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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
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Joint Group on Trade and Competition

ROUNDTABLE ON PUBLIC AND PRIVATE DISPUTE RESOLUTION MECHANISMS

-- Note by the United States --

This note is submitted by the US Delegation to the Joint Group on Trade and Competition FOR DISCUSSION at its forthcoming meeting on 26 October 2000.

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Roundtable on Public and Private Dispute Resolution Mechanisms

weaknesses. The benefits of early neutral evaluation are that even if the evaluation fails to resolve the case entirely, the opinion of the evaluator as to the likely outcome of the case may help to clarify the issues in the case and narrow areas of disagreement, thereby enhancing the subsequent chances of settlement. Evaluators may operate under a number of different procedures, but typically follow the flexible approach used in mediation involving joint and separate meetings with the parties.

6. *Minitrials* enable the parties to present an abbreviated version of their case to a third party neutral and representatives of the parties with legal authority to settle the dispute. The neutral helps with procedure for the minitrial and gives advisory rulings on issues which arise during the course of the proceeding regarding case presentation, settlement range, etc. Following the minitrial, the neutral and the decision making party representatives meet to discuss settlement in a mediation type format. The purpose of the minitrial is to focus the decision makers on the case and provide an opportunity for the parties to have a "sneak preview" so that they may be better prepared to engage in settlement discussions. The format is voluntary and non-binding.

7. Finally, *summary jury trials* involve a summary presentation to a mock jury. The degree of formality of the proceeding may vary, but can involve strict adherence to rules of evidence or procedure. Jurors render an inadmissible, advisory opinion that can then be used to assist the parties in settlement. Summary jury trials are usually non-binding.

2. The Administrative Dispute Resolution Acts of 1990 and 1996

8. In accordance with the Administrative Dispute Resolution Act (ADRA) of 1990, 5 U.S.C. §§ 571 -584, the Attorney General has sought to promote greater use of alternative dispute resolution (ADR) techniques in civil litigation. ADR techniques in this context were defined to include "arbitration, mediation, early neutral evaluation, neutral expert evaluation, mini-trials, and summary jury trials." In 1995 the Antitrust Division announced a policy "to encourage the use of ADR techniques in those civil cases where time permits and there is a reasonable likelihood that ADR would shorten the time necessary to resolve a dispute or otherwise improve the outcome for the United States." The policy recognizes that ADR will not be suitable for merger cases because of time constraints. ADR, which involves use of a neutral third party, is not intended to replace traditional direct negotiations among the parties, but rather to provide an additional tool.

9. Further, pursuant to the ADRA of 1996, which renewed the ADRA of 1990, each U.S. federal agency is required to promote the use of ADR techniques as an alternative to litigation in various program areas, including federal civil enforcement actions. On May 1, 1998, President Clinton established an interagency ADR working group, headed by the Attorney General, to encourage and coordinate the development of government agencies' ADR programs. This working group in turn created a subgroup whose goal is to develop civil enforcement dispute resolution programs by federal agencies in appropriate cases.

10. With respect to arbitration, it is important to note that the ADRA of 1996 permits the federal government to use arbitration, including binding arbitration, in appropriate cases, but conttr17.8(e)0.8(i)8.27(l)-3.e

or at least on an understood frame of reference. Other issues to be resolved include whether the mediation would encompass only governmental practices or some mix of governmental and private practices; how the panelists would obtain necessary evidence; and how timing issues might be addressed if disputes regarding mergers were involved. Despite these obvious complexities and there are doubtless others, the Advisory Committee believes that a report from an expert panel considering the facts of a dispute between nations might add a useful expert opinion for the affected parties and the global community. Much, of course, would hinge on the credibility of the expert panel and the availability of information sufficient to provide an informed basis for expert analysis.

Chapter 6, "Preparing for the Future."

14. The Department of Justice is still reviewing the recommendations in the ICPAC Report.

5. The UN Convention on Recognition and Enforcement of Foreign Arbitral Awards

15. One advantage of cross-border arbitration of antitrust disputes, as opposed to litigation, or other forms of ADR, is that there is a mechanism for recognition and enforcement of foreign arbitration awards. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[2] more commonly referred to as the "New York Convention" has been ratified by 112 nations. This Convention enables relatively swift recognitiontifo413 lat1s 6 [(fo413 latm( )1.2(lat)8.4eD)-10.9(olat)8.eac 6 [(foin Arb)12.29ivido

2. Business-to-Consumer Disputes

18. In online disputes between businesses and consumers, several additional considerations apply. For example, governments have traditionally not interfered with contractual terms providing for binding arbitration that have been freely negotiated by businesses. However, concerns have been expressed about the enforcement of pre-dispute binding arbitration clauses in international consumer contracts because parties may have unequal bargaining power.[3] Consumer groups have expressed other concerns about ADR,