

NAFTA Advisory Committee on Private Commercial Disputes
Eighth Meeting
November 18-19, 2000
San Francisco

MINUTES

The Eighth Meeting of the NAFTA Advisory Committee on Private Commercial Disputes was opened by David Andrews, Legal Adviser, U.S. Department of State, and Katherine Lunney, Principal Deputy General Counsel, U.S. Department of Commerce. The U.S. co-chairs noted that the meeting was the final one for three original members on the U.S. side who had had a profound influence on the direction and content of the Committee's work: Rona Mears, Jim Carter, and David Rivkin. The U.S. co-chairs welcomed Nancy Oretskin, Jim Nelson, and Lorraine Brennan as new members. A full list of participants is attached at Tab 1.

DRAFT REPORT ON THE COMMITTEE'S FIRST FIVE YEARS

The Committee considered a draft report on its work over the five years since it had been created pursuant to section 2022 of the NAFTA. Several significant achievements were mentioned: The Committee had reviewed existing national legal frameworks and determined that they were adequate in each country. The Committee had also determined that promotion efforts in the region were inadequate because they were being aimed at lawyers rather than at the principal (small and medium-sized business customers (SMEs) and judges. The Committee had been successful at examining and analyzing legal issues. The Mexico City Conference in June 1999 had been extremely successful in targeting judges, but the Committee had otherwise been relatively unsuccessful in organizing regular promotion activities. It was emphasized that the Committee creates an invaluable NAFTA-wide meeting place for experts addressing issues related to arbitration and other forms of ADR.

As for future work, it was noted that the practice of choosing meeting sites with geographic diversity was a strength of the Committee and should be continued. There

was some criticism of the lack of resource commitments by the three governments, and considerable discussion about how that could be addressed. There was also a call to target media more effectively and a suggestion to find members for the Committee with expertise in media relations. There was a call for redoubling efforts to promote ADR to smaller businesses. Several delegates called for addressing cross-border problems, including obstacles to free movement for lawyers between the U.S. and Canada.

It was decided that the five-year report would be completed and transmitted to ministers as a follow-up to the first Committee report issued in 1996.

REPORT ON THE MEXICO CITY CONFERENCE

Nancy Oretskin and Luis Miguel Diaz reported on the June 1999 conference in Mexico City, and distributed copies of the hardbound proceedings. Of the two target audiences, the Conference was successful in attracting at least 120 judges from Mexico. Comments by those attending were very positive, including from judges outside Mexico City. Attendance by individuals from business, however, was not significant. It was remarked that aiming the conference at both audiences was not recommended for the future. In addition to the June Conference, UNCITRAL had held a seminar for about 50 judges, and the President of the Supreme Court had met with the Secretary General of the ICC. All of these events in close proximity underlined what some saw as a very positive trend for the Mexican judiciary in supporting the growth of arbitration for resolving private commercial disputes.

GOVERNMENT REPORTS

FTAA: Mexico reported that ministers had decided to begin working on a text of a draft Free Trade Area for the Americas, with a target of 2003. It was not yet clear how broad the mandate would be in addressing dispute resolution. In the meantime, with respect to private commercial disputes, the negotiators were looking to the experience in APEC and were compiling a comprehensive catalogue of existing national legislation on arbitration and ADR. The FTAA website is located at < ftaa-alca.org >.

APEC: Canada reported that since the Committee's last meeting the APEC Dispute Mediation Experts Group (DMEG) had

issued a revised version of its Guide to Arbitration and Dispute Resolution in APEC Member Economies that catalogues national ADR legislation. Copies of the revised Guide were distributed and Canada noted that it is also available on the APEC website at

www.apecsec.org.sg/committee/dispute.html. The DMEG also sponsored a conference in Singapore in April 1999 on WTO dispute resolution. It was noted that the future of the working group was now unclear, as the mandate had been shifted from an independent working group to the Committee on Trade and Investment.

ICSID: Canada explained that given the absence of a federal-state clause, Canada cannot accede to the Convention without the support of all provinces and territories. Canada reported that Ontario had recently confirmed its support for ratification but that discussions with Quebec and Alberta were still ongoing. The federal government is hopeful that these provinces will soon provide their indication of support. In preparation for implementation, the Uniform Law Conference has drafted a uniform Act to implement the Convention. 11

NAFTA 707 Committee: Mexico reported that the 707 Committee had decided the best approach to deal quickly and effectively with disputes involving perishable goods and small businesses in the agricultural field was to create an independent entity financed privately. A draft of the proposed Fruit and Vegetable Dispute Resolution Corporation was circulated. The Corporation would be open for voluntary membership, and would create uniform trade standards and dispute resolution rules to govern its members. Awards would be enforceable under the New York Convention. There is some expectation that the uniform standards and dispute resolution mechanisms could also influence domestic developments.

Panama Convention: The U.S. reported that it had published as a proposed rule under the Administrative Procedure Act the draft amendments to the rules of procedure of the Inter-American Commercial Arbitration Commission (IACAC). The U.S. had taken a reservation to the convention to the effect that it would only apply amendments to the rules in the United States if it declared they were accepted. Implementing legislation requires formal rulemaking. It was noted that members were free to provide any comments on

the proposed amendments, and that the period for comment ended on November 19.

UNCITRAL

Jose-Marie Abascal Zamora reported that UNCITRAL would be convening a Working Group on Arbitration March 20-31 in Vienna to begin consideration of a number of issues regarding implementation of the New York Convention and UNCITRAL texts. The four priority issues would be the preparation of a conciliation model law, problems with the requirement of a formal exchange of writing under article 2(1) of the Convention, the enforceability of interim measures, and enforcement of arbitral awards set aside in the country of origin. Quite a bit of interest was expressed for this work and the importance of harmonizing work of the Committee with UNCITRAL's work, and the suggestion was made for the Committee to be represented as an intergovernmental organization at the Working Group session in March.

COMMITTEE REPORTS

The U.S. co-chairs pointed out that the Committee was at a cross-roads and needed to consider carefully the directions it wanted to pursue in its future work. They asked for frank discussion, and suggested that all of the current work and organization of subcommittees be placed on the table for reconsideration. The remainder of the meeting was therefor devoted to an in-depth discussion of the organization of subcommittees and their future work. Discussions were held in plenary and in break-out sessions of the subcommittees. It was decided to continue Subcommittee III on Outreach; Subcommittee IV (Enforcement) with a new focus on Legal Issues; Subcommittee V (Mediation) with a new focus on Dispute Avoidance and Other Forms of ADR, and to create a new Subcommittee VII on the Resolution of Small or Simple International Disputes. The work of Subcommittee VI on Judicial Liaison was incorporated in that of Subcommittee III. Copies of the work plans of the subcommittees are attached at Tab 2.

Subcommittee III - Communication/Outreach: The Subcommittee on Outreach determined to focus on outreach to SMEs, in-house counsel, the judiciary, and the bar as an adjunct to the main meetings of the Committee. In that connection, the Subcommittee proposed a number of specific

steps in connection with the next meeting of the Committee in Calgary in June 2000 and the following meeting in 2001 in Mexico. The Subcommittee determined to explore liaison with national judge training institutes, to enhance dialogue with corporate counsel associations, and to take a number of specific program steps.

Members: Selma Lussenberg (contact), David Haigh, Fernando Estavillo, Dana Nahlen, Phil Robbins, Jim Nelson.

Subcommittee IV - Legal Issues: The Subcommittee on Legal Issues determined to continue reports on national developments, and to review progress with a number of ongoing projects, including: the U.S. Model Arbitration Act; the draft Hague Convention on Jurisdiction and the Enforcement of Foreign Judgments; the UNCITRAL Working Group on Arbitration; NAFTA Chapter 16 Working Group on cross-border issues. The Subcommittee also decided to begin drafting proposed answers to selected legal issues that could be useful for clarifying legal issues under the general law of international commercial arbitration.

Members: Doak Bishop (contact); Cecil Branson, Nabil Antaki, Jeff Talpis, Carlos Loperena, Luis Enrique Graham, Jose Luis Siqueiros, Cesar Garcia Mendez, Carolyn Lamm, Dana Haviland.

Subcommittee V - Dispute Avoidance and Other Forms of ADR: The Subcommittee on Dispute Avoidance and Other Forms of ADR other than Arbitration decided to monitor the work of UNCITRAL on conciliation and in APEC and other organizations and provide comments as appropriate. The Subcommittee would also produce a report concerning the draft model law on mediation that has been under preparation. The Subcommittee would begin research and the preparation of possible recommendations on dispute avoidance and the use of forms of arbitration other than arbitration, and legal issues they raise. The Subcommittee would also produce guidelines for businesses on dispute avoidance and dispute resolution.

Members: Neil Gold and Martin Ertl (contact); Thomas Drucker, Jeff Talpis, Jose Marie Abascal Zamora, Luis Miguel Diaz, Richard Page, Nancy Oretskin, Jim Nelson.

Subcommittee VII - Resolution of Small or Simple Disputes: The Subcommittee on Small and Simple Disputes set as its

goal to identify and develop new mechanisms and fora for resolving small and simple disputes. The Subcommittee would survey existing institutions, fora, mechanisms, and procedures, identify customers and types of disputes, explore electronic methods for resolution ("E-ADR"), work with existing institutions in the NAFTA region, and foster new ideas and recommendations.

Members: Pascal Paradis (contact), Henri Alvarez, Luis Miguel Diaz, Dana Haviland, Lorraine Brennan, Nancy Oretskin, Scott Donahey.

NEXT MEETING

Canada invited the other members to attend the Ninth Meeting of the Committee in Calgary, Alberta, June 22-23, 2000.