Services (Bombardier Inc., Montreal)*. A second panel on Recent Developments in International Arbitration Law in Canada, Mexico and the United States included presentations from Robert E. Lutz II, David R. Haigh and Luis Miguel Diaz.

The outreach sessions were very well attended with over 70 participants including members of the Quebec bar, arbitration practitioners and academics.

VIII - Next Meeting

Mexico will be chairing the next meeting in Oaxaca. Dates suggested: May (TBC).
Mexico will be proposing dates after the FTC Ministers meeting.