

**NINTH MEETING OF  
THE NAFTA ADVISORY COMMITTEE ON PRIVATE COMMERCIAL  
DISPUTES**

**June 22-23, 2000**

**Calgary**

**MINUTES**

The NAFTA Advisory Committee on Private Commercial Disputes (the Committee) convened its ninth meeting on June 22-23, 2000 in Calgary. The meeting was chaired by Denyse MacKenzie, Principal Counsel, Trade Law Division, Department of Foreign Affairs and International Trade, Canada. Mexican Government member Hugo Perezcano Díaz welcomed José María Abascal as a new non-government member to the Committee. Jeff Kover of the United States welcomed Bob Lutz and John Townsend as new U.S. non-government members to the Committee. A list of participants at the 9<sup>th</sup> meeting is attached (appendix 1)

**REPORTS OF THE SUBCOMMITTEES**

Subcommittees III, IV, V and VII presented reports of their work plans. There was discussion of these reports and of the activities undertaken by each subcommittee. \* Updated work plans from each of the subcommittees will be provided. (to date, these have not been received).

Subcommittee III **B** Communication/Outreach

The subcommittee's work plan objectives to organize communication programmes to coincide with NAFTA 2022 Committee Meetings had succeeded in Calgary to reach the main outreach targets, namely small business, in-house counsel, the judiciary and legal community. First, the Committee had assisted in the ~~A~~nternational Commercial Arbitration Seminar sponsored by the Calgary Chamber of Commerce and the Canadian Foundation for Dispute Settlement that took place immediately prior to the Committee meeting. A number of Committee members participated as speakers or panelists. The clear value of these events to outreach objectives supported their inclusion in the planning of future Committee meetings with a view to drawing on the talent and expertise of Committee member participation.

Inclusion in the Committee's programme of an opportunity for an exchange of views with SME representatives was targeted to both imparting information about the value and usefulness of ADR in international trade and in providing Committee members with an

opportunity to learn more about SME client needs pertinent to dispute resolution. (A report of this session is provided below). The participation of members of the Canadian judiciary to share their experiences on ADR with the Committee was designed to engage an exchange of views and advance a dialogue with the judiciary from the three NAFTA countries.

The sub-committee will maintain the focus of its present workplan on continuing education and outreach. In doing so it will be exploring with the Committee the potential of a web site.

Members: Selma Lussenburg (contact); David Haigh; Fernando Estavillo; Dana Nahlen; Jim Nelson; Phil Robbins

#### Subcommittee IV - Legal Issues:

The subcommittee's reports on developing legal issues involving ADR addressed the following items:

- (1) *U.S. Model Arbitration Act:* The subcommittee reported on the status of the proposed amendments (paper provided) and advised Committee members that there was still time for input from the Committee .
- (2) *Special Commission of the Hague Conference on Private International Law on the negotiation of a Convention on Jurisdiction and the Recognition and Enforcement of Judgments* The subcommittee reported on formal negotiations that had taken place in Vienna and noted that the current draft of the agreement was available on the Hague Convention web-site at [www.hcch.net](http://www.hcch.net). Plans were that the next negotiating session will take place in two stages in June 2001 and thereafter year end or in early 2002.
- (3) *UNCITRAL Working Group on Arbitration on a possible Protocol for the New York Convention or changes to the UNCITRAL Model Law and Arbitration Rules:* Three Committee members (from Canada, the US and Mexico) attended the March 2000 meeting of the Working Group on Arbitration as observers and delegates of the NAFTA 2000 Committee. The delegates provided a report on the activities of the Working Group and the proposals under discussion. These are targeted to addressing conciliation, the requirement of a written form for arbitration agreements and the enforceability of interim measures. (The delegates' written report was provided to the Committee and further information may be found at [www.uncitral.org](http://www.uncitral.org)) A further meeting of the Working Group is scheduled to take place in November. It is anticipated that the November meeting will also address topics and priorities for future work The Committee welcomed the prospect that NAFTA 2000 Committee delegates would again participate and continue to report to the Committee on developments.

- (4) *Formal statement for the Committee providing answers to questions on selected legal issues:*

The subcommittee's report on recent developments including American Law Institute's (ALI) drafting project of a *Uniform Mediation Act* (online information available from ALI and information/commentary also on University of Pennsylvania web site). Though the original schedule indicates that work will be complete this year a roll-over for another year is likely. In addition the subcommittee noted work underway under auspices of American Arbitration Association (AAA) and American Bar Association (ABA) to revise the 1977 ethical code and important implications proposed revisions will have for arbitrator conduct. The ABA (Dispute Resolution Services) also has an interest in applicability of the code to on-line arbitration. The Committee's work plan for the plan for the next six months will consider preparing for Committee review at the next meeting a Code of Ethics for NAFTA Countries. The Committee noted that a [www.adrworld.com](http://www.adrworld.com) highlights developments in ADR on a daily basis.

The subcommittee also noted International Bar Association (IBA) evidence rules and developments including witness statements, efforts to address through disclosure issues of arbitrator impartiality.

The subcommittee will continue to work on these and other items on their current workplan.

Members: Doak Bishop (contact); Cecil Branson; Nabil Antaki; Jeffrey Talpis; Jose Luis Siqueiros; Cesar Garcia Mendez; Carlos Loperena Ruiz; Dana Haviland; Carolyn Lamm; Bob Lutz; Jose Maria Abascal Zamora

#### Subcommittee V: *Dispute Avoidance and Other Forms of ADR*

The subcommittee advised on progress underway on workplan items. The subcommittee reiterated that it would welcome comments on its discussion paper earlier provided to members, *ADispute Prevention - Working Paper*. The next version of the paper will be available on line with a view to facilitating further comments and its completion. The subcommittee also made available and briefly reviewed with Committee members the final text of *A Model Law For International Commercial Mediation*, based on research undertaken by the subcommittee. The subcommittee will maintain its work on all areas of the workplan and intends to expand work on issues of dispute avoidance and the role to be played by in-house counsel in the prevention and management of disputes. There is also an interest in the subcommittee to further explore the implications of culture as this pertains to dispute avoidance and dispute resolution.

Members: Neil Gold and Martin Ertl (contact) ; Jeffrey Talpis; Jose Maria Abascal Zamora; Luis Miguel Diaz; Nancy Oretskin; Jim Nelson; Richard Page

Subcommittee VII - *Resolution of Small and Simple Disputes:*

The subcommittee reported on current work plan activities and in particular those targeted to the goal of the development of an effective fora for the resolution of small disputes. Indications are that the lack of mechanisms in place for the resolution of these claims results in many of them just being dropped; research into the nature of these claims is ongoing. The subcommittee also reported on the growing use and importance of the internet and its applicability to the resolution of small claims including consumer claims as internet marketing proliferates. E/ADR developments include a number of private sector driven arbitration mechanisms as exemplified by trade and domain name arbitration. The latter already has proven to be effective; in utilising a documents only procedure it also engages limited costs (information is available on the WIPO website). The committee considered that despite significant innovations in E/ADR models and work ongoing at the OECD, ICC etc., E/ADR models do not yet appear entirely appropriate to the arbitration of consumer complaints. The subcommittee will undertake further work to collect information and review jurisdictional and legal issues that will have to be addressed as E/ADR expands with a view to the development of rules for E/ADR that could apply to NAFTA Region. Overall, the committee will maintain its work plan with particular focus on new ideas and initiatives concerning the resolution of small disputes and the development of recommendations on means that would facilitate their resolution.

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

**REPORTS ON DEVELOPMENTS IN THE FIELD**

**FTAA:** Mexico reported on state-of-play of FTAA negotiations. He noted that dispute settlement discussions were ongoing and that considerable progress should be realised by December. Discussions include inclusion of ADR commitments similar to that undertaken in the NAFTA. One initiative includes the compilation of laws/procedures on ADR in the countries of the hemisphere to facilitate a better understanding of what is available now (available on FTAA website: [www.ftaa-alca.org](http://www.ftaa-alca.org)). This would also provide a basis for future analysis and hemispheric ADR

initiatives. The workplan in future may include initiatives directed to the enforcement of arbitration agreements and awards by the judiciary. There is also issues of technical assistance for those countries lacking model laws.

Hugo Perezcano Diaz

**Fruit and Vegetable Report:** Canada provided an update on the Fruit and Vegetable Dispute Resolution Corporation (DRC), and the establishment of a private, industry-driven, commercial dispute resolution mechanism for trade in perishable agricultural products among the NAFTA countries. Under the system, firms in Canada, Mexico and the USA adhere to a common set of trade standards (practices), mediation and arbitration procedures and enforcement provisions with respect to NAFTA trade in specified perishable agricultural products (fruit and vegetables). As of February 1, 2000, there were 500 members with an expected 1,500 members by year end. Though membership is largely from Canada and the USA, Mexican membership is picking up. The DRC, incorporated in the autumn of 1999, has a full time staff and CEO headquartered in Ottawa (with four board members from each NAFTA country). Its mandate is to provide education, advice and informal mediation services to DRC members (it does so through a service centre in Chicago. It also provides both low cost expedited and standard CAMCA arbitration services to its members and currently is building up its rosters for both. The NAFTA 2002 Committee played a pivotal role through one of its members (Henri Alvarez) in working with the team that put the DRC together. Mr. Alvarez provided Committee Members with a brief review of the background and structure of the DRC and the DRC dispute resolution system (details provided in meeting binders)

Denyse MacKenzie; Henri Alvarez

### **Alternative Dispute Resolution BBorderless on-line Marketplace**

Committee members received a report about a conference held in Washington D.C. (Borderless On Line Marketplace) on June 6-7, 2000. Participants at the conference included business people, the legal community, and government representatives. The conference addressed issues related to marketing on the internet and in particular issues related to cross jurisdictional net business and cyber settlement of business claims. There was also discussion of how to address consumer claims (One example discussed was Square-trade = E-BAY (auction house on Net). In dealing with consumer protection there are clearly operational difficulties for business in addressing myriad of laws from

different jurisdictions. It was noted that this conference is a step towards the development of international by-laws in this area, an objective that hopefully also will be advanced by the forthcoming conference at the Hague in December (information is available at [www.ecommerce.go/adr](http://www.ecommerce.go/adr)).

Jeffrey Kovar; Lorraine Brennan

## **UNCITRAL**

**Report of Government Representatives:** The USA noted that the most recent UNCITRAL meeting in March marked the first occasion that non-government representatives from the NAFTA 2022 Committee participated as observers. The USA will provide Committee subcommittees with copies of final reports.

The Committee agreed that a discussion of developments under NAFTA Chapter 11 should be added to NAFTA 2022 Cite agenda for next meeting.

**Session with SME Representatives:** The Committee heard from and exchanged views with two representatives of small and medium sized business, Rita Eliza and David Savage. Each brought a unique perspective to the Committee and shared views on the doing business in the NAFTA region as this related to ADR and the work of the Committee. The Committee took note of the overriding benefit that a greater appreciation of ADR and model clauses could bring to Sees. In particular representatives urged that outreach be directed to ensure that outreach be undertaken with a view to providing ADR and model clause information to local delivery points including Chambers of Commerce and that governments make more use of their trade services and information services to get the message out about ADR and how this can provide a fast fair and consistent means of settling disputes.

## **Session with Canadian Judiciary: Mr. Justice Blair Mason and Madame Justice Carol Conrad:**

Mr. Justice Blair Mason of the Alberta Court of Queen's bench and Madame Justice Carol Conrad of the Alberta Court of Appeal participated in a round table discussion on the issue of the use of ADR in the court process. Participants were pleased to be able to hear their assessment of the benefits of mediation, to share their views on the role counsel can appropriately play and to compare and contrast experiences in different jurisdictions of the NAFTA region.

## **NEXT MEETING:**

Mr Hugo Perezcano invited the Committee to attend the Tenth Meeting of the Committee in Mexico, March 15-16, 2001 (locale and final dates to be determined). It was agreed that in keeping with the Committee's determination to take every opportunity to advance outreach

activities, the Mexico meeting will ensure that one day is set aside for a conference focusing on ADR similar to the one that preceded the Calgary meeting on June 21.

**NAFTA 2022 COMMITTEE**  
**9<sup>TH</sup> Meeting of the Committee**  
**Calgary June 22-23, 2000**

**PARTICIPANTS LIST**

**Government Co-Chairs**

*Denyse MacKenzie*  
*Kirsten Hillman*

**Non-Government Members**

*Cecil O.D. Branson*  
*Thomas C. Drucker*  
*Neil Gold*  
*David R. Haigh*  
*Selma M. Lussenberg*  
*Jeffrey Talpis*

**Special Advisors**

*Henri Alvarez*  
*Martin Ertl*  
*Pascal Paradis*



## **MEXICO**

### **Government Co-Chairs**

*Hugo Perezcano Díaz*  
*Maria Elena Múgica*

### **Non-Government Members**

*Luis Miguel Díaz*  
*Gerardo Lozano*  
*Eduardo Siqueiros*  
*José María Abascal Zamora*

**UNITED STATES OF AMERICA**

**U.S. Government Staff**

*Jeffrey D. Kovar*  
*Ursula Odiaga Iannone*

**U.S. Non-Government Members**

*Lorraine M. Brennan*  
*Dana Haviland*  
*Dana G. Nahlen*  
*James E. Nelson*  
*Nancy A. Oretskin*  
*Richard W. Page*  
*Philip A. Robbins*

**U.S. Alternate Non-Government Members**

*Doak Bishop*  
*M. Scott Donahey*  
*Carolyn B. Lamm*  
*Professor Robert E. Lutz*  
*John Townsend*