

Report of the Thirteen Meeting of the NAFTA Advisory Committee on Private Commercial Disputes celebrated in Oaxaca City, September 25th and 26th, 2003

The NAFTA Advisory Committee on Private Commercial Disputes (the Committee) convened its thirteen meeting on September 25th and 26th 2003, in Oaxaca City, Mexico. The meeting was co-chaired by Hugo Perezcano Díaz, General Counsel for Trade Negotiations and Ricardo Ramírez Hernández, Deputy General Counsel of the Ministry of Economy. The Mexican government welcomed four new alternate members: Sofia Gomez Ruano, Francisco González de Cossío, Carlos McCadden, and Julian Treviño to the Committee. A list of participants at the 13th meeting is attached (appendix 1)

The first item on the agenda was a presentation of the reports from government representatives on dispute settlement negotiations (Canada: WTO; Mexico: FTAA; U.S.: Hague Convention).

II - Reports From Government Representatives On Recent Developments

WTO – DSU Negotiations

The Canadian government representative, Kirsten Hillman, summarized the status of the negotiations. The DSU negotiations are not part of the single undertaking and have not kept in pace with the general WTO negotiations, which is fortunate given recent developments. In reference with suspension of benefits, lack of clarity as to when a Member is entitled to suspend benefits has led to the so-called sequencing arrangements. In that order, proposed modifications have been made to substitute *ad hoc* sequencing arrangements by disputing parties. Transparency and Amicus submissions, i.e. discussions on enhancing third party rights will be done in the near future, to date it has been done on an *ad hoc* basis. Finally, in relation with permanent bodies, appointing panellists has been a cumbersome and questions about relevant expertise have led to proposals to move from *ad hoc* panels to more permanent bodies.

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 eleven year. The larger project conceived to harmonize rules that would cut across civil and commercial litigation run into insurmountable problems, given differences in jurisdiction between the different systems. The regulation of the web site made it even more difficult to move forward. Efforts to narrow issues to limited grounds of jurisdiction were undertaken. A draft was prepared for business to business relations regarding enforcement of choice of forum agreements and enforcement of resulting judgments. A survey done by the International Chamber of Commerce (ICC) showed that businesses thought that this would be very useful. The Hague Conference has received comments from the European Union (EU) plus 10 or more countries saying they are eager for the results.

Perhaps the most difficult question has been on intellectual property. There has been much debate about whether litigation involving the validity of a patent of a trademark

should be limited to the country where it was registered, or the common law right arose, since Copyright laws are based on international agreements.

FTAA Negotiations

Mexican government representative, Ricardo Ramirez, updated the Members on dispute settlement discussions in the Free Trade Agreement of Americas (FTAA). After the Miami Ministerial a new text will be released that will indicate the route of the FTAA negotiations. With respect to dispute settlement which is pending in a way on the development of substantive provisions it is foreseeable that the FTAA mechanism will be similar either to the WTO dispute settlement mechanism or to the NAFTA Chapter 20, mechanism. Concerns as to how results of the Cancun WTO Ministerial may affect the Miami Ministerial and FTAA progress are still being evaluated. The issue of how existing bilateral and regional agreements will relate to the FTAA has not been resolved. Finally, the draft text contains a 2022 type Committee of clause.

II – Update on current legal developments in each NAFTA country

United States

U.S. member, Robert Lutz reported on the discussions in the harmonization of ADR's rules. He commented about the existence of a US Commission on Uniform State Laws that attempts to develop some model laws. Most recently it produced the Revised Uniform Arbitration Code which has already been adopted by some States and is pending in 16 others, although some of the major States are still not included. Implementing legislation on the recently approved Uniform Mediation Act has been introduced in 5 States. UNCITRAL Model Law proposal is to be largely incorporated into the Uniform Mediation Act.

About ethics in International proceedings, Bob Lutz, commented of two major guidelines: the ABA/AAA Rules of 1997 and the IBA Guidelines. ABA/AAA is looking to adopt a new set of guidelines (already approved by AAA) which includes a Code of Conduct, instrument that will become effective in April 2004. Under these rules the party appointed arbitrators are presumed to be neutral (as opposed to current rules), in consistency with the current international practice. The ABA has also established best practices for e-commerce. IBA has also established Guidelines for bias and disclosure in international arbitration, in which any person considered for arbitrator, should determinate individually its impartiality if it decides to accept its nomination.

Finally, Doak Bishop, U.S. member, explained the use of class action arbitration under United States legal procedures. If a contract arbitration clause does not prohibit class action arbitration; the arbitrator has discretion to certify a class action. If the arbitrator does, one or a few persons are then certified to represent the whole class, and recover damages on their behalf.

Canada

Canadian member, David Haigh explained that the Supreme Court of Canada has recently dealt with Model Law type issues in Deputeaux (Cailliou). This case deals with

dispute on a copyright issue in which the Quebec Court of Appel annulled the award because copyrights are in-arbitrable. This Court decided that the standard of review is correctness because it involves matters of public order. The Supreme Court decided that matters are arbitrable unless there is a clear intent of the law to exclude arbitration. The provisions in question dealt with division of powers, not with arbitrability, thus arbitration is not excluded. It also decided that limitations on arbitrability have to be construed very narrowly, and under those circumstances, it's necessary to preserve the autonomy of arbitration.

Mexico

Mexican member, Carlos Loperena, reported on the developments of arbitration in Mexico, he said that recent challenge of enforcement action of an award based on unconstitutionality of Article 1435 (Article 19 of UNCITRAL Model Law) giving broad powers to arbitrators to conduct the proceeding is being considered by the Supreme Court in Mexico. There is confidence that the Mexican Supreme Court will rule in favour of the constitutionality of the Article. Courts have traditionally upheld and enforced arbitration clauses.

Mexican arbitration centers CANACO and CAM have been very active in promoting arbitration; the CAM has organized a moot arbitrating competition. The IACAC, ICC, and CAMCA have also become very active in Mexico, a program on arbitration topics is being developed and soon to be distributed to Universities in Mexico.

Cecilia Azar, Mexican member, reported that the mediation project has been working fine; it has been discussed with 17 Federal States, providing them with technical assistance on training and in administering mediation centers. Several States have adopted mediation laws, which generally create mediation centers, annexed or sponsored by local Judiciary of Executive, although currently they do not provide for private mediation. It's probable that the project will be supported by a Web site and an annual newsletter at the end of each year regarding the information and progress made on each State.

III - NAFTA 2022 Web Site Presentation

The Committee at its last meeting had indicated its interest in developing a web site that could be hosted by 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 its presentation. Selma Lussemburg, Canadian member, indicated that one of the major problems is the content. It was agreed that the final comments on the website should be ready by October, 31st. No comment assumes acceptance by the Committee. Spanish and French versions would need to be updated and later posted.

The final English version of the brochure was circulated for comments by Committee members. A paper on enforcement proceedings is to be circulated, and it should be ready to be posted by the end of November. It was also mentioned that since the Web site would be "out" of Canada, it would need to comply with Canadian Federal Law on protection of privacy, so consent of each member (current and former) would need to be secured.

With respect to the list of ADR institutions, the Committee discussed the criteria that should be applied to accept or reject them : (1) Non-for-profit; (2) Operate in the NAFTA region; (3) Institution must be recommended by a Committee member; (4) No Committee member should object to the inclusion of that institution; and (5) If there are objections, then it should go back to the Committee as a whole.

The list of institutions was circulated for comments of the Committee members. Any objections to institutions on the list should be made by the end of the meeting, as well as any suggestion for inclusion of other institutions in the list. Ant the Committee should approve it.

Selma Lussemburg mentioned that they will work with the Tucson center on outreach programs, she will explore with Nancy Oretskin, and Luis Miguel Diaz to get the 1999 Conference materials on the Tucson Center Web Site. Disclaimer will be circulated to be commented on.

In reference with the third party materials received from members, they shall be posted during 60 days for the review of a Review Board, as to whether or not it is suitable for its inclusion. If there is no rejection, such works will be linked into the website. If the Review Board decides that materials are not appropriate, it should give reasons and post them on the Chat Board. If a Government Member feels strongly that it should be posted, the Committee will take it up at its next meeting, as an interim process while the Site is up and running.

Kevin J O'Shea, U.S. private member, made a presentation of the National Law Center for Inter-American Free Trade (NLCIFTA), of Tucson, Arizona; he explained that the NLCIFTA organized 3 meetings with the Outreach Committee. Their plan is to have 3 more meetings this year.

It was mentioned that it has been very difficult for the Committee and Subcommittee to carry out the outreach part of its mandate, in part because of a lack of time and a lack of funds. Therefore it was proposed to find an existing seminar or conference to plug in an ADR component with the ready made audience, rather that setting up a new seminar. This format was recommended by the Outreach Subcommittee and its main focus is targeting non-lawyers, business people, and especially small and medium size businesses. Finally, he expressed the interest of the Center to make that kind of meetings, at least one in Canada and another in Mexico.

The UNCITRAL working group on arbitration was represented by José Maria Abascal Zamora who reported that the working group has the following pending issues: 1) power of arbitral Tribunals to establish interim measures; it is still vague what the definitions of interim measures are and the scope of arbitrators powers. A third party interim measure is

being considered but with strong safeguards; 2) power of courts to enforce interim measures, and 3) power of courts to issue interim measures in support of arbitration.

IV - Subcommittee Reports and Priorities

Subcommittee III Communication/Outreach

The Subcommittee reported that their primary objective is to get a Web Site going by next meeting in May (Selma Lussemburg). The Subcommittee will request feedback from members, although they need to receive final comments on the material that was distributed by Oct. 31, and the comments of the paper on enforcement. It was also requested that members from each delegation review and ensure that it is current (Members who accepted such task are: Mexico-Carlos McCadden and Francisco González de Cossío; US-Doak Bishop; and Canada-Jeff Talpis), and finally it was necessary to obtain a list of country institutions. It was also agreed that Materials for inclusion on the private section of the Web Site should be sent before October 31st.

Subcommittee IV Legal Issues

The Subcommittee commented that its focus of outreach activities should be on the Code of Ethics, Doak Bishop mentioned that they will prepare a guide to be considered at the next meeting. In reference with the group on Restatement of the Law on ADR, they said that they will create a Group for a Restatement of International ADR, or study the status of the law and making recommendations. They will provide a specific proposal to be discussed by next meeting. One possibility would be for this Committee to come up with principles.

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, Francisco Gonzalez de Cossio mentioned that one of the main purposes of the Subcommittee is to have by October 29th the final version of letter to and Decision of the NAFTA Free Trade Commission and circulated ASAP. Finally Cecilia Azar will undertake to prepare an updated draft of the Mexican version of Brochure of the Alternative Settlement Disputes, to be reviewed by José María Abascal and then circulated to all members.

Subcommittee VII Resolution of Small and Simple Disputes

The Subcommittee will prepare a list of institutions and gather information of special procedures. About e-ADR, Dana Haviland presented a pilot project. She said that the main idea is to establish a neutral e-ADR service with ramifications in the 3 countries that could assist small and medium-size businesses.

VII - Next Meeting

United States will be chairing the next meeting in Santa Fe. Dates suggested: September (TBC). United States will be proposing the specific dates after the NAFTA Free Trade Commission meeting is scheduled.

**NAFTA ADVISORY COMMITTEE ON PRIVATE COMERCIAL DISPUTES
(2022)**

13TH MEETING LIST OF PARTICIPANTS

PRIVATE MEMBERS

1. Cecil O.D. Branson Q.C.
2. David R. Haigh
3. Jeffrey Talpis
4. Pascal Paradis
5. Selma M. Lussenburg
6. Alejandro Ogarrio R.E.
7. Carlos Loperena
8. Carlos Mac Cadden
9. Cecilia Azar
10. Francisco González de Cossío
11. José Luis Siqueiros
12. José María Abascal
13. Julián Treviño
14. Luis Enrique Graham
15. Luis Miguel Diaz
16. Sofia Gómez Ruano
17. Dana Haviland
18. Dana Nahlen
19. Doak Bishop
20. James E. Nelson
21. Kevin J O'Shea
22. Lorraine Brennan
23. Nancy Oretskin
24. Philip A Robbins
25. Robert E. Lutz

GOVERNMENT MEMBERS

1. Jeffrey Kovar
2. Kirsten Hillman
3. Linda Young
4. Hugo Perezcano
5. Ricardo Ramírez
6. Carlos Vejar
7. Nancy Bernal

