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COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS

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LIST OF COMMENTS OF CANADA ON THE PROPOSAL BY THE UNITED STATES OF  
AMERICA FOR LEGISLATIVE GUIDELINES FOR INTER-AMERICAN LAW ON  
AVAILABILITY OF CONSUMER PROTECTION DISPUTE RESOLUTION AND REDRESS  
FOR CONSUMERS

Permanent Mission of Canada  
to the Organization of American States



Mission permanente du Canada  
auprès de l'Organisation des États américains

NOTE No. 105

The Permanent Mission of Canada to the Organization of American States presents its compliments to the Department of International Law of the Secretariat for Legal Affairs at the Organization of American States and has the honour to provide herewith a list of Comments of Canada on the proposal by the United States for Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers, and attached Model Laws.

The Permanent Mission of Canada to the Organization of American States avails itself of this opportunity to renew to the Department of International Law of the Secretariat for Legal Affairs at the Organization of American States the assurances of its highest consideration.



Washington, D.C.

29 April 2010

Canada

**List of Comments of Canada on the Proposal by the United States of America for  
Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute  
Resolution and Redress for Consumers**

Canada is generally supportive of those aspects of the proposed Draft Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers (Draft Guidelines) submitted by the US that reflect the 2007 Recommendations of the OECD on Consumer Dispute Resolution and Redress (“OECD Recommendations”). There are a number of issues that must, however, be clarified and discussed within the Working Group, some of which are raised below.

**1. Legislative Guidelines**

**A. Paragraph 2.1**

We need clarification on whether the mention of “criminal laws” in paragraph 2.1 of the Draft Guidelines refers strictly to the criminal/penal law aspects contained in Annex D.

**B. Paragraph 3.6**

We need clarification as to why the definition of “Disadvantaged or vulnerable consumers” contained in the OECD Recommendations<sup>1</sup> has not been included in the Draft Guidelines?

**C. Paragraph 3.7**

We need to discuss the nature of the information that should be provided to consumers to ensure greater transparency of ADR. This discussion should include consideration of whether information should be provided to the consumer regarding the substantive rules upon which the ADR provider will make a determination and more particularly whether or not the consumer’s rights, as established under consumer protection legislation, will be enforced.

**D. Paragraph 3.9**

This provision ensures that consumers are offered the necessary assistance for the completion of their documents in relation to a dispute with a seller. However, it does not indicate on whom this obligation rests. Is it the state that must ensure that sufficient assistance is provided? Or is it the seller that should bear such a responsibility? Given the possible resource implications for states, this should be discussed and clarified.

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<sup>1</sup> “Disadvantaged or vulnerable consumers” refers to particular consumers or categories of consumers, who because of personal characteristics or circumstances (e.g. age, mental or physical capacity, education, income, language or remote location) may meet particular difficulties in accessing dispute resolution and redress.

E. Paragraph 3.10

We need to clarify and discuss how the issue of language, which may be a significant barrier in some cases, will be addressed.

F. Paragraph 4 - Collective and/or representational Dispute Resolution and Redress for Common Injuries to Consumers

A number of legal and procedural issues may affect the rights of non-resident consumers in regard to cross-border class actions. One such issue is whether a state that adopts either the “opt-in” or “opt-out” option (referred to in paragraph 4.7 of the Draft Guidelines) should apply its rules to non-resident consumers. Another important consideration is the extent to which a cross-border class action may deprive non-resident consumers of their rights under their domestic legislation, and how this should be addressed. The complexity of the issues increases in instances of multiple cross-border class actions, i.e. of class actions commenced in more than one state that are based on the same or similar claims and that have overlapping categories of class members. Many of these issues are not addressed in the Draft Guidelines.

That said most of the legal and procedural issues pertaining to cross-border class actions may affect claims in all areas, not solely consumer claims. As such, we believe that CIDIP VII would not be the appropriate forum to fully discuss them. However, cross border class actions and multiple cross border class actions could be addressed in a future CIDIP should sufficient interest to do so be expressed.

*i) Paragraph 4.4.4*

We need to clarify and discuss the following:

- a. why the wording of paragraph 4.4.4 is more restrictive than the corresponding provision in the OECD Recommendations.

*Proposed Paragraph 4.4.4: include prohibitions against abusive collective actions, particularly when economic harm to consumers is trivial, speculative, non-existent or non-proportional to the remedies sought;*

*OECD Recommendation: Such procedures include measures to discourage abusive collective actions, particularly when consumers have not suffered economic harm;*

- b. whether the term “trivial” is used in regard to the harm suffered by individual consumers or to the harm suffered by consumers collectively?

*ii) Paragraph 4.6*

We note that the OECD Recommendations do not contain a provision similar to paragraph 4.6. We ask for clarification as to the source of the proposed paragraph.

Canada considers paragraph 4.6 to be unnecessarily limiting of consumer interests. Therefore, as currently worded, we could not support it.

*iii) Paragraphs 4.5.2 and 4.11*

These two sets of provisions ensure that entities, other than the consumer himself, have legal standing or are authorized to commence legal actions on behalf of affected consumers. Such extension of legal standing for initiating legal actions exists in some countries. However, we are not aware of any application outside a given jurisdiction. For example, to our knowledge, a consumer protection agency of a given jurisdiction cannot commence an action on behalf of consumers from its jurisdiction in another jurisdiction.

It should therefore be clarified that these provisions are not intended to give standing to foreign consumer protection enforcement authorities to commence an action as representative of their nationals before foreign courts.

G. Paragraph 6.1

We need to clarify and discuss the reason for the addition of the conditions “*not for resale or other commercial activity*” to the first part of the definition of “Consumer”.

H. Paragraph 6.5

We need to clarify and discuss the concept of “Economic harm” and the reasons why the proposed definition in paragraph 6.5 of the Draft Guidelines differs significantly from that of the OECD Recommendations.

Proposed definition: *“Economic harm” means actual monetary loss sustained by a consumer in a business-to-consumer transaction as the direct and foreseeable result of that transaction.*

OECD definition: *“Economic harm” refers to actual monetary loss sustained by a consumer as a result of a breach of legislation or common law principles aimed at protecting consumers.*

**2. Draft [Model Law/Cooperative Framework] for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes (Annex A) and Draft Model Rules for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes (Addendum I)**

In February 2010, at a meeting of the Informal Working Group, the US introduced Annex A and Addendum I. Annex A proposes the establishment of government-sponsored ODR structures at the national level that also involve the private sector, and of a “Central Clearinghouse” with a number of responsibilities at the regional level. This proposal is entirely new to the CIDIP VII negotiations. Addendum I replaces the previous Annex B (Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims) and differs from the latter in that it contains model rules that strictly follow the newly proposed structures under Annex A.

Canada is concerned about the impact on the CIDIP VII negotiations of the recent introduction of proposals that would require extensive analysis and discussions on entirely new issues. The fundamental questions raised by Annex A and the Addendum include: the level of potential interest by Member States to participate in the proposed ODR structures and the resource implications to establish and to manage them; the level of interest of consumers in ODR; the level of interest of businesses to participate in the proposed structure and the actual costs to them; the recruitment of ODR providers and the recognition of their qualifications; the “critical mass” that would be needed in terms of participation (Member States, ODR providers and businesses) for the proposed structures to work in a cost-effective manner; the resource implications for the OAS to provide the required support at the regional level; the choice of applicable guidelines for the arbitration process; and the technical and practical aspects of ODR itself. Furthermore, for Canada, the new proposal potentially raises complex issues regarding the division of powers between our federal and the provincial and territorial governments.

Although the proposal for government-sponsored ODR structures contains interesting features, Canada would not be in a position to support it without extensive discussions/negotiations on the numerous questions raised by the proposal, and without consultations domestically on the negotiated proposal. In our view, these discussions would require considerable time and additional resources.

In June 2009, the General Assembly took note that the member States were determined to work toward completion of the proposed documents on consumer protection, and to that end instructed the Permanent Council to set up a working group. The objective set out in the General Assembly Resolution is to set dates for CIDIP VII as soon as possible, preferably in the first half of 2010.

In our view, in light of the current status of the preparatory work, a decision should be made on whether or not the CIDIP VII negotiations will include the recent new proposal by the US for government-sponsored ODR. If it is decided that negotiations will include this topic, sufficient time will be required to allow Member States to effectively work through the fundamental questions raised by Annex A and the Addendum. If it is decided

that it would not be appropriate to embark on the negotiation of an entirely new proposal for state-sponsored ODR structures at this stage of CIDIP VII, consideration should then be given to the possibility of reserving this topic for CIDIP VIII, if sufficient interest were expressed by Member States.

A number of basic principles regarding ADR appear in paragraphs 3.5 to 3.10 of the Draft Guidelines. Canada supports these principles subject to the above comments. However, we believe other fundamental principles should guide ADR/ODR in the area of consumer claims:

- Consumers should not be deprived, by way of mandatory ADR/ODR clauses in consumer contracts made before a dispute arises, of their right to seek redress through their court system,
- Consumers may, however, be provided with the opportunity to choose ADR/ODR after the dispute arises;
- Prior to choosing ADR/ODR, consumers must be informed of:
  - the procedural rules that will guide the conduct of the arbitration, and the substantive rules upon which arbitrator's determination will be made, including whether or not the arbitrator will apply consumer protection legislation;
  - whether or not the arbitral award will be binding on the consumer and/or the business; this would require a discussion on whether the consumer will have the right to seek legal redress if dissatisfied with the results of the ADR process;
  - the consumer's and the business's rights, if any, to challenge the award;

We reserve the right to raise other issues in the course of the negotiations.

### **3. Draft Model Law: Alternate Dispute Resolution For Consumer Payment Card Claims (Annex B)**

Annex B of the US Proposal was also introduced in February 2010. It adds an entirely new topic to the CIDIP VII negotiations. It raises issues pertaining to financial institutions that may require extensive discussions as well.

Canada is of the view that a decision should also be made on whether the CIDIP VII negotiations will include the recent proposal contained in Annex B, or whether it should be postponed to a future CIDIP, if sufficient interest is expressed by Member States.

As to the content of Annex B, Canada is not in a position to provide comments. We reserve the right to do so at a later date, if appropriate.

#### **4. Draft Model Law on Small Claims (Annex C)**

##### A. Purpose and Scope of application

It is stated in the introductory paragraph that the draft Model Law is intended to establish a procedure for resolving small claims in consumer contracts. However, a number of provisions of the Draft Model Law appear to apply to small claims generally. We need to clarify and discuss the intended scope of application of the draft Model Law and to consider whether certain provisions need to be worded differently.

##### B. Articles 6.1 and 6.2

We need to discuss whether written procedures should be favoured over oral hearings for consumer claims.

We also need to examine how the principle contained in paragraph 3.2 of the draft Guidelines<sup>2</sup> could be reflected in the draft Model Law.

##### C. Article 6.6

We need clarification as to why this provision is bracketed.

##### D. Article 7.1

We need to clarify and discuss the imposition of a time limit for rendering decisions. Assuming that a time limit was imposed, we would also need to discuss whether six months is an appropriate limit and when the time period should commence.

#### **5. Draft Model Law on Government Redress For Consumers Including Across Borders (Annex D)**

##### A. Article 2.4

In order to ensure consistency and clarity between the Draft Guidelines and the Draft Model Law, we need to consider:

- replacing the terms “Competent authority” by “Consumer protection enforcement authority” (with corresponding changes throughout Annex D)
- replacing the proposed definition by that found in paragraph 6.6 of the Draft Guidelines

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<sup>2</sup> *“Dispute resolution and redress for consumers acting individually should be available to consumers through judicial or administrative tribunals and/or through a consumer protection enforcement agency. (...)”.*



B. Article 4.1

In order to ensure consistency and clarity between the Draft Guidelines and the Draft Model Law, we need to consider replacing "*as a result of fraudulent or deceptive commercial practices*" by the wording used in paragraph 5.1 of the Draft Guidelines ("*as a result of being deceived, or defrauded, or misled due to fraudulent or deceptive commercial practices in a business-to-consumer transaction*").

C. Article 4.3 (b)

We need to discuss the following proposed change to the wording of paragraph 4.2:

(b) foreign businesses which have caused consumers in the State of the consumer protection enforcement authority (currently referred to as the competent authority) to suffer economic harm as result of being deceived, defrauded, or misled in business-to-consumer transactions.

D) Article 5.4

Paragraph 5.4 deals with confidential information. What constitutes confidential information should be determined by domestic legislation. We should therefore discuss the possible deletion of the last part of the sentence ("*in particular in sharing confidential business or personal information*").

E) Articles 6.1 and 6.2

Implementation of paragraphs 6.1 and 6.2 could potentially raise problems in the Canadian federal system. Canada reserves the right to raise issues for clarification, discussion or negotiation in the course of the meetings of the Informal Working Group.