

# **SEVENTH MEETING OF THE NAFTA ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES**

**November 9-10, 1998, Toronto**

## **MINUTES**

### **SUMMARY**

The NAFTA Advisory Committee on Private Commercial Disputes (“the Committee”) convened its seventh meeting on November 9-10, 1998 in Toronto. Co-Chairs for the meeting were Valerie Hughes, General Counsel, Trade Law Division, Department of Foreign Affairs and International Trade Canada, and Kirsten Hillman, Counsel, Trade Law Division, Department of Foreign Affairs and International Trade Canada. A list of participants at the meeting is attached as Appendix I. The Committee heard the reports of its four subcommittees, discussed organizational issues related to the Conference on Alternative Dispute Resolution in the NAFTA Region to be held in Mexico City on June 3-4, 1993 (the “ADR Conference”) and discussed the program for the ADR Conference. It was agreed that the next meeting of the Committee would be held in Mexico City immediately following the ADR Conference.

### **REPORTS OF THE SUBCOMMITTEES**

Subcommittees III, IV and V presented their written reports. There was discussion of these reports and the activities undertaken by each subcommittee. Subcommittee VI reported on the activities that it has undertaken in support of the ADR Conference. The workplans for the Subcommittees III, IV and V are attached as Appendix II.

#### **Subcommittee III (Targeted Outreach)**

In its report, Subcommittee III set out how it has continued to identify trade associations and other business organizations within the NAFTA region that can be used as vehicles for communicating information to the target audience (i.e. small and medium size businesses and in-house counsel) on the use and importance of ADR. The Subcommittee has been compiling contact names and information regarding these organizations on a regional basis and intends to send letters to these organizations from the member(s) of the Subcommittee. Copies of the draft letter were circulated for comments. The Subcommittee is also developing speakers notes and article outlines to facilitate presentations to the target audience. An outline of topics for speakers in the U.S. was prepared and presented by the Subcommittee. The Mexican and Canadian members of the Subcommittee indicated that similar outlines are being prepared for presentations in Mexico and Canada. Many members of the Committee noted that there are important differences between NAFTA countries and between regions within each NAFTA country and that therefore this regional approach to targeted outreach is appropriate and useful. The Mexican government representatives reported that the

Mexican government is preparing to launch a NAFTA 2022 website upon which it will post the Spanish version of the brochure on ADR in international contracts, and other materials. Canada and the U.S. already have such websites and have posted this brochure.

In the advancement of its mandate to deliver the Committee's message regarding ADR, the Subcommittee reported that it is seeking to identify appropriate opportunities for the Committee to co-sponsor or endorse programs and publications by other organizations on a non-funded basis. In particular, the Subcommittee reported that it had been approached regarding the co-sponsorship by the Committee of an educational program to promote the use of mediation in U.S.-Mexico commercial disputes. This program is being organized by the McGill Center for Creative Problem Solving at California Western School of Law in San Diego. The Committee discussed the possibility of endorsing or co-sponsoring programs such as this one. A number of Committee members expressed the view that prior to the Committee sufficient detail regarding the proposal must be obtained. It was decided that criteria should be established to guide the Committee in determining the events or publications that are appropriate for co-sponsorship. Subcommittee III agreed to develop a list of proposed criteria and circulate it to Committee members for comment (a final version of the criteria is attached as Appendix III).

#### Subcommittee IV (Enforcement Issues)

Subcommittee IV presented its report and elaborated on the work that it has done since the March 1998 meeting. The Subcommittee indicated that the text of the draft enforcement brochure has been circulated and that comments have been received. A copy of the revised brochure was circulated at the meeting for final comments by November 30, 1998. During the discussions regarding the brochure it was suggested that the final version be distributed at the ADR Conference. The Subcommittee reported that it will continue to work on the monograph on enforcement issues within the three countries with a complete draft to be circulated by the time of the next meeting of the Committee. The Subcommittee also reported that it has succeeded in gathering available arbitration legislation and other materials from the NAFTA countries and that it is now concentrating on filling in some information gaps.

There was a general discussion regarding possible electronic dissemination of the information prepared by Subcommittee IV. Some members suggested that the Committee explore whether documents such as the enforcement brochure and the compilation of arbitration legislation from the NAFTA countries could be included on the Parties' NAFTA websites. It was also suggested that the Committee may want to consider establishing its own website. Government co-Chairs questioned whether there was a need to incur the costs of establishing another website given that each country has its own site. They noted the possibility of establishing links to other relevant sites, such as the APEC website which includes a listing of arbitration legislation in all APEC member economies.

Subcommittee IV provided an update on emerging legal issues involving enforcement. In particular, there was discussion of legislative action taken in response to a 1998 decision by the Supreme Court of California that held that a lawyer who was not a member of the California bar and who represented a party in a California arbitration was doing so illegally. In addition there was a report on the status of proposed amendments to the U.S. Model Arbitration Law that appears to represent a move towards greater judicial review of arbitration decisions. The Committee decided to formally comment on the proposed amendments. Subcommittee IV agreed to develop and circulate comments on the proposed amendments. Subcommittee IV agreed to develop and circulate comments on the proposed amendments in early 1999. Mexican members reported that a current proposed amendment to the Arbitration Chapter of the Mexican Commerce Code or to the Amparo Law would promote ADR.

The Subcommittee also report that the Special Committee of the Hague Conference on Private International Law Proposes to issue a full draft of the proposed Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgements at the end of 1998 for discussion at a plenary meeting in the Hague in the summer of 1999.

The Subcommittee reported that it would like to continue the development of an analysis of new modalities for trilateral resolution of small and simple claims by adding U.S. and Mexican examples to the report dealing with the Canadian experience in accelerated dispute settlement mechanisms. The Committee expressed support for the work on small claims dispute resolution and decided that it would be worthwhile to create a new subcommittee to address this subject more fully. The proposed mandate of this Subcommittee, as well as its tentative membership, is attached as Appendix IV.

#### Subcommittee V (Mediation/Conciliation)

Subcommittee V presented its draft paper on culture and mediation, its annotated bibliography of materials on conflict and culture, its draft model law on mediation and a proposed brochure on mediation.

There was general discussion on the paper and the bibliography and Committee members agreed to provide comments to the subcommittee by mid-December, 1998 so that the paper could be revised and possibly distributed at the ADR Conference.

The Committee discussed the proposal for a model law on mediation and recognised such a model could be a useful tool. It was further noted that this document did not necessarily have to be used as a model law but that it could also be useful as an outline of issues. The Subcommittee also indicated that in further refining this model law it would attempt to contact groups that are exploring draft model laws, such as the American Bar Association (ABA), the United Nations Commission on International Trade Law (UNCITRAL) and The Society of Professionals in Dispute Resolution (SPIDR).

There was discussion of the draft brochure on mediation. Subcommittee V noted that many comments had been received from Committee members and that many of those comments had already been integrated into the present draft. The Subcommittee noted that there was still time to comment on this document but that it was essentially in its final form. Some Committee members suggested that the brochure would benefit from a discussion of the importance of cultural sensitivity in mediation. There was also discussion of the draft paper on culture and mediation, including whether it should be posted on the websites.

#### Subcommittee VI (Liaison with the Judiciary)

Subcommittee VI reported that its focus has been on using the ADR Conference to gain access to the judiciary.

Mexican co-Chair Ricardo Ramirez reported that a new chief Justice of the Supreme Court was to be elected in December 1998 and that the Mexican members would solicit the support the new administration.

### **ORGANIZATION OF THE ADR CONFERENCE**

Representatives from the two organizations that have agreed to co-sponsor the ADR Conference and assist in its organization gave presentations introducing their organizations and providing some details regarding the kinds of assistance they would be able to provide. Ms. Nancy A. Oretskin, Director of the U.S.-Mexico Conflict Resolution Center at the New Mexico State University, a non-profit organization that provides education, training and services in the area of ADR. Ms. Oretskin was joined by the Center's Mexican Director Dr. Luis Miguel Diaz, who is a Mexican NAFTA 2022 Committee member. Mr. Nick Ranieri attended the meeting on behalf of the Legal Centre for Inter-American Trade and Commerce (*Centro Juridico para el Comercio Interamericano*) at the *Instituto Tecnologico de Estudios Superiores* (ITESM) in Monterrey, Nuevo Leon, a group that pursues projects aimed at legal and regulatory reform with a view to eliminating barriers to free trade in the NAFTA region.

Canadian co-Chair Kirsten Hillman recognised that Ms. Oretskin and Mr. Ranieri have extensive experience that will contributed to the success of the Conference and thanked them in advance, on behalf of the Committee, for all of the work that they will be doing to help the Committee ensure that the Conference is a success.

There was extensive general discussion on they key logistical elements of the conference, such as location and requisite facilities, registration fees and estimated number of attendees.

## **PROGRAM FOR THE ADR CONFERENCE**

The Committee considered the target audience for the Conference and discussed how it could work to ensure attendance of both the judicial and the business communities from the three NAFTA countries. Mexico emphasises that it would be essential to obtain the support of the Mexican Judicial Branch in order to secure their participation in the Conference. Many Committee members noted that while the Committee has been successful in getting information out to the legal and judicial communities, more effort needs to be made to reach small and medium size businesses.

Canadian co-Chair Valerie Hughes presented a draft standard invitation letter to speakers. Committee members were invited to comment on the letter and it was agreed that the final version of the letter should be used when providing speakers with the details of the Conference and their particular presentation. It was also decided that a centralized list of speakers would be kept by Ms. Oretskin.

Session coordinators gave reports on the organization of their sessions, including proposed topics and proposed and confirmed speakers. Some concerns were raised that there might be overlap between two of the sessions scheduled for Day One; namely the plenary session on the overview of ADR in the NAFTA region and the parallel sessions on ADR and the legal and business communities. Organizers for these sessions agreed to review their programs with a view to avoiding overlap and making the best possible use of speakers. There was also discussion of whether it was appropriate for the business workshop in the afternoon of Day Two to focus on drafting dispute resolution clauses. Many members note that it is lawyers and not business people who draft these arbitration clauses. It was decided that it would be more appropriate for this session to focus on the negotiation of arbitration clauses. It was also suggested that the specific focus on particular industries such as construction, electronics and textiles, might be too narrow. Session coordinators agreed to consider adopting a broader approach.

## **GOVERNMENT REPORTS**

### FTAA Negotiations

Mexican co-Chair Ricardo Ramirez reported on the progress of FTAA negotiations and advised the Committee that the FTAA negotiators have expressed an interest in the mandate and activities of the NAFTA 2022 Committee. Negotiators are seeking further information and have suggested that a seminar exploring the possibility of a Committee to promote the use of alternative dispute resolution in the context of the FTAA might be worthwhile.

After discussion the Committee decided to: 1) send the Chair of the FTAA negotiations the 1996 report of the Committee to the NAFTA Commission and a copy of the draft agenda for the ADR Conference, 2) invite the FTAA negotiators to the ADR Conference and propose that they hold, in conjunction with the Conference, a seminar or information session that would explore the mandate and activities of the NAFTA 2022

Committee and the utility of establishing such a Committee for the FTAA region, and 3) suggest possible speakers for such a seminar. Mr. Ramirez agreed to contact the Chair of the FTAA on behalf of the Committee.

#### NAFTA 707 Committee

Mexican co-Chair Ricardo Ramirez reported that the next meeting of the NAFTA 707 Committee would be in February 1999, and that it has a new mandate from the NAFTA Commission. One project that will be proposed in February is the compilation of a “black list” of companies that have not abided by arbitration awards. A Mexican member noted that such a list would be useful in Mexico because, unlike in Canada and the U.S., issuing licences to businesses dealing in perishable commodities is not the practice under Mexican law.

#### APEC Dispute Mediation Experts Group (DMEG)

Canadian co-Chair Valerie Hughes chairs the APEC DMEG and reported on its activities. The DMEG is in the process of updating its publication “A Guide to Arbitration and Dispute Resolution in APEC Member Economies” (a copy of which was distributed to Committee members at the March 1998 meeting). The updated version will be available in hard copy and will also be accessible on the APEC website. The DMEG is also planning a three day advanced training seminar on WTO dispute resolution to be held in Singapore from April 19-21, 1999.

### **WORK OF THE COMMITTEE AFTER THE ADR CONFERENCE**

The Committee spent some time proposing and discussing possible activities and priorities of the Committee following the ADR Conference. The kinds of activities identified fall into three broad categories: outreach, new areas for study and Committee membership. A list of the possible activities identified by Committee members is attached as Appendix V. The United States will provide a draft report to the NAFTA Commission that will set out a proposed new workplan for the Committee. After the draft is reviewed by co-Chairs, it will be circulated to the Committee for comments.

### **NEXT MEETING OF THE COMMITTEE**

The Committee decided that its next meeting would be held in Mexico City immediately following the Conference. It was further proposed that the following meeting would be held in November or December 1999, possibly in San Francisco.

## Appendix I

### Seventh Meeting of the NAFTA 2022 Committee: Participants

#### Canada

- 1) Mr. Henri Alvarez
- 2) Mr. Cecil Branson
- 3) Mr. Thomas C. Drucker
- 4) Mr. Martin Ertl
- 5) Mr. Neil Gold
- 6) Mr. David Haigh
- 7) Ms. Kirsten Hillman
- 8) Ms. Valerie Hughes
- 9) Ms. Selma Lussenburg
- 10) Mr. Pascal Paradis
- 11) Mr. Jeffrey Talpis
- 12) Ms. Linda Young

#### Mexico

- 1) Mr. Luis Miguel Diaz
- 2) Mr. Luis Enrique Graham
- 3) Mr. Carlos Loperena
- 4) Mr. Raul Medina Mora
- 5) Mr. Alejandro Ogarrio
- 6) Mr. Ricardo Ramirez
- 7) Mr. Carlos Vejar

#### United States of America

- 1) Ms. Lorraine Brennan
- 2) Mr. Doak Bishop
- 3) Mr. James Carter
- 4) Mr. Scott Donahey
- 5) Ms. Jean Heilman Grier
- 6) Ms. Dana Haviland
- 7) Ms. Kathryn Helne
- 8) Ms. Kathryn Lunney, Deputy General Counsel, U.S. Department of Commerce
- 9) Ms. Dana Nahlen
- 10) Mr. James Nelson
- 11) Mr. Richard Page
- 12) Mr. David Rivkin
- 13) Mr. Philip Robbins

#### Other

- 1) Ms. Nancy Oretskin, Director, U.S.-Mexico Conflict Resolution Center
- 2) Mr. Nick Ranieri, Director, ITESM Centro Jirci (Centro Juridico Para El Comercio Interamericano)

## **Appendix II**

### **Subcommittee Workplans**

#### Subcommittee III (Targeted Outreach)

##### Workplan

The goals of Subcommittee III include targeted outreach to small and medium-sized businesses and in-house counsel. Subcommittee III will undertake the following, as appropriate:

1. Continue to identify trade associations, small business organizations, chambers of commerce and other business organizations, as well as law-related organizations and institutions, within the three NAFTA countries that are appropriate to reach the targeted audiences, and contact each:
  - a. Offering to provide speakers and written materials, including brochures prepared by the Committee, regarding the importance of planning for dispute settlement, the advantages and disadvantages of arbitration, mediation and other ADR mechanisms, the role and choice of ADR institutions and rules, methods for dispute avoidance and other relevant matters;
  - b. To determine whether such organizations have newsletters or may identify other publications through which the Committee might disseminate similar information on dispute settlement of interest to the small business community and in-house counsel;
  - c. Identifying appropriate speakers and authors of such materials for presentation to the targeted audiences, with an emphasis on seeking participation by knowledgeable members of the small business community in making such presentations, as well as members of the Committee and other appropriate legal professionals; and
  - d. To arrange for the publication or distribution of such materials and to schedule speakers;
2. Complete speakers' notes and article outlines to facilitate such presentations by July 1, 1999;
3. Make recommendations, where the Subcommittee determines appropriate, to the government co-chairs for Committee co-sponsorship of conferences,



seminars and other programs or publications aimed at delivering information regarding ADR to the target audiences;

4. Track speaking engagements and publications arranged or co-sponsored as a result of the outreach efforts of the Subcommittee, and report such results to the Committee at each Committee meeting;
5. Explore methods of using the Internet and other electronic means to reach the small business community for delivery of information and materials regarding ARD;
6. Develop a proposal on the methods and uses of ADR for training courses, in business schools, colleges and universities; and
7. Explore differences in the methods of outreach required to be most effective in reaching the target audiences in each NAFTA country.

#### Subcommittee IV (Enforcement Issues)

##### Workplan

1. Submit the completed short brochure on the process of enforcing agreements to arbitrate and arbitral awards in the NAFTA countries, following final comments from the Committee members to be made by November 30, 1998;
2. Prepare a draft of a fuller monograph on enforcement issues within the three countries, with a complete draft to be circulated by the time of the next meeting of the Committee;
3. Continue to evaluate and assist in efforts to publish collections of arbitral legislation and other materials to the NAFTA countries;
4. Review the next draft of proposed amendments to the U.S. Model Arbitration Act, which is expected to be issued early in 1999, and develop recommendations for consideration by the Committee; and
5. Monitor work of the Special Commission of the Hague Conference on Private International Law on the negotiation of a Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments.

### Subcommittee V (Mediation/Conciliation)

#### Workplan

1. Finalize brochure on mediation for publication;
2. Revise paper on culture and mediation;
3. Revise outline of draft model law on mediation;
4. Consider and research processes used in mediation;
5. Consider publication of Subcommittee's research work on mediation.

## **Appendix III**

### **CO-SPONSORSHIP GUIDELINES**

The following Guidelines should be considered by the NAFTA Advisory Committee on Private Commercial Disputes in determining whether to co-sponsor programs or publications offered by other organizations:

1. The program material should advance the mandate of the NAFTA Advisory Committee on Private Commercial Disputes.
2. In the reasonable judgment of Sub-Committee III and the government co-chairs the expectation should be that the conference proposed for co-sponsoring will be of high quality with sound financial planning.
3. No financial or other resources of the NAFTA Advisory Committee on Private Commercial Disputes should be committed or implied as a result of the co-sponsorship by the NAFTA Advisory Committee on Private Commercial Disputes. Similarly, co-sponsorship shall not imply approval or certification of the substantive materials presented at the program.
4. Presentation of programs in all three NAFTA languages is preferred. If a program is to be presented in Canada, presentation in both English and French may be a condition of co-sponsorship by the NAFTA Advisory Committee on Private Commercial Disputes, if determined appropriate by the Canadian government co-chairs. If a program is to be presented in Mexico, presentation in Spanish may be a condition of co-sponsorship by the NAFTA Advisory Committee on Private Commercial Disputes, if determined appropriate by the Mexican government co-chairs.
5. Co-sponsorship by the NAFTA Advisory Committee on Private Commercial Disputes shall be favoured for appropriate programs sponsored or organized by non-profit educational (non-commercial) purposes.
6. Sponsoring organizations shall permit distribution, as appropriate, of Committee prepared materials at all programs agreed to be co-sponsored by the NAFTA Advisory Committee on Private Commercial Disputes.
7. To be eligible for co-sponsorship by the NAFTA Advisory Committee on Private Commercial Disputes, the materials of a program should address alternative methods of resolution of disputes arising between persons from at least two of the three NAFTA countries. Disputes arising in other countries not members of NAFTA may also be considered (it is not necessary that the topics be limited to NAFTA if the program is otherwise considered appropriate).

8. The limitations stated in these criteria shall be communicated to the sponsoring organizations in writing if it is agreed that the NAFTA Advisory Committee on Private Commercial Disputes shall be a co-sponsor of the event.
9. Decisions regarding co-sponsorship by the NAFTA Advisory Committee on Private Commercial Disputes shall be made by the government co-chairs of the Committee, upon recommendation by members of Subcommittee III (Targeted Outreach) of the Committee.

## **Appendix IV**

### **Subcommittee on Small Claims Resolution: Mandate**

#### Goal:

To explore effective fora and mechanisms for resolution of small cross-border claims in NAFTA region.

#### Initial Mandate:

1. Identify existing mechanisms for (expedited) low-cost handling of small claims with regard to:
  - Procedural rules/arrangements for small claims;
  - Services;
  - Panel of arbitrators and mediators;
  - Definition of small claims, size of claims, type of relief granted; and
  - Experience with small claims.
2. Review/evaluate existing mechanisms/for a:
  - In liaison with AAA, WIPO, CAMCA, U.S.-Mexico Conflict Resolution Center and other dispute settlement centres; and
  - Consider sufficiency of existing mechanisms/fora to meet needs of small claimants.
3. Next steps/recommendations.

#### Tentative membership:

Ms. Lorraine Brennan, U.S.A.

Mr. Scott Donahey, U.S.A.

Ms. Dana Haviland, U.S.A.

Mr. Pascal Paradis, Canada

Mr. Juan Ygnacio Reyes Retana, Mexico

## **Appendix V**

### **Suggestions by Committee Members for Possible Future Committee Activities**

#### **Outreach:**

- Continue to expand outreach efforts to make SMEs aware of what the Committee has done, is doing and plans to do
- Develop an annual bulleting on the Committee projects/developments/accomplishments
- Reconsider confidentiality requirements
- Take stock of Committee papers/surveys and determine whether any should be brought together in some form of publication – Add private contributions?

#### **New Areas for Study/Investigation:**

- Mechanism for transnational small claims dispute resolution building on work of Subcommittee IV (Pascal Paradis). Look to work of AAA, WIPO, etc.
- Move beyond traditional views of mediation and arbitration, e.g. process issues
- Explore methods to prevent disputes
- Consider supplementary or ancillary agreements building on the New York and Panama conventions. Possible issues: enforcement of interim agreements and the “writing” requirement of the New York Convention
- Prepare a list of arbitrations in the NAFTA region and include their qualifications
- Compile reports of key decisions

#### **Committee Membership:**

- Consider expansion of membership in each NAFTA party
- 4Ensure former members are kept involved in Committee work.