

SIXTH MEETING OF THE
NAFTA ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES
March 16-17, 1998, Miami, Florida

MINUTES

Summary

The NAFTA Advisory Committee on Private Commercial Disputes ("Committee") convened its sixth meeting on March 16-17, 1998. Co-chairs for the meeting were Andrew Pincus, General Counsel of the U.S. Department of Commerce, and David Andrews, Legal Adviser of the U.S. Department of State (an attendance list is included as Attachment I). The Committee heard reports from its four subcommittees, held a roundtable discussion with judges from each country, decided to hold an international conference in Mexico on arbitration and other forms of alternative dispute resolution (ADR), and created a steering group to assist in planning that conference. The Committee deferred a decision on whether to hold its next meeting in conjunction with the international conference, pending a final decision on scheduling that conference.

Conference on International Arbitration, Mediation, and Other Forms of ADR

The Committee agreed that it should convene a general conference on arbitration, mediation, and other forms of ADR in Mexico in late 1998 or early 1999. The Committee discussed the desirability that the conference target business and judicial audiences. A suggestion was made that the chief justices of each country's supreme court could be approached to deliver keynote addresses to the conference. Some members felt that attempting to target two very distinct audiences would not be effective, and that the conference should be devoted to one or the other, or that two conferences should be held. Other members suggested that one conference could address the needs of both audiences if there was a concurrent program of workshops for participants to attend on alternate days to the main programs. A suggestion was made that mock arbitrations and mediations be held.

There was some discussion about seeking participation from the Asia-Pacific Economic Cooperation (APEC) forum, the Organization of American States (OAS), and from countries participating in the development of a Free Trade Area of the Americas (FTAA). Members stressed the need to draw on outside sponsorship from groups with expertise in arbitration, mediation, and other forms of ADR. It was also suggested that organization of the conference could be a useful task for the new NAFTA Coordinating Secretariat, to be established in Mexico City. Finally, questions were raised about the practicality of convening such a conference by the fall of 1998, when the next Committee meeting would ordinarily be scheduled, or whether early 1999 would be more workable.

It was agreed that these and other issues should be considered by a small steering group. The steering group was created with two private sector members from each country (Guillermo Aguilar Alvarez and Jose Maria Abascal from Mexico, David Haigh and Neil Gold from

Canada, and David Rivkin and Dana Haviland from the United States), plus the government members, to coordinate the planning of the conference. Mexico stated that it would circulate proposals for institutions that may be willing to help sponsor and prepare the conference, and members were invited to provide Mexico with suggestions. U.S. member David Rivkin was asked to prepare an initial proposal for consideration.

Subcommittee Reports

Subcommittees III, IV, and V gave summary presentations of their reports, and the Committee held general discussions on each report. It was agreed that subcommittee workplans should be revised to include reasonable milestones to ensure that work is well spaced during the period between meetings. Subcommittee VI introduced a judicial roundtable in which each delegation presented views on arbitration, mediation, and other ADR practice in the courts of that country and information about judicial training. The revised workplans of the four subcommittees are set out in Attachment II.

Subcommittee III (Targeted Outreach)

In its report, Subcommittee III described efforts by its members in the United States and Mexico to identify and communicate with targeted audiences regarding information on the use and importance of arbitration and other forms of ADR in resolving private commercial disputes. Agendas and outlines were attached to its report from conferences, seminars, and university courses addressing arbitration, mediation, and other forms of ADR, and in which members of the Committee played some role. A letter from the U.S. co-chairs sent to approximately 80 small business organizations offering to identify speakers and provide information on arbitration, mediation, and other forms of ADR was also attached. The Mexican members stressed that the needs for information on arbitration and ADR were very different in each country. They underlined the general lack of knowledge of arbitration and ADR in Mexico in both the business and judicial communities, and noted that the recognition and enforcement of arbitral awards was not yet routine and institutionalized in Mexico. The Mexican members stressed the important role of the Committee in providing advice in this respect. The U.S. members identified the need in the United States to reach a broad selection of private sector groups, and expressed the desire to target small business and trade organizations in California and other Mexican border states. The Subcommittee also asked members to provide any comments on the outline presented in its report for use by participants in a speakers bureau.

The Committee agreed that Subcommittee III should continue its workplan, including to identify appropriate organizations and institutions for outreach, and arrange for speakers. The Committee set July 1, 1998, for completion of the speakers' notes and article outline to facilitate speakers' presentations. In addition to continuing efforts to use the internet to reach the small business community, the Subcommittee was asked to develop a proposal on the methods and uses of ADR for training courses in business schools and universities, and to explore differences

in the methods of outreach that would be most effective with the target audiences in each NAFTA country.

Canadian co-chair James Stringham reported that the Canadian subcommittee members had sent a letter to all bar associations and provincial law societies in Canada seeking nominees for speakers. He also provided a demonstration of his government's planned internet publication of the Committee's introductory brochure on ADR, and reviewed various issues for the Committee to keep in mind in addressing the electronic publication of its work. Mr. Stringham stressed that: the Committee should tailor the materials that it puts on websites to the intended audience; items should be kept short, and broken down into sections to minimize the need to scroll through a long text on the computer; e-mail addresses of institutions and individuals cited should be included wherever possible; "hotlinks" to other relevant internet sites should be made available; and provision should be made for a browser to give feedback on the site. It was also suggested that information on the speakers bureau being developed by Subcommittee III could be included in the brochure. Mr. Stringham stated that the brochure would be published soon on the internet (in English and French), and would be located at the Canadian government's "INFOEXPORT" website: <www.infoexport.gc.ca>.

Mexico reported that SECOFI maintains a website at <www.secofi.gob.mx>, and that Committee materials would shortly be published there.

Subcommittee IV

Subcommittee IV invited comments on its draft brochure on the enforcement of agreements to arbitrate and arbitral awards in the NAFTA countries. A proposed introduction and draft section on U.S. law were attached to the report of the Subcommittee. The Committee agreed that all such comments should be received by March 31, 1998, and a full draft brochure should be circulated to all members for comment by July 1, 1998. Subcommittee member Cecil Branson presented a draft monograph on the enforcement of international commercial arbitration agreements in Canada, which could make up part of a fuller monograph on enforcement issues in the three countries or be published separately. The Committee asked Subcommittee IV to continue to examine the appropriateness of developing a fuller monograph, and to circulate any draft by the time of the next meeting or the planned conference, whichever is sooner. The Committee also asked the Subcommittee to continue to consider ways to publish collections of arbitration legislation and other materials gathered for the Committee.

The Subcommittee presented several developing legal issues. The first was a recent decision of the California Supreme Court holding that a New York lawyer who had traveled to California to represent a client in an arbitration was impermissibly "practicing law" without being a member of the California bar and could not collect his fee. Concern was expressed that if this decision were followed by other jurisdictions in such a way as to prohibit outside attorneys from conducting international arbitrations, it could have a far-reaching negative impact on the use of arbitration to settle international business disputes. At present, foreign lawyers are

not restricted from carrying out international arbitration in Mexico or Canada, and the California decision does not apply to lawyers from foreign jurisdictions conducting an international arbitration. However, recent decisions on the availability of insurance to lawyers and on arbitrator immunity in Canada could raise similar concerns.

Another development discussed was the role of *amparo* proceedings in Mexico for the review of a final order to enforce an agreement to arbitrate or arbitral award. The view was expressed by members of the Committee that arbitrators should not be considered "authorities" for purposes of mounting an *amparo* challenge to official actions, and that their awards should not be reviewable.

The Committee agreed that it would not be appropriate for the Committee to address legislatures, such as those in Mexico or the State of California, on these issues, but should continue to monitor developments very closely, as well as consider the appropriateness of bringing them to the attention of the NAFTA Free Trade Commission.

U.S. alternate member Michael Hoellering reported on efforts underway in the United States by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to prepare a model law on arbitration. Some proposals being considered by NCCUSL raised concerns, including proposals to provide greater judicial review of arbitral awards and to address the immunity of arbitrators -- both subjects considered well settled in the United States by case law. Members expressed a desire to follow the progress of this model law closely. The Committee agreed that Subcommittee IV should continue to report to it on developing legal issues involving enforcement, and develop any recommendations for its consideration.

Canadian member Jeff Talpis brought to the Committee's attention the work being carried out by the Hague Conference on Private International Law on a draft Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments. Draft clauses under consideration in the Hague related to arbitration were distributed. It was noted that two different approaches were being considered to limit the convention's applicability to matters subject to arbitration. It was proposed that the Committee follow the developments on the draft Convention closely.

Committee special adviser Pascal Paradis from Canada, summarized his "Report on the Preliminary Examination of New Modalities for Trilateral Resolution of Small and/or Simple Claims in International Commercial Disputes," which was attached to the report of Subcommittee IV. Mr. Paradis discussed the notion of a "small claim," and what makes it small or amenable to expedited dispute settlement. He also reviewed expedited dispute settlement procedures in the Quebec and Ontario courts, and in various arbitration rules. The Committee expressed its appreciation for the work of Mr. Paradis and for that of Committee member Nabil Antaki from Canada, and agreed to continue its examination of this issue, in particular through a study of Mexican and U.S. examples of expedited judicial procedures.

Subcommittee V

Subcommittee V presented a detailed report prepared by special adviser Martin Ertl from Canada consolidating the work of the Subcommittee, including from the fourth and fifth meetings of the Committee. The Committee held a short discussion on the draft brochure on mediation prepared by the subcommittee and decided that any comments on the draft should be submitted to the subcommittee by March 31, 1998, so that it could be revised and completed for submission to governments by July 1, 1998, for subsequent publication and incorporation onto national webpages. The view was expressed that the same mediation clauses should be used for all Committee purposes. The issue of whether the Committee should recommend existing mediation rules, such as those of the United Nations Commission on International Trade Law (UNCITRAL) or the Center for Arbitration, Mediation, and Conciliation in the Americas (CAMCA), was also considered but not resolved, and the Subcommittee was asked to give further consideration to the issue.

The Committee discussed a possible model law of mediation. It decided to contact the American Bar Association (ABA) and seek an opportunity to provide input on international issues arising in the model law currently being drafted under the auspices of the ABA. The Committee decided to proceed to prepare draft model law provisions on enforcement and other key issues relevant to cross-border mediation. The Committee also decided that ideas on how the subcommittee's compendium of research on mediation in the three NAFTA countries could be published should be submitted to the subcommittee by March 31, 1998. Finally, the Committee decided that it would be useful to prepare an index of existing resources on cross-cultural issues arising in cross-border mediation, as well as a memorandum or list of key issues.

Subcommittee VI (Judicial Roundtable)

The three delegations presented their views on arbitration, mediation, and other forms of ADR, and on judicial training in their respective jurisdictions, and answered questions from members of the Committee.

On behalf of the U.S. delegation, the Hon. Rya Zobel, U.S. District Judge for the District of Massachusetts, and Director of the Federal Judicial Center, described the task of the Federal Judicial Center to train federal judges and court staff, to conduct training for foreign judges in the United States and abroad, and to conduct and fund research into judicial administration. She stated that conference and research rooms, and video conferencing equipment was available. She noted that the Center would be holding a conference on judicial education in the Southern Hemisphere in Puerto Rico in December 1998. Judge Zobel stated that U.S. federal judges had a statutory mandate, now expired, to experiment with a range of ADR techniques. She had few views on arbitration, since in her mind, once a dispute was properly before the court (because it lacked an arbitration clause), there was no benefit in holding an arbitration rather than a trial. Judge Zobel noted that the use of arbitration is so well established, and the law on enforcement

of agreements and awards so clear in the United States, that the Center did not see a need for extensive judicial training on the substantive law of arbitration.

Judge Zobel stated her belief that judges could play an important role in speeding the settlement of the vast majority of commercial lawsuits through the creative and effective use of ADR, including mediation by magistrates and senior judges, summary jury trials, and mini trials, and could keep dockets moving by enforcing arbitral awards and agreements to arbitrate. She noted that some studies differ on the practical effect of using arbitration in speeding up the resolution of cases, but that she believes the quality of the participants, business reasons for settling, timing, and nature of the dispute were key (e.g., employment discrimination cases rarely settle). Judge Zobel said that the Federal Judicial Center has started to provide courses on international law, and responded favorably to a suggestion that the Committee prepare a desk book on treaties and international agreements on ADR.

On behalf of the Canadian delegation, the Hon. Kenneth Lysyk, Justice of the Supreme Court of British Columbia and Associate Director of the National Judicial Institute, Lysyk described the National Judicial Institute (NJI) of Canada as smaller than the U.S. Federal Judicial Center, without conference or research rooms. He stated that Canadian judges are familiar with arbitration clauses and arbitral awards, readily handle such cases, and are generally glad of the relief they provide to heavy case loads. It is many years since judges viewed arbitrators as competitors. There is little recourse to arbitration once the case is properly before the court. The NJI does conduct training on various forms of ADR that can speed up the settlement of cases, including mini trials and mediation. Justice Lysyk stated his belief that it is up to the bar and business interests to press for greater use of arbitration clauses in contracts, and that judges generally do not play an important role in that. He agreed that a deskbook on international agreements on ADR would be a useful addition to the NJI's resources.

The Mexican delegation discussed broadly the use of arbitration, mediation, and other forms of ADR in the Mexican judicial system. It was noted that huge caseloads were overburdening the courts, and that many courts were both unaware of, and unable to use effectively, alternative methods of resolving cases. It was also noted that greater efforts to educate lawyers, judges, business people, and legislators regarding arbitration, mediation, and other forms of ADR were still needed.

Government Reports

APEC

Canadian co-chair Valerie Hughes reported on the work of the Dispute Mediation Experts Group of APEC, of which she is the new chair. Ms. Hughes described the goals of the Group, which are to encourage APEC member economies to work within existing dispute resolution fora and conventions, particularly in the World Trade Organization (WTO), adopt legislation to give effect to existing conventions, and seek more information on available dispute

resolution mechanisms. She noted the publication by the Group of "A Guide to Arbitration and Dispute Resolution in APEC Member Economies," a compendium of national laws on alternative dispute resolution (a copy of which was provided to each member at the meeting), and pointed out that the work of the Committee contributed to that compendium. Ms. Hughes noted that Canadian members of the Committee have been invited to speak at an APEC seminar to be held on April 27-28 in Bangkok.

FTAA

U.S. Government adviser Jean Grier reported on the progress of the FTAA working group on dispute resolution, which is currently gathering information on national mechanisms, and may produce a compendium such as that prepared by the APEC experts group. Each country has been requested to consult with its private sector for input.

NAFTA 707 Committee

Mexican co-chair Hugo Perezcano Diaz reported significant progress in the work of the NAFTA Advisory Committee on Private Commercial Disputes Involving Agricultural Goods (Article 707 Committee). Mr. Perezcano reported that the Committee was circulating a draft of a proposed trilateral mechanism for resolving private agricultural disputes. Questions of the scope of application and rules of arbitration were being examined closely.

Next Meeting

The Committee decided to defer a decision on whether to hold the next meeting of the Committee in conjunction with the planned conference in Mexico, until scheduling of the conference could be better determined. Although some interest was expressed in maintaining the current informal schedule of meetings, and hold the seventh meeting in late 1998, it was recognized that preparation of a major conference may not be possible before early 1999.

