

DRAFT
2/20/96

THIRD MEETING OF THE
NAFTA ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES
February 12-13, 1996, Phoenix, Arizona

MINUTES

Summary

The NAFTA Advisory Committee on Private Commercial Disputes ("Committee") convened its third meeting February 12-13, 1996, in Phoenix, Arizona. Co-chairs for the meeting were Conrad Harper, Legal Adviser of the U.S. Department of State, and Ginger Lew, General Counsel of the U.S. Department of Commerce. An attendance list is attached. The Committee heard reports from its four subcommittees, reviewed a draft report to the NAFTA Free Trade Commission ("Commission"), prepared a new work program, and heard two presentations by non-Committee members. To carry out the new work program, the Committee decided to restructure its subcommittees. The final report to the Commission will be completed following final review by the Committee members and consultations among the government co-chairs. The Committee accepted Mexico's invitation to convene its fourth meeting in Mexico in the fall of 1996.

Subcommittee Reports

Each of the four subcommittees distributed copies of its report, and gave a summary presentation. The Committee held general discussions on each report.

Subcommittee I

There was general agreement that the draft brochure prepared by Subcommittee I should be reviewed by all members in light of the discussions of each of the subcommittee reports, and that more work was necessary before it could be referred to the Commission.

It was noted that Kluwers publishing company had expressed interest in publishing the compilation of laws presented by Subcommittee I at the Vancouver meeting. A site on the World Wide Web, an Internet link to a current Website, and a CD-Rom were also suggested as potential methods for disseminating this information. In any case, the problem of handling periodic updates of the information was noted, since the Committee does not have the resources to handle such a task. It was pointed out that the U.S. Library of Congress had approached the Government of Canada for assistance with a project to make the texts of the laws of the countries of the world available on the World Wide Web, translated into English, and that this project could

possibly incorporate the Subcommittee's work. It was recognized that the means of making the information accessible might vary with different legal and business audiences.

Subcommittee II

Subcommittee II produced an interim list of specialized providers of alternative dispute resolution ("ADR"), and there was considerable discussion of how to supplement and update it. Electronic means, via a new or existing site on the World Wide Web, was suggested. It was noted that specialized providers of ADR are often developed on an ad hoc basis and take very different forms from traditional arbitration. It was suggested that these systems, and criteria for evaluating them, could be examined as part of a more detailed examination of mediation. There was also some skepticism expressed about the benefits of such an exercise.

Subcommittee III

There was considerable discussion of the survey conducted by Subcommittee III, the limits of its methodology, the perceptions of arbitration and mediation it elicited, and whether those perceptions were actually derived from experience gained in the NAFTA region. The Committee also discussed the pros and cons of conducting additional surveys.

Subcommittee IV

The discussion of the subcommittee's report demonstrated that considerable interest remains for the Committee to conduct additional research on legal issues related to arbitration and mediation. A number of issues were identified that could usefully be the subject of additional research.

Draft Report to the Commission

The Committee discussed the draft report, and made various suggestions for revising it. The subcommittees met and coordinated specific language changes to those parts of the report addressing their work. There was agreement that the U.S. government members would prepare a revised draft of the Report immediately following the meeting, to be circulated to all members for comment. The government members would then aim to agree on the text of a final report by mid-March, if possible, in time for the next meeting of NAFTA ministers.

New Work Program

The Committee decided to restructure its subcommittees and the work assigned to them.

- Subcommittee I is established on an ad hoc basis to collect comments from all of the members on the draft brochure (to be targeted at first-time users) by March 1, and circulate a new draft. The Subcommittee will aim to complete a final draft of the brochure by mid-March, to be attached to the Committee's report to the Commission.

Subcommittee II has completed its work.

Subcommittee III is to continue to address promotion of arbitration, which was described as the heart of the Committee's mandate. The Subcommittee is to assess the current availability and effectiveness of education, training, and development (including educational materials) to small and medium businesses, in-house attorneys, law students, and judges. It should make recommendations on steps the Committee may take, such as conducting seminars, producing a "bench book" for judges, developing additional brochures for certain target audiences, and conducting additional surveys or focus groups. Subcommittee III is to assess the availability, advantages, and disadvantages of various methods of disseminating the work of the Committee, including the compilations prepared by previous Subcommittees I & II, and the brochure to be completed by Subcommittee I. These means could include commercial publication, and use of the World Wide Web - either through existing sites such as those at the Departments of Commerce and State, or those at some other institution.

- Subcommittee IV will continue to examine enforcement and other legal issues. It will also take up that component of previous Subcommittee I's mandate that called for the analysis and assessment of existing laws and institutions for arbitration and other forms of ADR. Issues such as consolidation of related issues in a single arbitration, interim relief, discovery, immunity of arbitrators from liability, the enforcement of agreements to mediate, and court-ordered mediation were identified as possible areas for further work by the Subcommittee.

-- Subcommittee V is created to address mediation and other forms of ADR. Numerous types of non-arbitration alternative dispute resolution were cited by members, including the specialized regimes in many industries, customary practices in Mexico, and formal mediation in the United States. This new subcommittee will be devoted to assessing the current availability and effectiveness of these other means of ADR in the NAFTA countries, and making recommendations to the Committee for further action.

Membership on the new subcommittees are announced as follows:

Subcommittee I: Antaki, Drucker, Lussenberg, Estrada Samano, Abascal Zamora, Rivkin, Enix-Ross.

Subcommittee III: Haigh, Hall, Trevino Azcue, Luis Siqueiros, Astigarraga, Rivkin, Ross.

Subcommittee IV: Branson, Talpis, Loperena Ruiz, Cardenas, Carter.

Subcommittee V: Drucker, Gold, ~~Von Weber~~, Abascal Zamora, Dickenson, Enix-Ross, Mears.

Presentations by Non-Committee Members

The Committee heard a presentation by Nancy Oretskin of the U.S.-Mexico Conflict Resolution Center, on the use of mediation in the resolution of commercial disputes in the NAFTA area, and the Center's experiences and views on the promotion of the use of ADR mechanisms in the NAFTA area. The Center expressed interest in exploring the publication of the brochure being prepared by the Committee, if appropriate funding could be identified.

The Committee also heard presentations by Abraham Okazaki, Eduardo Garcia Villasenor, Jean Gauthier, and Michael Hoellering from the Commercial Arbitration and Mediation Center for the Americas (CAMCA), which is a new dispute resolution facility for the NAFTA area. CAMCA is a joint facility consisting of the British Columbia International Commercial Arbitration Center, the Quebec National and International Commercial Arbitration Center, the Mexico City National Chamber of Commerce, and the American Arbitration Association.

Next Meeting

The Mexican government co-chair invited the Committee to hold its next meeting in Mexico. Mexico undertook to find acceptable dates in September or October, 1996, and tentatively suggested Guadalajara as the site.

[18225]

**TERMS OF REFERENCE
FOR
NAFTA ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES**

1. Mandate of the Committee

1.1 NAFTA Article 2022 requires the Advisory Committee on Private Commercial Disputes (Committee) to report and provide recommendations to the NAFTA Commission on general issues referred to it by the Commission respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of private international commercial disputes in the free trade area.

1.2 The Commission refers the following matters to the Committee for report and recommendations to the Commission as appropriate in accordance with Article 2022(4):

1.2.1 compilation, examination and assessment of existing means for the settlement of private international commercial disputes;

1.2.2 identification of sectors and types of businesses that would particularly benefit from the use of alternative dispute resolution (ADR);

1.2.3 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;

1.2.4 facilitation of the use of arbitration and other procedures in the NAFTA region, including the use of model ADR and other contractual clauses;

1.2.5 opportunities for expanded cooperation between institutions with an interest or involvement in ADR in the NAFTA region; and

1.2.6 issues relating to the enforcement of arbitration agreements and awards, and other litigation issues related to ADR.

1.3 The Commission may refer other matters to the Committee from time to time in accordance with Article 2022(4).

2. Membership of the Committee

2.1 The Committee will comprise up to 10 members from each Party, up to two of whom may be officials representing the Party and

up to eight of whom may be selected from outside the Government.

2.2 Each Party will appoint its own members of the Committee, and may establish terms for their appointment.

2.3 The government representatives will serve as the chairs of the Committee.

3. Agenda for Committee Meetings

3.1 The chairs will, in developing the agenda for a meeting, consult with and take fully into consideration the views of the members on specific issues to be considered by the Committee.

3.2 The chairs will circulate the agenda to the full Committee in advance of each meeting.

4. Meetings of the Committee

4.1 Meetings of the Committee will normally be hosted successively by each Party and will be presided over by the chairs of that Party.

4.2 The chairs, by consensus, may invite individuals who are not members of the Committee to participate in a meeting as appropriate.

4.3 The chairs, by consensus, will approve all actions and prepare all reports of the Committee and determine which recommendations should be submitted to the Commission, taking fully into account the views and positions of all Committee members.

4.4 The Committee may establish subcommittees to address specific issues within the scope of these Terms of Reference. A subcommittee may include individuals who are not members of the Committee, if so agreed by the Parties, in which case, each Party may appoint its own members to such subcommittee.

4.5 The committee will meet at least once each year.

5. Coordination with Article 707 Committee

The chairs will monitor the work of, and consult periodically with, the NAFTA Advisory Committee on Private Commercial Disputes Regarding Agriculture to promote cooperation and collaboration between the two Committees.