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A ROLE FOR GOVERNMENTS IN THE RESOLUTION OF INTERNATIONAL PRIVATE COMMERCIAL DISPUTES

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The North American Free Trade Agreement¹ ("NAFTA") presents a new opportunity for governments to foster the use of arbitration and other alternative dispute resolution mechanisms ("ADR") by the private sector. It also expands the role of trade agreements. Traditionally, trade and investment agreements have addressed two types of disputes. Primarily, they have provided mechanisms for resolving government-to-government disputes arising from the interpretation or application of agreements like NAFTA.² These mechanisms are used to determine whether parties to an agreement are complying with their obligations under the agreement.

A second type of dispute settlement reflects governments' interest in ensuring that their nationals have recourse to effective dispute settlement mechanisms when bringing investment-related claims against other governments. Consequently, an essential element of bilateral investment treaties has been an investor-state dispute settlement mechanism that commits signatory governments to submit investment disputes to binding arbitration at the investor's option.³ With the adoption of NAFTA, similar provisions were included in a free trade agreement for the first time.⁴

NAFTA's attention to dispute settlement was not confined to these types of provisions. Rather, in Article 2022, it broke new ground by addressing the resolution of international commer-

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1. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

2. See *id.* ch. 20, 32 I.L.M. at 693-99 (providing dispute settlement procedures).

3. The United States has signed 35 bilateral investment treaties, all of which include an investor-state dispute settlement mechanism as an integral part.

4. See NAFTA, *supra* note 1, § B, 32 I.L.M. at 642-47 (establishing arbitration mechanism for settlement of disputes between party to NAFTA and investor of another NAFTA party).

cial disputes between private parties.⁵ This article creates two specific obligations for the NAFTA partners (i.e., Canada, Mexico, and the United States), and establishes one collective responsibility. The individual responsibilities of each NAFTA country are: (1) to encourage and facilitate, to the maximum extent possible, the use of ADR to settle international commercial disputes between private parties in the NAFTA region;⁶ and (2) to provide appropriate procedures for enforcing agreements to arbitrate and for recognizing and enforcing arbitral awards.⁷

As to their collective responsibility, NAFTA requires the three countries, acting as the Commission,⁸ to establish an Advisory Committee on Private Commercial Disputes ("Committee") to report and provide recommendations on the availability, use, and effectiveness of arbitration and other procedures for resolving private commercial disputes in the NAFTA region.⁹ NAFTA specifies that the Committee is comprised of persons with expertise or experience in resolving private international commercial disputes.¹⁰ The Committee is composed predominantly of private sector representatives, but is chaired by two government representatives from each NAFTA country.¹¹

In its initial charge, the Commission directed the Committee to report and make recommendations on the following:¹² (1) compilation, examination, and assessment of existing means

5. *See id.* art. 2022, 32 I.L.M. at 698 (providing that use of alternative dispute resolution ("ADR") mechanisms will be encouraged and facilitated for disputes between private parties).

6. *Id.* art. 2022(1), 32 I.L.M. at 698.

7. *Id.* art. 2022(2), 32 I.L.M. at 698. A NAFTA country can satisfy the latter obligation by being a party to, and complying with, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") or the 1975 Inter-American Convention on International Commercial Arbitration. *Id.* art. 2022(3), 32 I.L.M. at 698. Mexico and the United States are signatories of both conventions, while Canada is a party only to the New York Convention.

8. *See id.* art. 2001, 32 I.L.M. at 693 (establishing Free Trade Commission). The Free Trade Commission is comprised of cabinet-level representatives of the three NAFTA partners or the designees of these representatives. *Id.* art. 2001(1), 32 I.L.M. at 693.

9. *Id.* art. 2022(4), 32 I.L.M. at 698.

10. *Id.*

11. The U.S. co-chairs of the Advisory Committee on Private Commercial Disputes ("Committee") are Ginger Lew, General Counsel of the U.S. Department of Commerce, and Conrad K. Harper, Legal Adviser of the U.S. Department of State.

12. Terms of Reference for NAFTA Advisory Committee on Private Commercial Disputes (Oct. 18, 1994) (available from Author).

for settling private international commercial disputes; (2) identification of sectors and types of businesses that would particularly benefit from the use of ADR; (3) promotion of the use of arbitration and other procedures for resolving private international commercial disputes in the NAFTA region, including ways to increase private sector awareness of the benefits of using ADR; (4) facilitation of the use of arbitration and other procedures in the NAFTA region, including the use of model ADR and other contractual clauses; (5) opportunities for expanded cooperation between institutions with an interest or involvement in ADR in the NAFTA region; and (6) issues relating to the enforcement of arbitration agreements and awards, and other litigation issues related to ADR.¹³

NAFTA's provisions on commercial dispute settlement may mark the beginning of a new era in dispute resolution. These provisions constitute a recognition that viable mechanisms for resolving commercial disputes between private parties from nations with different legal systems are essential in developing free and open trade and investment. Moreover, such mechanisms must be fair, effective, and expeditious.

The NAFTA commercial dispute settlement provisions are premised on the recognition that commercial dispute resolution is ultimately a private matter between the investors and traders involved in a business relationship. Nevertheless, when private parties are unable to satisfactorily resolve commercial disputes with foreign parties, they often turn to their national governments for assistance. Governments, however, can do little more than act informally to remove misunderstandings between the private parties, thereby enabling them to settle their differences through negotiation. Governments cannot adjudicate commercial disputes, nor can they impose or compel a settlement by either party to a dispute. Only occasionally will a dispute rise to

13. At its November 1994 organizational meeting in Mexico City, the Advisory Committee on Private Commercial Disputes adopted a work plan, comprised of the following: (1) the compilation of, and development of criteria for examining, existing laws, regulations, and practices available in each NAFTA country for the non-judicial settlement of disputes; (2) the compilation of, and development of criteria for examining, specialized regimes for settling disputes; (3) the means for promoting the use of ADR in the NAFTA area; and (4) issues relating to the enforcement of arbitration agreements and arbitral awards. Talking Points for NAFTA Advisory Committee (Nov. 14, 1994) (available from author). The Committee will meet for the second time in June 1995. *Id.*

a level of concern that would warrant a government espousing a claim. Thus, relying on governments is not an effective method of resolving commercial disputes.

The United States advocated inclusion of commercial dispute provisions in NAFTA due to concerns that where there is a perception in the business community that overseas commercial disputes are difficult and costly to resolve, businesses may be discouraged from entering commercial relationships with traders and investors in those countries. The practical consequences of such a perception are reduced exports of goods and services. These reductions, in turn, diminish the value of carefully-negotiated trade agreements.

NAFTA's approach to commercial dispute settlement could serve as a model for the role of governments in facilitating the resolution of international commercial disputes between private parties. The Committee offers an unprecedented opportunity, in the context of a trade agreement, to examine obstacles to the use of ADR and consider ways that ADR mechanisms can be improved and made more available to those engaged in cross-border trade and investment. NAFTA establishes a process for examining the availability, use, and effectiveness of ADR in the NAFTA region, but it does not prejudice or presume the results of the Committee's work.

Evidence that NAFTA's approach is striking a responsive chord is seen in the "G-3" Agreement,¹⁴ between Colombia, Mexico, and Venezuela, which contains provisions that are very similar to Article 2022 of NAFTA.¹⁵ In addition, the Asia-Pacific Economic Cooperation ("APEC") Pacific Business Forum ("PBF") stated in its October 1994 report that it was "concerned about commercial disputes between businesses in different member economies [and that the] legal framework for dispute resolution is very often unclear and commercial disputes are frequently taken outside the region for resolution."¹⁶ As a consequence, the PBF recommended that "APEC Economic Leaders agree to establish separate regional mechanisms for the settlement

14. Treaty on Free Trade Between the Republic of Colombia, the Republic of Venezuela, and the United Mexican States, June 13, 1994 (available from U.S. Department of State).

15. *Id.* art. 19-19.

16. APEC, REPORT OF THE PACIFIC BUSINESS FORUM: A BUSINESS BLUEPRINT FOR APEC, 14 (Oct. 1994).

through mediation, arbitration, etc of commercial disputes between businesses in APEC economies, where the present procedures are unclear.”¹⁷

Today, traders and investors participate increasingly in an international market, unrestricted by national boundaries. Moreover, exports play an expanding role in national economies. Thus, it is vital that businesses entering contracts with foreign partners may be confident that, should problems arise, they have access to effective alternative dispute settlement mechanisms. In this way, businesses can avoid involvement in unfamiliar foreign judicial systems where they may be disadvantaged. By addressing this issue, NAFTA has set a precedent for a new partnership between governments and the private sector in facilitating the resolution of international commercial disputes between parties from different countries.

17. *Id.*