

## MEMORANDUM

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TO: NAFTA Advisory Committee on Private Commercial Disputes (the  
"Committee")  
-Canadian members  
-Mexican members (through Mexican government representatives)  
-U.S. members (through U.S. government representatives)

FROM: Jonathan Fried and Christiane Verdon  
Canadian government representatives and co-hosts for Vancouver meeting

SUBJECT: Second Meeting of the Committee – Vancouver, June 19-20, 1995  
Report and Required Follow-Up

This memorandum summarizes the results of the second meeting of the Committee, held in Vancouver on June 19-20, and indicates agreed follow-up work expected of the four sub-committees.

### **General**

The Committee emphasized throughout its discussion that its work is directed to assisting the business community in all three countries, including small and medium-sized business, to trade and invest in the NAFTA region: means such as arbitration, mediation, and other alternative dispute resolution (ADR) than can help to reduce, avoid, and resolve disputes in a timely and cost-effective manner can thereby increase business confidence in cross-border commerce. Ultimately, the work of the Committee continues to be directed toward helping to ensure that these tools are available and made effective in aid of business needs.

To this end, the Committee received the reports of the four subcommittees established at its first meeting (Mexico City, November 14, 1994). The mandates of the subcommittees were as follows:

- Subcommittee I was tasked with compiling information on existing means for the settlement of private international commercial disputes (including model ADR and other contractual clauses) and on centres for commercial arbitration, and to develop some criteria for evaluation of their effectiveness;
- Subcommittee II was charges with identifying sectors and types of businesses that would particularly benefit from the use of ADR;

- Subcommittee III undertook to examine the promotion of the use of arbitration and other procedures for the resolution of private international commercial disputes in the NAFTA region, including ways to increase private sector awareness of the benefits of using ADR; and
- Subcommittee IV examined the issue of recognition and enforcement of arbitral agreements and awards.

### **Subcommittee I**

Subcommittee I's report contained a comprehensive compilation of the relevant laws of each country, although some further refinement remains to be done. The Canadian side wishes to update and edit its portion of the compilation, particularly respecting regulations, and the Mexican side will provide additional information if, for example, new CANACO rules are adopted. The revised compilation should be distributed to all Committee members in advance of the next full Committee meeting.

The Committee discussed if and how this compilation, as revised, should be disseminated to interested users in the three NAFTA countries, such as on a CD-ROM, or through the Internet. It was pointed out that dissemination of this information on a single occasion, without regular updating, may be of limited value. The subcommittee was asked to consider further this issue.

The Committee recalled that the underlying objective of the work of Subcommittee I was to assist business in identifying and using effective ADR procedures for the avoidance and settlement of cross-border commercial disputes. Accordingly, the Committee decided that Subcommittee I should complement its inventory of procedures and institutions with a compilation of existing model arbitration and other ADR clauses, to provide a better basis for assessing whether more work is required in this regard.

Finally, the Committee reviewed draft criteria that had been prepared by Subcommittee I for the future evaluation of the effectiveness of commercial arbitration institutions. The Committee agreed that it should not itself be using these criteria to assess arbitration institutions or procedures, but rather, that such criteria could provide guidance to business and counsel to facilitate their own decisions regarding whether to pursue ADR and if so, through which institutions or procedures. The Committee therefore directed Subcommittee I to continue the development of criteria with this objective in mind.

### **Summary of follow-up work required**

#### **Subcommittee I will:**

- (a) **continue to revise the compilation of relevant laws as necessary;**

- (b) **consider further whether and how this compilation of laws should be publicly disseminated;**
- (c) **compile model arbitration and other ADR clauses in the three NAFTA countries; and**
- (d) **continue to develop criteria or a checklist for the evaluation of arbitration institutions and procedures.**

## **Subcommittee II**

The Subcommittee's preliminary report on the use of ADR in specific sectors included an inventory of available institutions and procedures tailored to specific sectors and industries. The Committee agreed that the work of this Subcommittee should continue with the objective of assisting the Committee to assess what, if anything, is needed in the NAFTA region to ensure that ADR is available and effective for business in a cross-border context. To this end, the Committee agreed that the Subcommittee should continue to refine the inventory, including adding a Mexican component, and to identify where gaps may exist.

To identify the sectors in which more problems may have arisen, and the areas in which costs associated with disputes may be high, the Committee requested the three governments to provide statistics on trade volumes, broken down by sector and industry, between the three countries, and any available information on sectors or industries that have had difficulties resolving private commercial cross-border disputes.

To assist in identifying sector-specific models and institutions that may provide useful models for others, the Committee requested the three governments to provide detailed information on ADR in respect of agricultural products and the work of the NAFTA Advisory Committee on Private Commercial Disputes regarding Agricultural Goods (the "707 Committee"). The government co-chairs will monitor the work of, and consult periodically with, the 707 Committee. The Canadian and U.S. government co-chairs undertook to provide to the Mexican government co-chairs information concerning existing mechanisms for private commercial disputes in agricultural trade.

## **Summary of follow-up work required**

### **Subcommittee II will:**

- (a) **continue to revise its compilation of sector-specific ADR;**
- (b) **consider further whether and how this compilation should be publicly disseminated;**

- (c) **undertake an illustrative analysis of one or more industry or sector-specific ADR regimes that may provide useful models for others, or that may, in the light of further information received from the NAFTA governments on trade volumes between the three countries, and/or sectors or industries that have had difficulties resolving private commercial cross-border disputes.**

**The Government co-chairs will:**

- (a) **provide trade statistics, broken down by sector and industry to the extent possible;**
- (b) **provide information, to the extent that it can be obtained, on the quantum and pattern of commercial disputes in specific sectors; and**
- (c) **monitor the work of, and consult periodically with, the NAFTA Advisory Committee on Private Commercial Disputes regarding Agricultural Goods.**

**The Canadian and U.S. government co-chairs will provide to the Mexican government co-chairs information concerning existing mechanisms for private commercial disputes in agricultural trade.**

### **Subcommittee III**

The Subcommittee's report, including a trilateral executive summary and three separate country reports, examined the means by which promotion occurs, who conducts the promotion, and to whom the promotion is directed. The Committee noted the assessment of the Subcommittee that promotion varied between the three NAFTA countries both in terms of volume and emphasis, that most activities were aimed at ADR providers and counsel rather than at businesses, and that education and training are essential components of raising levels of awareness regarding the benefits of ADR.

The Committee emphasized that conclusions regarding what promotion, education, and training activities might be recommended could only be made on the basis of a more focused identification of needs. To this end, the Committee agreed that Subcommittee III should survey the legal, business and judicial communities to obtain more accurate information regarding current levels of awareness. The Committee noted in this regard that various terms of art can be understood differently by different audiences, and therefore requested the Subcommittee to prepare a "glossary" or informal explanation of terms, both for use in surveying user needs and for the reference of other members of the Committee.

## **Summary of the follow-up work required**

### **Subcommittee III will:**

- (a) prepare a draft glossary of terms used in ADR, including arbitration, mediation, and conciliation;**
- (b) with input from other Committee members by July 31, develop a questionnaire or other means to survey legal, business and judicial communities; and**
- (c) on the basis of responses, undertake a focussed assessment of the needs of these communities in respect of promotion, education and training.**

### **The Government co-chairs will:**

- (a) facilitate communication with their respective judicial branches in this regard; and**
- (b) consider ways to facilitate exchange of information between the Committee and UNCITRAL, the Inter-American Commission for Commercial Arbitration, and other similar institutions.**

### **Subcommittee IV**

The Subcommittee's report concluded that, in general terms, the systems in place in the three NAFTA countries for the recognition and enforcement of arbitral agreements and awards are working well. The Committee asked the Subcommittee to update its paper in the light of new legislative developments in Mexico, to undertake a more detailed analysis of various procedural issues identified in the Subcommittee's report, and to include an analysis of the responsiveness of the three legal systems to other forms of ADR, including agreements to mediate, settlement agreements, and related issues.

The Committee took under advisement the Subcommittee's proposal on an "*amicus* project", that could include preparation of a model brief and making expert witnesses available for judicial proceedings where required; and on preparing a "how to" brochure on recognition and enforcement, for possible use by the business community.

## **Summary of follow-up work required**

### **Subcommittee IV will:**

- (a) update its paper on recognition and enforcement, particularly in the light of recent changes to Mexican law; and**
- (b) undertake a more detailed analysis on procedural issues identified in its report and on the receptiveness of the three legal systems to other forms of ADR.**

### **Work Common to All Subcommittees**

The Committee agreed that all four Subcommittees, in conducting follow-up work, should consider:

- (a) the need to take mediation and other forms of ADR fully into account;
- (b) the need to pay particular attention to how ADR may assist in resolving small claims and in meeting the needs of small and medium-sized businesses, including through surveys of business associations representing small and medium-sized businesses;
- (c) the need to ensure full coordination of the work of the four subcommittees, particularly so that different subcommittees do not conduct surveys of the small target groups;
- (d) through consideration of such issues as model ADR clauses, to take account of the “dispute prevention” benefits of ADR; and
- (e) the need to prepare contributions for a report to the NAFTA Free Trade Commission, a draft of which will be considered at the next meeting of the Committee.

The Committee agreed that Subcommittee reports for the next meeting should be circulated by December 15, 1995, to provide a basis for the government co-chairs to prepare a draft report to the Commission for discussion by the Committee.

The delegation of the United States extended an invitation to the Committee to meet in Phoenix, Arizona on February 5-6, 1996.

Christiane Verdon  
Senior General Counsel  
Constitutional and International Law Section  
Department of Justice

Jonathan T. Fried  
Principal Counsel  
Trade Law Division  
Department of Foreign Affairs  
And International Trade

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