



## **NAFTA ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES: A 15-YEAR RETROSPECTIVE**

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ON BEHALF OF THE 2022 COMMITTEE

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The editors gratefully acknowledge the contributions and input of past and present members of the NAFTA 2022 Committee as listed in this report, including the special assistance provided by Keith Loken, Kevin O’Shea, Mariana Silveira, and Tricia Smeltzer. This “Retrospective” is dedicated to all past and current 2022 Members who contributed so much to making the 2022 Committee’s history.

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## I. Introduction

The NAFTA Advisory Committee on Private Commercial Disputes (the Committee) and its specific work are defined by NAFTA Article 2022 and the Terms of Reference established by the NAFTA Free Trade Commission (FTC). The past and current membership of the Committee includes leading practitioners and outstanding academics. The Committee, having met for the first time in 1994, has now been in operation for more than 15 years and has held 20 meetings. Thus, the Committee felt that this is an appropriate time to review its work and accomplishments in promoting ADR in the NAFTA region.

The following report provides detail about the organization of the Committee, the focus of the meetings held over the years, special projects and accomplishments, and future plans. It is hoped that this Retrospective will be valuable to the Free Trade Commission (FTC) in advising it of progress in the field of ADR since the inception of the NAFTA, and may provide a basis for specific direction from the FTC regarding the continuing work of the Committee. It is also intended that the Retrospective would be posted on the NAFTA 2022 website, where it could serve as a resource for public users of that site.

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### A. NAFTA Article 2022

Treaty Establishment of Advisory Committee — The Committee was established in 1994 pursuant to Article 2022 of the North American Free Trade Agreement, which states:<sup>1</sup>

#### **Article 2022: Alternative Dispute Resolution**

1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.
2. To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.
3. A Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration.

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<sup>1</sup> "North American Free Trade Agreement." The *NAFTA Secretariat*. N.p., 08 012 1993. Web. 12 Oct 2010. <<http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=153#A2022>>.

4. The Commission shall establish an Advisory Committee on Private Commercial Disputes comprising persons with expertise or experience in the resolution of private international commercial disputes. The Committee shall report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area.

## **B. Terms of Reference**

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The Free Trade Commission specified Terms of Reference for the founding of the Committee:<sup>2</sup>

### **1. Mandate of the Committee**

1.1 NAFTA Article 2022 requires the Advisory Committee on Private Commercial Disputes (Committee) to report and provide recommendations to the NAFTA Commission on general issues referred to it by the Commission respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of private international commercial disputes in the free trade area.

1.2 The Commission refers the following matters to the Committee for report and recommendations to the Commission as appropriate in accordance with Article 2022(4):

1.2.1 compilation, examination and assessment of existing means for the settlement of private international commercial disputes;

1.2.2 identification of sectors and types of businesses that would particularly benefit from the use of alternative dispute resolution (ADR);

1.2.3 promotion of the use of arbitration and other procedures for the resolution of private international commercial disputes in the NAFTA region, including ways to increase private sector awareness of the benefits of using ADR;

1.2.4 facilitation of the use of arbitration and other procedures in the NAFTA region, including the use of model ADR and other contractual clauses;

1.2.5 opportunities for expanded cooperation between institutions with an interest or involvement in ADR in the NAFTA region; and

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<sup>2</sup> <http://www.nafta-sec-alena.org/en/view.aspx?x=314>.

1.2.6 issues relating to the enforcement of arbitration agreements and awards, and other litigation issues related to ADR.

1.3 The Commission may refer other matters to the Committee from time to time in accordance with Article 2022(4).

## **2. Membership of the Committee**

2.1 The Committee will comprise up to 10 members from each Party, up to two of whom may be officials representing the Party and up to eight of whom may be selected from outside the Government.

2.2 Each Party will appoint its own members of the Committee, and may establish terms for their appointment.

2.3 The government representatives will serve as the chairs of the Committee.

## **3. Agenda for Committee Meetings**

3.1 The chairs will, in developing the agenda for a meeting, consult with and take fully into consideration the views of the members on specific issues to be considered by the Committee.

3.2 The chairs will circulate the agenda to the full Committee in advance of each meeting.

## **4. Meetings of the Committee**

4.1 Meetings of the Committee will normally be hosted successively by each party and will be presided over by the chairs of that Party.

4.2 The chairs, by consensus, may invite individuals who are not members of the Committee to participate in a meeting as appropriate.

4.3 The chairs, by consensus, will approve all actions and prepare all reports of the Committee and determine which recommendations should be submitted to the Commission, taking fully into account the views and positions of all Committee members.

4.4 The Committee may establish subcommittees to address specific issues within the scope of these Terms of Reference. A subcommittee may include individuals who are not members of the Committee, if so agreed by the Parties, in which case, each Party may appoint its own members to such subcommittee.

4.5 The Committee will meet at least once each year.

## 5. Coordination with Article 707 Committee

5.1 The chairs will monitor the work of, and consult periodically with, the NAFTA Advisory Committee on Private Commercial Disputes Regarding Agriculture to promote cooperation and collaboration between the two Committees.<sup>3</sup>

### C. Past and Current Committee Members

#### 1. Current Committee Members<sup>4</sup>

##### Canada:<sup>5</sup>

###### *Government Co-Chairs*

- Matthew Kronby, Ottawa, Ontario
- Cecilia Delfino, Ottawa, Ontario

###### *Non-Government Members*

- Nabil N. Antaki, Montreal, Quebec
- Frédéric Bachand, Montreal, Quebec
- Kevin Banks, Kingston, Ontario
- Pierre Bienvenu, Montreal, Quebec
- William G. Horton, Toronto, Ontario
- Selma M. Lussenburg, Toronto, Ontario
- Sir Francis Price, Edmonton, Alberta
- James E. Redmond, Edmonton, Alberta
- Allan Stitt, Toronto, Ontario
- Glenn Sigurdson, Vancouver, British Columbia
- Jeffrey Talpis, Montreal, Quebec
- Richard Weiler, Ottawa, Ontario

##### Mexico:<sup>6</sup>

###### *Government Co-Chairs*

- Carlos Véjar Borrego, Mexico City
- Aristeo López Sánchez, Mexico City

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<sup>3</sup> The NAFTA Art. 707 Committee has since been discontinued [eds.].

<sup>4</sup> <http://www.nafta-sec-alena.org/en/view.aspx?conID=793>.

<sup>5</sup> <http://www.nafta-sec-alena.org/en/view.aspx?conID=793>.

<sup>6</sup> <http://www.nafta-sec-alena.org/en/view.aspx?conID=794>.

*Non-Government Members*

- José María Abascal Zamora, Mexico City
- Cecilia Azar, Mexico City
- Cecilia Flores, Mexico City
- Francisco González de Cossío, Mexico City
- Elsa Ortega López, Mexico City
- Carlos Loperena, Mexico City
- Carlos McCadden, Mexico City
- Alejandro Ogarrio Ramírez España, Mexico City
- Leonel Pereznieta Castro, Mexico City
- José Luis Siqueiros, Mexico City
- Sofía Gómez Ruano, Mexico City
- Julián Treviño, Mexico City

United States:<sup>7</sup>

*Government Co-Chairs*

- Keith Loken, Washington, DC
- Tricia Smeltzer, Washington, DC

*Non-Government Members*

- Steven K. Andersen, Salt Lake City, UT
- Harry L. Arkin, Denver, CO
- Doak Bishop, Houston, TX
- Lorraine Brennan, New York, NY
- Dana Haviland, Los Altos, CA
- Carolyn B. Lamm, Washington, DC
- Robert E. Lutz, Los Angeles, CA
- Dana G. Nahlen, Dallas, TX
- James E. Nelson, Denver, CO
- Kevin J. O'Shea, Tucson, AZ
- Philip A. Robbins, Phoenix, AZ
- Ann Ryan Robertson, Houston, TX
- Mariana Silveira, Tucson, AZ

**2. Past Committee Members**

Canada:

*Government Co-Chairs*

- Jonathan T. Fried, Ottawa, Ontario

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<sup>7</sup> <http://www.nafta-sec-alena.org/en/view.aspx?conID=795>.

- Kirsten Hillman, Ottawa, Ontario
- Valerie Hughes, Geneva, Switzerland
- Meg Kinnear, Ottawa, Ontario
- Eric Leroux, Ottawa, Ontario
- Denyse MacKenzie, Ottawa, Ontario
- Brendan McGivern, Geneva, Switzerland
- James Stringham, Ottawa, Ontario
- Sylvie Tabet, Ottawa, Ontario
- Christiane Verdon, Ottawa, Ontario
- Cynthia Westaway, Ottawa, Ontario
- Linda Young, Ottawa, Ontario

*Non-Government Members*

- Henri Alvarez, Vancouver, British Columbia
- Honourable George W. Adams, Toronto, Ontario
- Cecil Branson, Q.C., Salt Spring Island, British Columbia
- Ellen C. Desmond, Saint John, New Brunswick
- Thomas C. Drucker, Toronto, Ontario
- Martin Erdl, Vancouver, British Columbia
- Rita Egizii, Calgary, Alberta
- Neil Gold, Windsor, Ontario
- David R. Haigh, Q.C., Calgary, Alberta
- Valerie Hughes, Geneva, Switzerland
- Robert M. Hall, St. John's, Newfoundland
- Kathleen J. Kelly, Toronto, Ontario
- E. Neil McKelvey, St. John's, Newfoundland
- Andrew Newcombe, Victoria, British Columbia
- Pascal Paradis, Quebec, Quebec
- J. William Rowley, Q.C., Toronto, Ontario
- David D. Tavender, Calgary, Alberta

Mexico:

*Government Co-Chairs*

- Guillermo Aguilar Álvarez, Mexico City
- Mariano Gomezperalta Casali, Mexico City
- Linda Pasquel Peart, Mexico City
- Hugo Perezcano Díaz, Mexico City
- Ricardo Ramírez Hernández, Mexico City

*Non-Government Members*

- Edgar Elías Azar, Mexico City
- Rodolfo Cruz Miramontes, Mexico City
- Luis Miguel Díaz González Rubio, Mexico City

- César García Méndez, Mexico City
- Luis Enrique Graham Tapia, Mexico City
- Fernando Estavillo Castro, Mexico City
- Miguel Estrada Sámano, Mexico City
- Gerardo Lozano, Mexico City
- Eduardo Medina Mora, Mexico City
- Raúl Medina Mora, Mexico City
- Jesús Serrano de la Vega, Mexico City
- Eduardo Siqueiros, Mexico City
- Fernando Villareal, Monterrey, Nuevo León
- Claus Von Wobeser, Mexico City

United States:

*Government Co-Chairs*

- David R. Andrews, Washington, DC
- Jean Heilman Grier, Washington, DC
- Conrad Harper, Washington, DC
- Ursula Odiaga Iannone, Washington, DC
- Jeffrey D. Kovar, Washington, DC
- Ginger Lew, Washington, DC
- Michael J. Matheson, Washington, DC
- Sean Murphy, Washington, DC
- Kathryn Helne Nickerson, Washington, DC
- Andrew Pincus, Washington, DC
- David P. Stewart, Washington, DC

*Non-Government Members*

- Gerald Aksen, New York, NY
- José I. Astigarraga, Miami, FL
- Charles Brower, Washington, DC
- José Cardenas, Phoenix, AZ
- James Carter, New York, NY
- Hector Chinchilla, Oakland, CA
- H.N. Cunningham, III, Dallas, TX
- John M. Dickenson, III, Santa Paula, CA
- M. Scott Donahey, Palo Alto, CA
- Deborah Enix-Ross, New York, NY
- Michael F. Hoellering, New York, NY
- Rona Mears, Dallas, TX
- Gerard Morales, Phoenix, AZ
- Nancy Oretskin, Las Cruces, NM
- Richard Page, San Diego, CA
- William Quarles, Van Nuys, CA
- Lucy Reed, New York, NY

- David Rivkin, New York, NY
- Susan Kohn Ross, Los Angeles, CA
- Laura B. Sherman, Washington, DC
- John M. Townsend, Washington, DC
- Samuel F. Vale, Rio Grande City, TX
- Stephen Zamora, Houston, TX

## II. 2022 Meetings, Activities, and Organization

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Although the basic composition of the Committee has remained constant – predominantly private sector participation with government Co-Chairs – the organization and the work of the Committee’s subcommittees have evolved over time. Where initially there were multiple subcommittees, as subcommittees completed their mandate, new subcommittees or working committees were established. Today, there are two subcommittees: Legal Issues and Outreach. Both of these subcommittees were reorganized at the Vancouver meeting (2008), discussed at the Querétaro meeting (2009), and reaffirmed at the Houston meeting (2010) as reflecting the essential functions and activities of the Committee.

The work of the Committee has also evolved over time. Initially, consistent with the mandate of the Committee, it examined and assessed the state of alternative dispute resolution (ADR) in each of the NAFTA countries, including identification of sectors of the economy that embraced Alternative Dispute Resolution (ADR), addressed the facilitation and use of arbitration in the NAFTA region and examined issues involved in the recognition and enforcement of arbitral awards. This work was used as the basis to determine whether there was a need for legislative reform in the NAFTA countries, treaty amendment, and for additional education and outreach. Once the Committee had examined the issues and conducted outreach specific to arbitration, consistent with its mandate, it then considered the role of other forms of ADR such as mediation and conciliation, identified constituencies that would benefit from training and education with respect to ADR, considered other structures for ADR such as online dispute resolution and sought input from business and trade organizations and unique cultures that had developed successful ADR practices. In subsequent years, focus has been on outreach—especially with respect to judicial education—and monitoring legal developments in each country with specific attention to areas needing reform and identification of subjects and issues to recommend to the NAFTA Free Trade Commission (FTC):

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· Subcommittee No. III, which subsequently became known as the Outreach Committee, existed since the initial meeting in 1994. The Legal Issues Subcommittee can trace back its origins to Subcommittee IV, also created at the first meeting. The Subcommittee structure has changed since that initial meeting, but both of the current subcommittees have existed in some shape or form since day 1. It could be said that the Legal Issues Subcommittee was also involved in the work of former Subcommittee I (which was the Subcommittee that produced informational brochures).

### **III. Meeting-by-Meeting Summary (based on the minutes of each 2022 meeting available on the Committee website)<sup>8</sup>**

This summary review is based upon the minutes of each meeting available on the Committee website.

#### **1<sup>st</sup> Meeting**

*November 14, 1994, Mexico City, Mexico*

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The purpose of the first meeting of the Committee was to establish a structure and process pursuant to which the Committee could comply with the Terms of Reference.

Subcommittees were created with mandates as follows:

Subcommittee I – (i) gather information on the existing means of settlement for private commercial disputes, (ii) identify model ADR and other contractual clauses used in private commercial dispute settlement, (iii) identify centers available for commercial arbitration, and (iv) commence the consideration and development of some criteria for examining the effectiveness of the existing laws and regulations, practices and institutions available in each of the three countries for settlement of disputes obtained through non-judicial means.

Subcommittee II – identify sectors of the economy, industries and businesses that would benefit from the use of ADR (including specialized regimes) in the three countries to settle disputes through means other than the judicial system.

Subcommittee III – examine the promotion and use of arbitration and other ADR mechanisms to resolve private international commercial disputes and develop means of increasing the use of ADR within the NAFTA countries in the private sector.

Subcommittee IV – examine the issues involved in the recognition and enforcement of arbitration agreements and awards.

The rotation for hosting meetings was set: Mexico, Canada, and the United States.

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<sup>8</sup> <http://www.nafta-sec-alena.org/en/view.aspx?conID=786>

· For some reason, this was altered over the years to a rotation that is now (2010) set as: Mexico, United States, and Canada.

## **2<sup>nd</sup> Meeting**

*June 19-20, 1995, Vancouver, British Columbia, Canada*

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Consistent with the objectives of the NAFTA, including the promotion and facilitation of trade in the NAFTA region and the creation of a predictable framework for business and investment, the Committee acknowledged that its primary focus should be to assist the business community in the NAFTA region through the development and promotion of mechanisms for arbitration, mediation, and other forms of ADR to help reduce, avoid and resolve the time and cost of the dispute settlement process. In that regard, the Committee anticipated that small and medium-sized businesses and businesses dealing in cross-border commerce would likely receive the greatest benefit from such initiatives.

Subcommittee I reported that it (i) had surveyed and compiled a comprehensive list of the relevant laws and, to a lesser extent, the regulations in each country that provided for or contemplated the use of arbitration and other forms of ADR; and (ii) had substantially completed its review of such laws and regulations. It was noted that this information would benefit from further refinement and require updating from time to time. A broader dissemination of this information was debated, and it was agreed that without appropriate infrastructure and funding to support continuous updating, the information would be of limited value and become quickly dated. The Committee concluded that what was significant was that ADR was being used in all three countries and that a legislative framework existed to support the use of ADR.

It was agreed that rather than allocate resources to continuous updating, the Subcommittee would focus its attention on the compilation of existing models of arbitration and other ADR clauses used in the NAFTA countries to provide a basis for determining whether the Committee could be of assistance in further developing and improving such clauses. There was agreement that the development of a brochure explaining arbitration and ADR would be useful to the business community. Further, the Subcommittee was asked to consider developing model clauses for consideration by the Committee with a view to sharing such clauses in the broader business community.

It was noted that while the Subcommittee had been tasked with and had developed some preliminary criteria for consideration by the Committee for the evaluation of the effectiveness of commercial arbitration institutions in the NAFTA region, the Committee should not itself conduct such evaluations. Instead, it was agreed that the Subcommittee should develop criteria which would provide guidance to the business community in connection with the selection and use of arbitration and ADR institutions in the NAFTA region.

Subcommittee II reported that it (i) had identified a number of industry and/or economic sector-specific ADR practices; and (ii) had compiled a list of the predominant ADR institutions in the NAFTA countries. In order for the Subcommittee to better identify industries or economic sectors that would benefit from ADR, including those where the costs associated with arbitration and other forms of ADR were high, it requested that the Governments provide statistics on trade and, to the extent such information was available, data on sectors or industries that had experienced difficulties in the resolution of international private commercial disputes in the

NAFTA region. Consistent with the focus of the Subcommittee on sector initiatives, the Governments were asked to provide information with respect to the establishment and work of the NAFTA 707 Advisory Committee on Private Commercial Disputes (the NAFTA 707 Committee) which focuses on the agricultural sector.

Subcommittee III reported on its examination of the use of and promotion of the use of arbitration, mediation or other means of ADR in the three countries. The preliminary findings of the Subcommittee were that there was limited promotion and use of arbitration in Mexico, a degree of penetration and use in Canada, and the highest level of engagement and promotion in the United States. It was observed that in all three countries, promotion and use of arbitration and other forms of ADR were targeted at individuals already in the field — lawyers, arbitrators, and other ADR service providers, and that outreach to corporations, in-house counsel and business executives was limited. In light of the foregoing, it was agreed that Subcommittee III's next mandate should include the development of an ADR glossary as an education and ADR promotion initiative. It was also requested to make recommendations to the Committee with respect to “next steps” to increase awareness in the business community about arbitration and ADR, including education of business executives and corporate legal counsel to break down any barriers to the use of ADR.

Subcommittee IV reported that it had considered the legislative framework in place as well as the treaties between the NAFTA partners and concluded that the recognition and enforcement of arbitral awards was working well, although certain procedural concerns were identified. The Subcommittee was asked to assess further the procedural concerns and to expand its consideration of recognition and enforcement to forms of ADR other than arbitration, including agreements to mediate, settlement agreements, etc.

There was general agreement that all Subcommittees should continue with their respective mandates (as modified and expanded during the meeting). It was also agreed that going forward the Subcommittees should look not only to arbitration but also to other forms of ADR in their analysis and deliberations. Furthermore, the Committee identified the need to focus on small and medium-sized businesses and the desirability of coordination between the work of the Subcommittees. The Committee agreed to take under consideration the development of model arbitration clauses. Further, it was agreed that “dispute prevention” was an area that merited further consideration by the Committee. The Committee also commenced work on a report to the NAFTA Free Trade Commission.

### **3<sup>rd</sup> Meeting**

*February 12-13, 1996, Phoenix, Arizona, United States*

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Subject to final review by the Government Co-Chairs, the Committee's draft report to the NAFTA Free Trade Commission was reviewed and agreed to for submission to the Trade Ministers meeting later in 1996.<sup>9</sup> The report observes that each NAFTA country has laws and procedures at the state or provincial and federal level that support the use of arbitration, and

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<sup>9</sup> <http://www.nafta-sec-alena.org/en/view.aspx?conID=968>.

further legislation was not presently recommended. However, the Committee did identify some difficulties regarding the recognition and enforcement of arbitral agreements and arbitral awards. The Committee identified the need for greater promotion for the use of ADR to end-users (business executives and in-house/corporate counsel) and the small business community. Distribution of brochures and the presentation of seminars were recommended as a significant step forward in promoting the use of arbitration in the NAFTA region. Furthermore, the Committee identified a growing interest in mediation and conciliation. Mediation was recommended as an effective way to resolve disputes while preserving commercial relationships. The Report also noted the Committee's support of the mandate and work of the NAFTA Advisory Committee on Private Commercial Disputes Regarding Agriculture and the desire for the two groups to explore ways of working jointly. The Report also discussed the future of the Committee.

Finally, the Committee recommended that the Free Trade Commission:

“Adopt a statement substantively in the following form: ‘The Free Trade Commission confirming the commitment of the NAFTA Parties to encourage and facilitate, to the maximum extent possible, the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area; and acknowledging the obligation of the Parties to recognize and enforce arbitral awards under applicable international conventions and national laws states its support for the use of arbitration and other forms of alternative dispute resolution in the NAFTA area, and wishes to draw to the attention of the Judiciary the significant benefits inherent in the use of arbitration and other forms of alternative dispute resolution. In this connection, the Commission calls for the assistance of each Party to: (1) take appropriate steps to ensure that domestic laws do not provide for the judicial review of arbitral awards in a manner inconsistent with their international obligations, including the NAFTA and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention); (2) take appropriate steps to include issues related to arbitration and other forms of alternative dispute resolution in judicial training programs; (3) encourage courts to direct matters to arbitration or other forms of alternative dispute resolution, and enforce arbitral awards and arbitration agreements, where appropriate; and (4) promote dispute prevention.’ The Committee further recommends that this report be appended to Minutes of the Commission meeting and be available on request and disseminated by Committee members through whatever means are appropriate.”<sup>10</sup>

After the Subcommittee reports and with Subcommittees I and II having substantially completed the mandated work projects of their respective subcommittees, and after a full Committee discussion, it was agreed that the Committee would restructure the Subcommittees and develop new or updated work programs/mandates as follows.

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<sup>10</sup> *Id.*

Subcommittee I reported that it had substantially completed its primary mandate of surveying the existing legislative framework for arbitration in the NAFTA region. There was substantial discussion about the possibility of publishing the data compiled by the Subcommittee including by a commercial publisher, CD-ROM, government website, Internet linkages, etc. Concern was expressed about maintaining the data current. The Subcommittee agreed to give further consideration to the best method for disseminating the information to various constituencies and to the matter of translation. The Subcommittee tabled for consideration by the Committee a draft brochure entitled “Alternative Dispute Resolution in International Contracts” including two model clauses. One clause would be for use in connection with arbitration and the other for mediation. The Subcommittee was asked to solicit comments from the Committee as a whole via email to finalize the brochure for presentation and approval at the next meeting.

Subcommittee II advised that it had completed its mandate of identifying sectors of the economy, industries and businesses that would benefit from ADR and the compilation of a list of commercial ADR providers in the NAFTA region. The dissemination and maintenance of a current list of institutions (including *ad hoc*) was debated. It was agreed that this information supported the work of Subcommittee I and to the extent that further work was required or desired, it could be assumed by Subcommittee I. It was agreed that Subcommittee II had completed its work and that another Subcommittee with a new mandate should be established in its stead.

Subcommittee III produced a survey on awareness of arbitration and mediation in the NAFTA region which was reviewed and discussed by the Committee. It was acknowledged that the work of the Subcommittee focusing on the promotion of arbitration and other methods of ADR should continue as well as its consideration of the development of training programs. It was determined that Subcommittee III should continue to address the promotion of arbitration. In addition, the Subcommittee was asked to assess the availability and effectiveness of education, training and development of materials for small and medium-sized businesses. The Subcommittee was asked to give further consideration to the development of other brochures for specific target audiences. In addition, the Subcommittee was tasked with assessing the availability, advantages and disadvantages of ADR and the best method of disseminating the work of the Committee.

Subcommittee IV provided reports on enforcement of arbitral awards and legal issues associated with the NAFTA region. It was agreed that this was a continuing area of interest and concern for the Committee and that, where possible, the work of the Subcommittee should also address mediation. Further, it was noted that the Subcommittee I mandate of assessment of existing legislative regimes and institutions was closely aligned with the work of Subcommittee IV and should be subsumed in the mandate of Subcommittee IV. Matters such as consolidation, single arbitration, discovery, interim relief, and immunity of arbitrators were identified as areas that merited further consideration by this Subcommittee.

Subcommittee V, Mediation/Conciliation, was established in light of the completion of the work of Subcommittee II. Subcommittee V was established to examine the availability and

effectiveness of mediation and conciliation in resolving private commercial disputes in the NAFTA countries.

## **4<sup>th</sup> Meeting**

*November 14-15, 1996, Guadalajara, Jalisco, Mexico*

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Mexico reported that the Advisory Committee on Private Commercial Disputes Regarding Agricultural Goods, established under NAFTA Article 707 (the NAFTA 707 Committee), was preparing to meet with agreed terms of reference. The Committee expressed a continuing interest in the work of the NAFTA 707 Committee given its sector-specific mandate. There was agreement from the Government Co-Chairs that the Committee would, to the extent possible, be kept abreast of any developments in this area.

The United States reported that its Department of Commerce had placed on its website information about the 2022 Committee and had listed the summary of arbitration laws that Subcommittee I had reported on. It was decided that it would be useful to continue to have the Department of Commerce include the work of the Committee along with the Committee's Report to the Free Trade Commission, when completed, since the work of the Committee had already been publicly posted on the U.S. Department of Commerce's website.

Subcommittee I, during the interim period, had finalized the brochure on arbitration and ADR which included model arbitration and mediation clauses for use by the business community in connection with the resolution of private commercial disputes. The brochure was entitled "Alternative Dispute Resolution in International Contracts."<sup>11</sup> It was agreed that the work of this Subcommittee was now complete and any "loose ends" could be subsumed in the mandates of the other Subcommittees.

Subcommittee II, focused on the promotion and use of arbitration and other forms of ADR, noted the desirability of acquainting judges in the NAFTA countries with arbitration and other methods of ADR, and identified the desirability of providing additional training where warranted. It was observed that in each of the NAFTA countries, institutions or opportunities arose for the purpose of training of judges which could be extended to arbitration and other forms of ADR. It was anticipated that such institutions would be interested in working with the Committee in developing arbitration and ADR training programs for the judiciary. As noted below, this gave rise to the establishment of Subcommittee VI.

Subcommittee III (renamed Targeted Outreach) reported on its outreach initiatives and was asked to continue with its promotion of the use of arbitration and other forms of ADR with specific emphasis on small and medium-sized businesses engaged in cross-border trade in the NAFTA region and on in-house counsel.

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<sup>11</sup> <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/report12.aspx?lang=en> (scroll down to Appendix D).

Subcommittee IV reported on its findings regarding enforcement in all three countries, including interim relief, discovery, liability of arbitrators, immunity from liability, and court-ordered mediation. It stated that more analysis was needed in order to provide a full comparative report on the relevant laws in the NAFTA region. The Committee requested that the Subcommittee continue with its analysis of existing laws, regulations, and practices that provided for arbitration and other forms of ADR and keep current the list of institutions engaged in providing same.

Subcommittee V reported that it had looked at the differing understandings of what constitutes mediation and conciliation in the NAFTA region, as well as the different legislative frameworks in each of the countries addressing mediation and conciliation including processes and use and enforcement of settlement agreements. It noted that mediation and conciliation were being used as a form of ADR, but that additional promotion and understanding of these forms of ADR were desirable. It also noted the need to examine the enforcement issues relating to mediation/conciliation awards in all three countries. The Subcommittee advised that the use of mediation was expected to increase because it was a less costly way to resolve claims for small businesses. The Subcommittee was asked to continue to address the differences between mediation and conciliation, explore the legal issues related to each, collect information regarding the practice and use thereof, consider and report on the advantages and disadvantages of mediation/conciliation and interface with Subcommittee III on its outreach initiatives, including other forms of outreach (*e.g.*, electronic). It was also asked to consider whether the brochure developed by the Committee should be expanded to include mediation and conciliation.

In response to the identification of the desirability of additional interface with the judiciary on ADR, the Committee established a new Subcommittee VI (Liaison with the Judiciary). This Subcommittee was asked, among other matters, to explore sources of funding that would provide judges in the NAFTA region with a forum within which the judiciary could discuss and share experience and expertise in the area of ADR and the opportunity to share their experiences regarding ADR with the Committee. The Subcommittee was also asked to consider the preparation of a reference book for judges and to assist with the development of training programs on ADR for the judiciary. In connection with the foregoing, the Subcommittee was asked to develop recommendations for consideration by the Committee as well as potential sources of funding. The Government Co-Chairs were asked to appoint special advisors to Subcommittee VI, including members of the judiciary.

## **5<sup>th</sup> Meeting**

*September 18-19, 1997, Montreal, Quebec, Canada*

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The Co-Chairs advised the Committee that the Committee's recommendation<sup>12</sup> set out in its Report to the Trade Commission of November 1996 was adopted without revision.

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<sup>12</sup> See *supra* note 10 and related text.

In addition, the Governments updated the Committee on the progress of the NAFTA 707 Committee, the Asia-Pacific Economic Cooperation (APEC) Dispute Mediation Experts and the Free Trade Area of the Americas (FTAA) Dispute Settlement Group. The Committee hosted its first targeted in/outreach meeting with members of the business community. Participants included representatives from the Canadian Federation of Independent Business, the U.S. Industry Sector Advisory Committee on Small and Minority Business for Trade Policy, and private manufacturing concerns engaged in trade in the NAFTA region. Industry representatives were asked to address how the Committee could better reach out to the business community and to provide insights on the problems that small and medium-sized businesses encounter in international business dealings and dispute resolution in the NAFTA region. It was observed that small businesses had a limited capacity for risk, and that dispute resolution was often slow, costly, inequitable, and gave rise to a high opportunity cost thereby undermining business success. The availability of fast, affordable, and equitable dispute resolution was identified as key for small businesses. The Committee was asked to consider finding solutions to address these concerns. With respect to education, it was noted that education in the context of industry or trade meetings was most helpful as was access to readily available information via trade offices, publications or the Internet. The need for assistance in drafting ADR clauses was identified.

Each of Subcommittees III –VI provided progress reports, and new workplans were adopted (see below).

Subcommittee III (Targeted Outreach) proposed a number of new targeted outreach activities consistent with its goal to continue to reach out and promote ADR among small and medium-sized businesses, including their in-house counsel, and sought the views of the Committee. After considerable discussion, there was agreement that the Subcommittee should continue with a wide variety of outreach activities and start to identify in each country which trade associations, small and medium-sized business organizations, and chambers of commerce were working to promote ADR and to develop a program to present to these organizations as teaching methods, together with written material. The Subcommittee was also asked to consider how it could develop ways to use the Internet as a means of reaching target audiences. There was also considerable discussion regarding the development of a speakers' bureau, training materials and publication and distribution of materials.

Subcommittee IV (Enforcement Issues) reported that it was continuing to work on a comparative monograph on enforcement issues. It was asked to consider ensuring that such a publication would address lawyers/advocates as well as the business community. With respect to enforcement, it was noted that gaps exist between international conventions that address enforcement and that the Subcommittee consider making a submission to those that were drafting new bilateral/multilateral conventions. A protocol to the New York Convention on the Enforcement of Arbitral Awards was debated, with concern expressed that this could give rise to patchwork coverage. The Committee also suggested that Committee members that participated in the United Nations Commission on International Trade Law (UNCITRAL) should express these concerns. The Subcommittee was asked to prepare short brochure(s) for public dissemination (including Internet) on the arbitral enforcement process, continue to work on a monograph on enforcement issues in the NAFTA region, continue to evaluate and assess collections of arbitral

legislation, continue to report on developing legal issues regarding enforcement and consider new forms of trilateral resolution of small claims in international commercial transactions.

Subcommittee V (Mediation/Conciliation) reported on two main areas of research — namely, the enforceability of mediation agreements and mediated settlements and the efficacy of mediation in resolving private commercial disputes. It was noted that while there are no applicable international conventions on enforceability of such agreements, such agreements should be enforceable under both common and civil law. There was considerable debate as to whether the Committee should undertake: (i) drafting model legislation to address enforceability and (ii) drafting a model international agreement to mediate. It was agreed that consistent with the Committee’s outreach mandate, a better first step would be the drafting of a mediation clause together with a discussion of such provisions as an education/outreach tool.

With respect to the efficacy of mediation in resolving private commercial disputes, the Subcommittee reported that there had been limited studies in this regard. Existing data suggested that mediation was less popular in Mexico than the other NAFTA countries, and where mediation is a court-mandated procedure, it was viewed as a formality. Canada and the United States appear to have high rates of satisfaction with mediation.

Subcommittee VI (Liaison with the Judiciary) reported, via the Government Co-Chairs, that both Canada and Mexico had had difficulty securing members of the judiciary to serve as advisors while six members of the judiciary had agreed to serve as such in the United States. It was decided that the Subcommittee should proceed without such additional support. The Subcommittee was asked to continue to examine the information available to the judiciary concerning ADR methods and their application to determine what needed to be added to the judicial outreach training program. Further, it was asked to consider the preparation of materials that would be of assistance to the judiciary and to explore opportunities for the judiciary to participate in targeted outreach.

## **6<sup>th</sup> Meeting**

*March 16-17, 1998, Miami, Florida, United States*

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The Government Co-Chairs updated the Committee on the progress of the NAFTA 707 Committee, the APEC Dispute Mediation Experts and the FTAA Dispute Settlement Group.

The Committee held a judicial outreach roundtable (organized by Subcommittee VI) with judges from each country. At the roundtable, members of the judiciary presented views on arbitration, mediation and other ADR practices in the courts of each country and information about judicial training. The judicial representatives advised that the judiciary could play an important role in speeding the settlement of many commercial lawsuits through the creative and effective use of ADR, including mediation by members of the judiciary, summary jury trials, and mini-trials. It was noted by the judiciary that once a matter was before the courts there was little benefit in proceeding with arbitration. It was noted that enforcement of awards in Canada and the United States was clear and that the need for judicial training on the substantive law of

arbitration was limited. However, it was acknowledged that further training on ADR in general for judges was desirable and that the preparation of briefing books for judges on international treaties and agreements on ADR was desirable. At the conclusion of the dialogue with the judiciary, it was decided that as part of its outreach mandate the Committee would host an international conference on arbitration and other forms of ADR in Mexico City in late 1998 or 1999. The target audience would be the business community and the judiciary. A steering committee was established to organize the conference, seek sponsorship and invite other international organizations involved in ADR to participate.

Each of the Subcommittees provided a report on its activities since the last meeting and adopted a new workplan as follows.

Subcommittee III (Targeted Outreach) reported that it continued to identify businesses and organizations that would be a target audience for educational programs on arbitration and other methods of ADR. The Subcommittee reviewed seminars, conferences, and courses on ADR in which the members of the Committee had participated or of which they were aware with a view to better understanding the extent of education and training available and to avoid duplication with other service providers. The Subcommittee had sent out letters offering speakers and training on all forms of ADR to small businesses in the United States and in Canada and had canvassed the bar associations and law societies seeking additional speakers and opportunities to promote ADR in the legal and business communities. It was noted that there was a lack of knowledge of arbitration in Mexico in the business and judicial communities and that enforcement of arbitral awards was not routine in Mexico. It was agreed it was appropriate to focus on the advancement of arbitration and other forms of ADR in Mexico. Canada and Mexico advised that work was underway to publish the Committee's brochure on ADR in French and Spanish, respectively, on the Governments' international trade websites.

Subcommittee IV (Enforcement) tabled for review by the Committee a draft brochure on the enforcement of agreements to arbitrate and arbitral awards in the NAFTA countries. A draft monograph on the enforcement of international commercial arbitration agreements in Canada was also circulated for review by the Committee and for inclusion in a trilateral Committee monograph thereon. The Subcommittee brought to the Committee's attention a number of new legal developments including a recent case which prohibited a lawyer from one United States State from participating in arbitration in another State on the basis that that lawyer was not a member of the forum State's bar. Concern was expressed that the Court's rationale might preclude lawyers from arbitrating in foreign jurisdictions. The recent use of the Mexican *Amparo* proceedings in the context of enforcement of an agreement to arbitrate or an arbitral award was discussed. Again concern was expressed that this was inappropriate in the context of international commercial arbitration. The Subcommittee was requested to monitor these developments and advise whether it would be appropriate to draw these issues to the attention of the NAFTA Free Trade Commission. Canada reported that negotiators of the proposed Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments were considering two different approaches to limit the Convention's application to arbitration clauses. The United States reported on the work of the National Conference of Commissioners on Uniform State Laws in preparing a model law on arbitration and discussed proposals put forth in this context on greater judicial review of arbitral awards and arbitrator immunity.

In response to the concerns expressed by the business community at a business outreach program, held in Montreal in 1997, about the cost and timeliness of the resolution of disputes for smaller businesses engaged in cross-border trade in the NAFTA region, the Committee received a special report entitled “New Modalities for Trilateral Resolution of Small and/or Simple Claims in International Commercial Disputes”. The purpose of the report was to consider what expedited dispute settlement processes might be possible in this context drawing on similar processes developed in the Canadian provinces of Ontario and Quebec. The Subcommittee was asked to continue to pursue this solution for smaller business and to look at similar processes in the United States and Mexico.

Subcommittee V (Mediation/Conciliation) distributed a draft brochure on mediation. After some preliminary feedback, Committee members were requested to provide timely comments to the Subcommittee to permit publication on the national government websites. The Committee debated, but was unable to resolve, whether it should recommend UNCITRAL and/or CAMCA (Commercial Arbitration and Mediation Centre for the Americas) mediation rules and thus requested the Subcommittee to give this further consideration and return to the Committee with a recommendation. The Subcommittee discussed the possibility of preparing a model law of mediation and the development of the American Bar Association’s (ABA) model law; it was decided that the Subcommittee should prepare draft model law provisions on cross-border mediation issues and enforcement. Lastly, it was acknowledged that cross-cultural issues played an important role in cross-border mediation and that the Subcommittee should identify such issues for consideration and discussion by the Committee.

## **7<sup>th</sup> Meeting**

*November 9-10, 1998, Toronto, Ontario, Canada*

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Mexico reported that the FTAA negotiators were looking at the NAFTA 2022 provisions for possible inclusion in the FTAA. It was agreed that the Committee would send the 1996 Report of the Committee to the Government negotiators and invite the FTAA negotiators to attend the 1999 Mexico City ADR Conference organized under the auspices of the Committee. Mexico also reported that the NAFTA 707 Committee was given a new mandate from the NAFTA Commission to put in place a private sector dispute resolution process to address issues in the agricultural sector, particularly in regard to perishable products. Canada reported that APEC was updating its “Guide to Arbitration and Disputes Resolution in the APEC Member Economies” and that it would be available both in print and on the APEC website.

Substantial time was spent discussing the substance of the Mexico City ADR conference, the organizational issues, co-sponsors, etc. It was decided that a Committee meeting would be held immediately after the Mexico City ADR Conference to facilitate the provision of a report to the NAFTA Free Trade Commission on the work completed to date and proposals for a new workplan.

Subcommittee III (Targeted Outreach) reported that it was continuing to identify and work with organizations that could assist in promoting ADR to targeted businesses. The

Subcommittee was preparing speakers' outlines and notes for each country to assist presentations at seminars and to address regional and country-specific differences. It was also identifying opportunities in which the Committee could endorse or co-sponsor, without funding, educational programs that promoted the use of ADR to resolve commercial disputes. The Subcommittee was asked to develop criteria to guide the Committee in determining which events should be co-sponsored by the Committee.

Subcommittee IV (Enforcement Issues) provided an update on the status of its brochure on enforcement of agreements to arbitrate and arbitral awards and sought further comments from the Committee with a timeline to permit dissemination of the enforcement brochure at the 1999 Mexico City conference. The Subcommittee presented a report on emerging legal issues arising with respect to enforcement of arbitral awards, including the status of proposed amendments to the U.S. Model Arbitration Act. It was reported that in Mexico amendments were being proposed to the Arbitration Chapter of the Mexican Commercial Code and the *Amparo* Law which were seen as supportive of ADR. Updates were also received with respect to the Hague Conference on Private International Law and its work on the proposed Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments. The Subcommittee led a discussion on the possibility of making all ADR materials available on websites and linking these materials to other sites that focused on ADR. The Subcommittee also suggested that a single website for the dissemination of the work of the Committee would be helpful.

The Subcommittee reported that it was continuing with the development of an analysis of new methods for trilateral resolution of small and simple claims. To further work in this area, it was agreed that consideration should be given to establishing a separate working group or committee to address such "small claims" dispute resolution.

Subcommittee V (Mediation/Conciliation) presented for discussion its draft brochure on mediation and requested final comments to finalize the brochure for the next Committee meeting. It also presented a draft paper discussing the impact of culture on mediation, and the possibility of a draft model law on mediation. It was agreed that the model law would be a useful tool, and it was decided that the Subcommittee would reach out to other organizations working in the area of mediation (e.g., ABA, UNCITRAL and the Society of Professionals in Dispute Resolution) for help in completing the draft model law by the next meeting.

Subcommittee VI (Liaison with the Judiciary) reported that it had been working to organize the upcoming ADR Conference for judges and businesses in Mexico City.

## **8<sup>th</sup> Meeting**

*November 18-19, 1999, San Francisco, California, United States*

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The Committee received a full report on the ADR Conference held in Mexico City, June 3-4 1999,<sup>13</sup> including that the Conference had been well received and attended. It was observed

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<sup>13</sup> The proceedings were published by Juris Publishing as *Commercial Mediation and Arbitration in the NAFTA Countries*, 1999 (editors Luis Miguel Diaz and Nancy A. Oretskin).

that attendance from the judiciary had been very good, but that the participation by the business community had been less robust. It was acknowledged that further ADR promotion continued to be desirable. The Government Co-Chairs drew the Committee's attention to the recognition of the Committee's work by the Free Trade Commission in connection with the organization of the 1999 Mexico City conference.

The Government Co-Chairs provided updates on a number of other matters. The Committee was advised that with respect to the FTAA it had not yet been decided how dispute resolution would be handled, but that the negotiators were looking at the APEC experience.

Mexico reported that it was working on the language for the FTAA and negotiators hoped to have the agreement completed in 2003. Mexico also reported on the work of the NAFTA 707 Committee and presented a draft proposal from the NAFTA 707 Committee that would establish the proposed Fruit and Vegetable Dispute Resolution Corporation to develop uniform trade standards and guidelines governing disputes between fruit and vegetable companies engaged in NAFTA regional trade.

Canada reported that APEC had released an updated "Guide to Arbitration and Dispute Resolution in the APEC Member Economies" listing all national ADR legislation.

Canada also advised that with respect to the adoption of the International Centre for Settlement of Investment Disputes (ICSID) procedures, in light of the absence of a federal-state clause, the Canadian Federal Government cannot accede to ICSID without the support of all provinces and territories.

The United States advised the Committee that it had taken certain reservations with respect to certain new procedural rules adopted pursuant to the Panama Convention (Inter-American Convention on Commercial Arbitration).

It was reported by members of the Committee that UNCITRAL was to discuss issues in implementing the New York Convention and that one topic would be the enforcement of arbitral awards. It was suggested that the Committee seek observer status at the UNCITRAL meeting. It was also noted that harmonization between the UNCITRAL efforts and NAFTA efforts in this area would be important.

The Government Co-Chairs noted that it was an opportune time for the Committee to reconsider its future work, as much of the work previously allocated to the various Subcommittees had been completed. Consequently, the Committee was asked to consider the direction it wanted to take in the future. After lengthy discussion in and among Subcommittees, it was decided to reorganize the Subcommittees as follows:

Subcommittee III (Outreach) would continue and would focus its outreach activities on small and medium-sized enterprises (SMEs), in-house counsel and the judiciary and would only focus on the practicing bar as an adjunct to other outreach activities — it having been determined that there were significant educational opportunities available within the various bar associations and that the level of understanding of ADR within the practicing bar was quite high. The

Subcommittee was also asked to explore liaisons with national judicial training centers. With regard to this direction, it was decided that Subcommittee VI (Judicial Liaison) would be combined with Subcommittee III, which would continue to work on outreach and training for in-house counsel, the judiciary, and in other areas as needed.

Subcommittee IV (Enforcement) would be renamed the Legal Issues Subcommittee and would continue to focus on legal developments, including the draft Hague Convention on Jurisdiction, the NAFTA Chapter 16 working group on cross-border issues, and UNCITRAL's Working Group (WG) on Arbitration. It would also draft answers to legal issues that would be helpful in promoting a better understanding of the general law in international commercial arbitration.

Subcommittee V (Mediation) would be renamed the Dispute Avoidance and Other Forms of ADR Committee and would observe and comment on the work done in UNCITRAL, APEC, and other national and international groups. In addition to its research, the Subcommittee was asked to produce guidelines to help businesses on dispute avoidance and dispute resolution.

Subcommittee VII (to be named Resolution of Small or Simple Disputes) was created out of Subcommittee V. It was asked to further research existing mechanisms for resolution of small business disputes, explore new methods and procedures including electronic methods of ADR, and work on drafting recommendations that would assist in the resolution of simple disputes.

In conjunction with the meeting, the Committee hosted a Judicial Roundtable as an outreach program. During the program, the judges discussed their ADR training and their experiences with arbitration and other forms of ADR, and the effectiveness of ADR in terms of cost, size of claims and speed in resolving disputes. Judges were also asked about their views on how to improve ADR and mediation training, and how to encourage arbitration and other forms of ADR.

## **9<sup>th</sup> Meeting**

*June 22-23, 2000, Calgary, Alberta, Canada*

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Mexico reported that negotiations to create the FTAA were ongoing and that commitments to promote the use of ADR were being included. The FTAA negotiators had compiled a list of ADR laws and procedures within the hemisphere; this list, available on the FTAA website, would better assist in the analysis and development of ADR methods.

Canada reported on the establishment of the Fruit and Vegetable Dispute Resolution Corporation (DRC) as an outgrowth of the NAFTA countries' commitment to explore the use of ADR in the context of cross-border trade in fruit and vegetables. The DRC will help resolve disputes in commercial trade in agriculture in the NAFTA countries through a common set of ADR practices, procedures, and enforcement. The DRC will provide training, education, advice, and informal mediation services. It was reported that a conference had been held to discuss ADR in the online marketplace.

Subcommittee III (Communication/Outreach) reported that it had co-sponsored, in the name of the Committee, an outreach program in conjunction with the Calgary Chamber of Commerce Dispute Resolution Committee and the Canadian Foundation for Dispute Resolution.

Committee members participated as panelists in the seminar which had a particular emphasis on challenges encountered with ADR in the context of the oil and gas industry. The audience included in-house counsel, the legal and judicial community, and small businesses. In addition, the Subcommittee arranged for two “in-reach programs” with the Committee. The first was with representatives of the SME community who made presentations to the Committee on ADR and doing business in the NAFTA region. These representatives underscored the need for outreach with respect to ADR and, in particular, the need for model clauses and the desirability of using Chambers of Commerce and government trade offices as the vehicles for such outreach/education/information initiatives. The second was a roundtable discussion with members of the Canadian judiciary, during which the benefits of mediation were emphasized, as was the constructive role that counsel play in such situations.

The Subcommittee committed to continuing with its outreach activities and to exploring the possibility of a Committee website.

Subcommittee IV (Legal Issues) reported on recent developments in the ADR area (including that amendments were still being considered to the U.S. Model Arbitration Act) and on the status of the negotiations at the Hague Conference on Private International Law of the proposed Convention on Jurisdiction and Recognition and Enforcement of Judgments. The Subcommittee also reported on: the American Law Institute’s (ALI) Enforcement of Foreign Judgments Project, the National Conference on Uniform State Laws’ Uniform Mediation Act project, the work being done on the Code of Ethics by the American Arbitration Association (AAA) and the ABA, and the International Bar Association’s (IBA) work on evidence rules.

A tripartite delegation comprised of several members of the Committee participated in the UNCITRAL WG on Arbitration in March 2000 and reported back to the Committee. They recommended that the Committee members continue to attend WG sessions and represent the Committee. The delegation reported that the WG had focused on three areas of interest: conciliation, enforceability of interim protection, and the writing requirements of arbitration agreements.

Subcommittee V (Dispute Avoidance and Other Forms of ADR) requested input on a discussion paper on Dispute Prevention in order to finalize it and post it online. The Subcommittee also reviewed for the Committee the Model Law for International Commercial Mediation. The Subcommittee expressed interest in researching how culture affected issues of dispute resolution and avoidance, as well as the role of in-house counsel in management and prevention of disputes.

Subcommittee VII (Resolution of Small or Simple Disputes) observed that existing ADR mechanisms were not suited to the resolution of small or simple disputes. It was noted that because no vehicle for the resolution of such disputes existed, most disputes were dropped and

resulted in a potential dampening of trade in the NAFTA region. It was noted that the Internet was creating demand for electronic-ADR (e-ADR). While work in that area was proving effective, the models were not yet suitable for small consumer arbitration. The Subcommittee decided to conduct further work to collect information and review jurisdictional and legal issues that arise with respect to e-ADR and towards development of rules for e-ADR for use by small and other businesses in the NAFTA region.

## **10th Meeting**

*March 7-8, 2001, Mexico City, Mexico*

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The meeting began with a discussion by the Committee of its future work. The main focus was on the Committee website project. It was agreed that this initiative should be explored by the Committee as a whole. Certain challenges were identified including that of maintaining current information, the importance of linking it to other NAFTA dispute settlement provisions (yet distinguishing the focus of NAFTA 2022 therefrom), and the scope of the material that could be posted to the site and be of use to the broader stakeholder community identified. In response thereto, Subcommittee III was asked to prepare a draft proposal for website development subject to certain guidelines with input from the rest of the Committee.

The meeting included a dialogue with the Mexican judiciary. The Committee was provided with useful insights from the judiciary, including an overview of the experience of national tribunals with arbitration and other forms of ADR. It was observed that Mexican judges have difficulty recognizing and enforcing arbitral awards due to unfamiliarity with the subject matter. The Committee was advised that conferences and seminars on ADR for judges and advisors would assist with the recognition of arbitral awards and reinforce the appreciation and use of ADR in Mexico.

The Committee was provided with an update on the FTAA negotiations. The Government Co-Chairs noted that information had been submitted to the negotiators promoting the inclusion of provisions on the use of arbitration and other forms of ADR in connection with the resolution of private commercial disputes. The Committee expressed an interest in ensuring that the FTAA provisions would be consistent with the NAFTA provisions so as to not establish a different regime.

In prior meetings, the Committee had expressed an interest in the proceedings under NAFTA Chapter 11 (Investor-State). One of the Committee members provided a report on the arbitral awards issued under Chapter 11. While the Committee and, in particular, Subcommittee IV, expressed an interest in this area, the Government Co-Chairs advised that this was not within the mandate of the Committee and that discussion of Chapter 11 issues could give rise to conflicts as both Committee members and the Government Co-Chairs had been and were likely to be involved in cases arising under these provisions of the NAFTA.

The Committee received updates/reports from the Subcommittees as follows.

Subcommittee III (Communication/Outreach) asked for proposals regarding what should be included in the Committee website in addition to the brochures or material previously agreed to by the Committee. It was agreed that the final texts would be vetted with the Government Co-Chairs. The Subcommittee sought final comments on the materials and proposals circulated. It was agreed that if no comments had been received a month after the meeting, then the Subcommittee would continue with the website development as proposed, create guidelines on the criteria for hosting the Committee website, and consider institutions that could be linked to the website. The Government Co-Chairs agreed to look into hosting the website on the existing NAFTA website maintained by the NAFTA Secretariat.

Subcommittee IV (Legal Issues) reported that the AAA was considering the Revised Uniform Arbitration Act code of ethics for international arbitrators, and that it might be applicable to NAFTA arbitrations. The Subcommittee proposed to undertake a project to develop a website listing all NAFTA Chapter 11 cases, the material presented in the hearings, and the awards. The Committee was advised that the United States Government would be posting this information on the Internet shortly and thus there would be no need for the Subcommittee to undertake this.

Subcommittee V (Dispute Avoidance and Other Forms of ADR) reported that it would work with Subcommittee IV on the UNCITRAL WG report since mediation and conciliation were also being considered by UNCITRAL.

Subcommittee IV & V members who observed the 33rd session of the UNCITRAL WG on Arbitration in New York in 2000 reported on the proceedings in the context of the reports of Subcommittees IV and V. Common to both Subcommittees was the monitoring and provision of comments to the WG, the examination of the Draft Model Law on Mediation, and tracking the developments at the Hague Conference on Private International Law. It was agreed that Subcommittees IV and V would prepare a document regarding the UNCITRAL WG deliberations and work towards developing a consensus within the NAFTA region.

Subcommittee VII (Resolution of Small or Simple Disputes) reported that it had found few rules and very few institutions that were concerned with small or simple disputes. The Subcommittee intended to focus on drafting Model Rules for Arbitration of Small and Simple Claims, along with procedures for submitting claims online and offline, and the guidelines for administrative procedures for the host institutions prepared to handle these types of claims. The Subcommittee suggested that e-ADR could be an avenue for resolving such disputes and thus proposed a pilot project working with two ADR institutes in each country with a focus on direct negotiations between businesses, as well as mediation and arbitration techniques. Document submission would be limited, with the ability to request additional documentation.

## **11<sup>th</sup> Meeting**

*January 28-29, 2002, Denver, Colorado, United States*

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The Committee received updates from the Government Co-Chairs with respect to a number of matters. The Committee was advised that little progress had been made on the inclusion of provisions promoting arbitration and other forms of ADR in the FTAA negotiating group despite the three NAFTA delegations' attempts. It was observed that it might be difficult to achieve provisions similar to those found in the NAFTA. Similarly, the Committee was advised that the Hague Convention on Judgments was stalled due to issues arising with respect to jurisdiction in cases involving the Internet.

Substantial time was devoted to Subcommittee meetings and reporting, including the development of new workplans for each of the Subcommittees.

The meeting included an Outreach Program entitled "Avoiding and Managing Disputes in NAFTA Countries." The presentations and discussions focused on avoidance and preventive measures and mediation as possible methods for resolving disputes.

Subcommittee III (Communication/Outreach) provided an update on the Committee website project. Canada advised that it would be able to develop and host a website as part of the NAFTA Secretariat subject to the proviso that the Secretariat would not take on an editing role. Two guiding principles were proposed by the Subcommittee and accepted: namely that the website be basic and simple (practical and user-friendly), and that the website should reflect the Committee's mandate, goals and work, and would include an introduction to ADR, a list of ADR organizations in the NAFTA region and possibly links to/from such institutions. The possibility of a chatroom for the Committee was also discussed. Substantial discussion ensued regarding appropriate disclaimers on the website. Lastly, it was agreed that the brochure previously approved by the Committee and distributed would benefit from updating. It was agreed that the Subcommittee would focus on the website development and updating the previously-approved brochure.

Subcommittee IV (Legal Issues) provided reports on legal developments in ADR in the NAFTA region. After introducing a draft Code of Ethics for Arbitrators, substantial discussion ensued about the provisions in the Code concerning 'partisan arbitrators', but no consensus could be achieved. The Subcommittee also updated the Committee on the Uniform Mediation Act. The Subcommittee was asked to reconsider the Code of Ethics in light of the Committee's discussions and to continue to provide updates and insights on legal developments affecting international commercial arbitration including developments within the UNCITRAL WG and the Hague Conference on Private International Law.

Subcommittee V (Dispute Avoidance and Other Forms of ADR) advised that many of its issues had been addressed in the context of broader discussions and committed to continue to work on dispute avoidance including: mediation and the UNCITRAL Model Law, the role of culture in mediation, and the enforceability of agreements to mediate and mandatory mediation. It also committed to exploring methods other than arbitration and mediation in the context of cross-border transactions and to look further at preventive law and mediation issues.

Subcommittee VII (Resolution of Small or Simple Disputes), in lieu of a report, gave a presentation on an electronic commerce ADR or e-ADR pilot project for small or simple

disputes. The focus of the project is to support the SME community and to provide a confidential, prompt, and cost-effective dispute resolution procedure. Substantial discussion ensued about the possibility of the Committee partnering with the presenter in some form of online dispute resolution project. Many difficult and complex issues were identified with respect to potential partnering with a commercial undertaking. The Subcommittee was asked to further consider this initiative taking into consideration the concerns expressed during the discussions and to come forward with a proposal at the next Committee meeting.

At the conclusion of the meeting, the Subcommittees were asked to prepare a written report providing an overview of the work to date, future direction of each Subcommittee, and any recommendations the Subcommittee would like to make to the NAFTA Free Trade Commission.

## **12<sup>th</sup> Meeting**

*October 31-November 1, 2002, Quebec City, Quebec, Canada*

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The meeting commenced with a presentation by the Quebec National and International Commercial Arbitration Centre, including a presentation of the Centre's new international arbitration rules.

The Committee received a presentation on the Mediation Project (*Proyecto para la Mediación en México*)<sup>14</sup> commenced in Mexico to build mediation capacity there with the support of a large number of the Mexican constituent states, the Mexican Supreme Court, the Mexican Bar, the Mexican National Chamber of Commerce (CANACO), the U.S. Agency for International Development (USAID) and the ABA. This was seen as a considerable advance with respect to the development of alternative forms of ADR in the NAFTA region.

The Committee received updates from the Government Co-Chairs on the World Trade Organization (WTO) Doha Round Negotiations (including negotiations on the Dispute Settlement Understanding and related issues), the FTAA negotiations (where dispute settlement provisions similar to the WTO dispute settlement mechanisms and NAFTA Chapter 20 were under consideration), and the Hague Conference on Private International Law (in particular, the negotiation of the Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters).

Committee members that participated in the UNCITRAL WG updated the Committee on some of the current issues including inconsistencies in the interpretation of the provisions of the New York Convention with respect to written arbitration agreements and potential amendment of the UNCITRAL Model Law to address this and/or to issue interpretative declarations. It was advised that interim measures (for relief, interim orders and jurisdiction) would be the subject of future meetings. The Committee also received a report from members on the UNCITRAL Model

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<sup>14</sup> [www.mediacionenmexico.org](http://www.mediacionenmexico.org).

Law on Conciliation detailing some of the issues under consideration in connection with the finalization thereof, and issues with respect to adoption of this Model Law in the NAFTA region.

Canada made a presentation on some of the key aspects of a possible Committee website including disclaimers, an updated version of the Committee's ADR brochure, and possible links/chatroom for the Committee.

Subcommittee III (Communication/Outreach) reported on the progress on the Committee website. It advised that it planned to focus more outreach programs on small businesses and small law firms. Further to the Government of Canada's presentation on the website to be hosted by the NAFTA Secretariat, the Subcommittee agreed to work on the substantive aspects of the website and to interface with the webmaster.

Subcommittee IV (Legal Issues) reported on four areas of interest to the Subcommittee — namely, the Uniform Arbitration Act, a Code of Ethics for arbitrators, an inventory of cases, and a project for training judges. The Subcommittee advised that while it had considered undertaking a compilation of existing international arbitration case law in the three countries, it had determined that it was more important that it allocate its time to providing updates on current ADR developments at each meeting. The Subcommittee asked the Committee to consider whether such updates could be posted on the website, once functional. The Subcommittee suggested that it might be opportune for the Committee to use the next meeting in Mexico as an opportunity for outreach and judicial training.

Subcommittee V (Dispute Avoidance and Other Forms of ADR) reported that it would continue to work on a recommendation from the Committee to be presented to the NAFTA Commission on the implementation of the UNCITRAL Model Law on Conciliation in each NAFTA country. The Subcommittee recommended that at a future meeting the Committee focus on dispute avoidance and also proposed holding a workshop session on inter-cultural communication.

Subcommittee VII (Resolution of Small or Simple Disputes) advised that it was continuing with its work on compiling a list of available providers of electronic-ADR. The proposed ADR pilot program was discussed further with discussion focusing on *pro bono* participation, ownership, and software licensing concerns. The possibility of Committee endorsement was postponed pending additional information.

A half-day outreach program was hosted by the Committee in the context of the Committee meeting. Programs included: Structuring Cross-Border Transactions in the NAFTA Region, Planning Efficient Dispute Resolution Mechanisms for Private Commercial Disputes, a Business Perspective on the Use of ADR, and Recent Developments in International Arbitration Law in each of the NAFTA countries.

## **13<sup>th</sup> Meeting**

*September 25-26, 2003, Oaxaca, Oaxaca, Mexico*

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The meeting commenced with reports from the Government Co-Chairs on dispute settlement negotiations. Canada reported that progress in the Dispute Settlement Understanding (DSU) negotiations at the WTO had been limited. Mexico reported that with respect to the FTAA negotiations, as previously reported, the dispute settlement provisions were likely to be similar to the WTO or NAFTA provisions.

The United States reported that negotiations at the Hague Conference on Private International Law on a proposed Convention on Jurisdiction and Recognition and Enforcement of Judgments were facing insurmountable problems because of different jurisdictional rules.

The Committee was advised that steps had been taken to include potential business-to-business dispute resolution, which was supported by the International Chamber of Commerce (ICC).

These reports were followed by updates on current legal developments in each country by Committee members.

Canada also reported that its Supreme Court had reviewed a case dealing with Model Law-type issues; the Court determined that unless there is a clear statement of intent in the law that certain matters are excluded from arbitration, then all matters are open to arbitration.

A Mexican member reported on arbitration developments in Mexico, including a case in which the Supreme Court was reviewing the enforceability of arbitration clauses, and was expected to uphold them. The Committee was advised that arbitration and mediation programs to promote centers have been going well, and that the Inter-American Commercial Arbitration Commission (IACAC), ICC, and CAMCA were very active in developing programs. The Committee was advised that the Mediation Project in Mexico, the subject of a special presentation at the Committee's Quebec City meeting (November 2002), was continuing to expand.

A U.S. report was provided on work by the National Conference of Commissioners on Uniform State Laws in developing model laws, including the Revised Uniform Arbitration Act which had been adopted or was under review by States. It was reported that the UNCITRAL Model Law would most likely be incorporated into the Uniform Mediation Act. The topic of class action arbitration in the U.S. legal system was also addressed. The question of ethics in international proceedings was once again highlighted, and it was noted that the IBA, as well as the ABA/AAA, were actively looking to adopt new guidelines including a Code of Conduct.

A report on issues pending in the UNCITRAL WG was presented; issues identified included those relating to the power of arbitral tribunals to establish interim measures, as well as the need to secure agreement on the definition of interim measures.

In light of the prior work of the Committee and, in particular, the work of Subcommittee V, the Committee allocated time to discuss the adoption by UNCITRAL of the Model Law on International Commercial Arbitration in 2002 and the desirability for uniformity in that regard throughout the NAFTA region. The Committee agreed that it would recommend to the NAFTA Trade Ministers for consideration at its meeting in October 2003 a resolution to encourage each of the NAFTA countries to adopt the "UNCITRAL Model Law on International Commercial Conciliation", in order to facilitate the effective resolution of private commercial disputes by establishing a harmonized legal framework within the NAFTA region.

Subcommittee III (Communication/Outreach) reported that with the support of the National Law Center for Inter-American Free Trade (NLCIFT) it had organized three outreach programs. Due to funding constraints, it was decided to focus in the future on trying to participate in and insert outreach programs into already-existing seminars and conferences.

The Committee received a presentation on the Committee website, including an example of what information the site would include, possible links to other sites, and the need to comply with Canadian federal law on privacy protection. The discussion also focused on criteria to be applied with respect to listing of ADR institutions on the website, and third party materials (and appropriate review by Committee members or other subject matter experts prior to posting). It was decided that if no comments from the Committee members had been received by the end of October 2003, the website as presented would be considered approved. The website was anticipated to be operational by May 2004.

Subcommittee IV (Legal Issues) reported that it was focusing on the Code of Ethics and that a guide would be prepared for review for the next meeting. The Subcommittee was informed about the ALI Project on Enforcement of Foreign Judgments and would monitor its progress.

Subcommittee V (Dispute Avoidance and Other Forms of ADR) reported that it was still working on the letter to the NAFTA Free Trade Commission and that an updated draft of the Spanish version of the ADR brochure would be completed. The Subcommittee reiterated its prior recommendation that the Committee dedicate some or all of an upcoming meeting to dispute avoidance.

Subcommittee VII (Resolution of Small or Simple Disputes) reported that it would compile a list of the institutions involved in the resolution of small or simple disputes and any special procedural information. An e-ADR pilot program was presented; the program would create a service for all three countries, assisting small and medium-sized businesses.

In conjunction with the meeting, the Committee met with and received a presentation from local Oaxaca community leaders on the development of arbitration and other forms of ADR. Participants included members of the Mexico City and Oaxaca judiciaries, as well as members of the local bar association, business community, and law school.

## 14<sup>th</sup> Meeting

September 26-28, 2004, Santa Fe, New Mexico, United States

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The meeting commenced with reports from the Government Co-Chairs. The Committee was advised that the Free Trade Commission adopted the Committee's recommendation that each of the NAFTA signatories take appropriate steps to adopt the UNCITRAL Model Law on International Commercial Conciliation.

The United States reported that the Hague Conference on Private International Law was working on an Enforcement of Judgments Convention that would deal with commercial disputes where the parties had decided on a specific forum to resolve disputes. It was anticipated that this would be completed by 2005 and would provide a parallel forum to the New York Convention. The Committee was advised that the United States-Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) had been completed but was not yet in force, and it contained an optional provision for a 2022-type Committee to promote arbitration and other forms of ADR.

It was reported that in the United States the UNCITRAL Model Law on Conciliation had been adopted by all 50 U.S. states and three territories as part of the Uniform Mediation Act.<sup>15</sup> It was also reported that the ALI had prepared a proposed federal statute on the recognition and enforcement of foreign judgments, and that more than 30 states had adopted the Uniform Foreign Money Judgment Recognition Act.

Canada presented a report on NAFTA Chapter 11 developments and noted that progress had been made with respect to transparency in the settlement of disputes and that government filings would be made public. Each of the Government Co-Chairs commented on challenges to various awards.

Mexico provided an update on the FTAA. It reported that texts had been submitted on the specific topics now agreed to be included in the proposed treaty, including dispute resolution.

The Committee received an update on the progress of the Committee website. It was reported that, with the help of the NLCIFT and the Outreach Subcommittee, the development of the Committee website was well underway and that it was anticipated that the website would be operational in all three languages by November 2004. A live demonstration was provided with the support of the NAFTA Secretariat. The Committee provided important feedback to the Subcommittee to assist with the final development of the website.

The Committee benefitted from updates provided by members of each of the NAFTA countries on recent developments in each jurisdiction with respect to arbitration and other forms of ADR.

Subcommittee III (Communication/Outreach) further reported that three ADR educational or outreach programs had been delivered in Calgary (Canada), Monterrey (Mexico),

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<sup>15</sup> <http://www.mediate.com/articles/umafinalstyled.cfm>.

and Vancouver (Canada). The educational programs were designed to promote the use of arbitration and other forms of ADR among small and medium-sized businesses engaged in cross-border business in the NAFTA region.

Subcommittee IV (Legal Issues) presented a draft Code of Ethics for Arbitrators in NAFTA Commercial Disputes that it had developed. It was felt that more research was needed on the comparative aspects of the existing codes of ethics in the three countries. There was concern that sufficient codes existed already and that adding more would only create additional confusion and provide grounds for challenging awards.

Subcommittee V reported that George Mason University had opened a new dispute resolution center and that a possibility existed for the Committee to work with the center. The Subcommittee will continue its work on identifying the different methods of ADR and which type is best in which situation, as well as working on guidance for multi-tiered ADR clauses to avoid awards being challenged.

Subcommittee VI expressed a need for new members and said it was planning to update its small claims report with a study on cost-effective and expeditious methods for resolving small business and consumer disputes.

## **15<sup>th</sup> Meeting**

*October 24-25, 2005, Ottawa, Ontario, Canada*

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A report was presented by the Fruit and Vegetable Dispute Resolution Corporation (DRC) that was created at the initiative of and with the support of the NAFTA 707 Advisory Committee on Private Commercial Disputes Regarding Agricultural Goods. Its purpose is to provide a means to resolve disputes arising in connection with the shipment and sale of agricultural products within the NAFTA region. The Committee was advised that it is a self-sufficient organization that deals with fruit and vegetable receivers and shippers and their disputes. The DRC provides a forum for the resolution of disputes in a timely, effective and enforceable manner, offering a means to avoid litigation and enabling the parties to maintain positive business relationships. DRC is a success story for the use of ADR in the NAFTA region.

The United States reported on the conclusion of the negotiations with respect to the Hague Convention, the scope of which was more limited than anticipated, but was at the stage of consideration for signature and ratification.

An update was provided on the work of the UNCITRAL WG on Arbitration. The focus of the WG continued to be on the enforceability of interim measures of protection and the requirement that an arbitration agreement be in writing. The Committee discussed both aspects, including proposals regarding how to satisfy the writing requirement for an arbitration agreement and whether deletion of this requirement was appropriate.

The Committee then received a number of country-specific reports including a report on current legal developments in the United States: expropriation law, arbitration development, codes of conduct for arbitrators, enforcement of foreign judgments, and the multijurisdictional practice of lawyers.

Mexico reported that it was in the process of adopting the UNCITRAL Model Law on International Commercial Conciliation.

Canada reported on legal developments relating to arbitration and class actions. It noted concerns with class-wide arbitration, and said that class actions in this context were not permitted. Canada noted that U.S. courts had approved class-wide arbitration with procedures intended to offer class action advantages without all of the irritants. The question was raised whether it was legally possible for class-wide arbitration to become a part of the NAFTA region, and whether judicial mediation could play a positive role in the process. The Legal Issues Subcommittee undertook to look at this question and report back to the Committee. Canada also reported on its implementation of the UNCITRAL Model Law on International Commercial Conciliation and said that its Committee members were exploring the best way to implement the Model Law. The Committee also received a presentation on Canada's policy initiative to develop a strategy for national mandatory mediation, particularly in the context of complex environmental claims against the Government.

It was noted that the Committee website became operational in April 2005 but that certain areas still required additional work.

Subcommittee III (Communication/Outreach) provided an update on its initiatives, including an outreach program in Charlotte, North Carolina held in the context of a conference in the transportation industry. A significant accomplishment was the inclusion of an ADR clause in a model Inter-American bill of lading. The Subcommittee intends to continue to develop the website, support targeted outreach initiatives, and include additional substantive materials on the website.

Subcommittee IV (Legal Issues) reported on the Hague Convention and UNCITRAL developments. It undertook to continue to work on a code of conduct with explanatory notes adapting it from the AAA/ABA Code, in lieu of continuing to pursue a mandatory code of conduct. The Subcommittee undertook to conduct further analysis with respect to class action arbitration in the NAFTA region, and analyze the issues relating to the enforcement of awards such as personal jurisdiction, the domestic law defense, and the U.S. doctrine of manifest disregard for the law. It would also consider anti-suit injunctions and their impact on arbitration.

Subcommittee V (Dispute Avoidance and Other Forms of ADR) agreed to undertake research on institutions providing ADR services in the NAFTA region similar to those provided by DRC but in other economic sectors, provide a regular report on legal developments at Committee meetings with respect to mediation and other forms of ADR (other than arbitration), monitor the implementation of the UNCITRAL Model Law on International Commercial Mediation, and continue to examine the usefulness of multi-tiered dispute resolution clauses (the latter in conjunction with Subcommittee VII).

Subcommittee VII (Resolution of Small or Simple Disputes) proposed that it would examine the following: whether domain name dispute resolution would be a suitable area for deciding disputes without hearings for small and simple claims; increased participation of importers and exporters in the work of the DRC and exploring other areas where this model could be adopted; the issue of consolidation of claims; and working closely with the Outreach Subcommittee to identify other economic or industry sectors that would benefit from education on alternative forms of ADR.

There were recommendations to hold Committee meetings every nine months for two full days instead of annually, as this would allow subcommittee meetings to be longer.

## **16<sup>th</sup> Meeting**

*June 22-23, 2006, Morelia, Michoacán, Mexico*

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The meeting commenced with reports from the Government Co-Chairs on recent developments. Government representatives from each country provided updates on NAFTA Chapter 11 cases, negotiations with respect to bilateral investment treaties (“BITs” and claims under BITs), negotiations with respect to free trade agreements (FTAs), and the signing of the CAFTA-DR by the United States. The Committee was also advised that the Hague Convention on Choice of Court Agreements had been concluded and was open for signature.

The Committee received a report from Committee members that participated in the UNCITRAL WG, including information that the WG had completed a draft document on interim measures and preliminary measures, as well as the proposed definition of what would constitute an agreement in writing. Further, the Committee was advised that the WG was recommending that the Treaty on Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention) would be amended to take into consideration changes required as a consequence of the adoption of the UNCITRAL Model Law.

The Committee was then provided with an overview of recent legal developments in each country by members of the Committee.

During the meeting, the Committee also participated in an outreach program with the local bar, including a presentation on local Mexican perceptions on arbitration and recommendations as to how to improve access to and use of arbitration in the region. The Committee also participated in a dialogue with the local judiciary and bar on mediation and arbitration in the State of Michoacán.

Committee reports were received and discussed as follows.

Subcommittee III (Communication/Outreach) reported that the Committee website is fully operational and the Subcommittee will undertake initiatives to increase the use of the website. Additionally, the Subcommittee reported that it will continue its presentations on ADR

programs directed to audiences in the judicial, business and legal communities. Future outreach work over the next term will take place with a greater emphasis on the judiciary in the three countries.

Subcommittee IV (Legal Issues) (i) reported that arguments regarding the ability to arbitrate disputes are not likely to be a significant obstacle to the enforcement of international awards in the NAFTA region (particularly Canada and United States) and that consequently the group felt no need to make any recommendations to the Free Trade Commission in this regard, (ii) suggested that the Committee could play a useful role in private-state dispute issues if the FTC would expand, perhaps by an internal pronouncement, the limitation stated in paragraph 1 of Article 2022 of NAFTA: “between private parties...” such that it could be interpreted to include “and between private investor and states in the NAFTA”, and to assist the resolution of disputes in relation to other matters described elsewhere in the NAFTA, an interpretation that might assist in more efficient resolution of disputes in those subject matters, and (iii) announced that the “Notes on Arbitrator Conduct for Private Commercial Disputes in the NAFTA Region” is now revised, and that particular subject of debate at prior Committee meetings should be endorsed/adopted by the Committee.

Subcommittee V (Dispute Avoidance and Other Forms of ADR) proposed to change the Subcommittee name either to Mediation, Other Forms of ADR and Dispute Avoidance, or to Dispute Management. The Subcommittee advised that it will continue searching for organizations that provide ADR arbitrators in the three countries for specific industries or sectors; currently, the Subcommittee is only aware of DRC which made a presentation at the 2005 Ottawa Committee meeting.

Subcommittee VII (Small and Medium-Sized Businesses) reported that there is a lack of information about small and medium-sized businesses dealing with ADR issues, and thus designed a three-step plan to increase the information regarding and access to ADR. In addition, the Committee received a pilot project presentation on e-ADR services for use by small and medium-sized businesses.

The meeting concluded with a discussion of the draft Report of the Committee to the NAFTA Free Trade Commission.

## **17<sup>th</sup> Meeting**

*March 8-9, 2007, San Juan, Puerto Rico, United States*

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The meeting commenced with reports from the Government Co-Chairs on recent developments. Canada reported on NAFTA Chapter 11 cases and negotiations regarding FTAs and BITs. It was noted that Canada had signed the Washington Convention regarding ICSID and was pursuing ratification. A report was provided on two domestic cases relating to impartiality of the arbitrator and enforceability of consumer arbitration clauses.

Mexico reported on Chapter 11 cases, FTA and BIT negotiations, and developments in the WTO. With regard to legal developments in Mexico, two Supreme Court cases were discussed involving the principle of competence-competence and the scope of *Amparo* review.

The United States also provided updates on Chapter 11 cases, FTAs and BITs. It was reported that the CAFTA-DR was in force with four parties. In the United States, recent developments included federal legislation prohibiting mandatory arbitration with active military personnel in consumer contracts and questions about bankruptcy jurisdiction precedence over the enforcement of arbitration. A report was provided with respect to the status of the Hague Convention on Choice of Court Agreements as well as recent developments in the UNCITRAL WG on Arbitration. Amendments to the UNCITRAL Model Law on Commercial Arbitration had been approved, and revisions to the 1976 UNCITRAL Arbitration Rules were being considered.

The Committee discussed the desirability of restructuring the Subcommittees, and whether it was time for a reassessment of the goals and objectives of the Committee.

Subcommittee III reported on efforts to update and improve the Committee website, including by adding links to other ADR websites to better assist small and medium-sized businesses. The Subcommittee is also continuing to deliver and explore additional outreach programs and connecting with other institutions to promote training in ADR. Committee members were asked to help identify venues and organizations for outreach programs.

Subcommittee IV reported that members were divided on whether to adopt the “Guidance Notes for Arbitrator Conduct” it had developed. Some Committee members believed the notes were useful; others thought they were too complex and that the subject was already covered in other rules and guidelines. The topic was tabled for later discussion. The Subcommittee is also examining the time it takes to enforce arbitration awards as well as case consolidation and class actions.

Subcommittee VII reported that it had updated its report on existing mechanisms to help small businesses settle disputes; this report included the use of e-ADR. It was decided that the Subcommittee would draft a report providing an overview of the issues faced in small claims, for use on the website.

The Outreach Subcommittee, with the assistance of the University of Puerto Rico Law School, the NLCIFT and the local business community, organized several panel presentations. The Outreach Subcommittee provided an overview of the nature and the work of the Committee and basic ADR concepts. The Legal Subcommittee hosted a panel on practical aspects of dispute resolution including the importance of having dispute settlement provisions, and when and how to include an arbitral clause. The Small and Simple Claims Subcommittee provided guidance on small and simple claims and discussed online dispute resolution. The program included participation from members of local interest groups, local law firms, judges, and the Puerto Rico Chamber of Commerce.

With the success of this outreach program, it was suggested that the target for outreach at the next meeting of the Committee could be the issues addressed by Subcommittees V and VII, *i.e.*, dispute avoidance and resolution of small and simple disputes.

## **18<sup>th</sup> Meeting**

*April 17-18, 2008, Vancouver, British Columbia, Canada*

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The meeting commenced with reports of the Government Co-Chairs who each, in turn, addressed current NAFTA Chapter 11 investor-state cases in progress, and provided updates on BITs and FTAs under negotiation/accession, Foreign Investment Protection and Promotion Agreements (FIPAs), as well as current WTO trade disputes.

A report was provided by Committee members on the recent UNCITRAL WG on Arbitration meeting. Matters under consideration at this meeting included the issue of transparency, reforming and providing for expedited service, and adding a procedural section to remove uncertainty. An amendment to the Model Law was proposed to include a simpler set of rules for small claims.

The Committee received an update from the U.S. Government Co-Chair with respect to the status of the Hague Choice of Court Agreements Convention — the subject of prior discussions at Committee meetings. It was anticipated that the United States would sign the Convention soon. It was observed that the Convention would provide a mechanism for the enforcement of awards similar to the New York Convention.

Subcommittee III (Communication/Outreach) provided a presentation and overview of the focus of the Subcommittee's work and mandate. The mandate of the Subcommittee is to promote the use of arbitration and other forms of ADR for the resolution of private/commercial disputes in the three NAFTA countries; it does not wish to duplicate what is already being done by other public and private sectors organizations. This is accomplished by identifying different audiences and constituencies, typically small and medium-sized businesses that otherwise do not have access or exposure to education or familiarity with arbitration and other forms of ADR in the context of cross-border NAFTA trade. Frequently, the Subcommittee provides a program in the context of an already-planned business or industry conference. Included in the presentation was an update on the use of the Committee website which has been in existence for three years, and has had more than 15,000 "hits".

Subcommittee IV (Legal Issues) provided the Committee with an update on legal developments in each of the NAFTA countries specific to arbitration and other forms of ADR.

In 2007, the Free Trade Commission instructed its officials to review the mandates of the NAFTA working groups and Committees. It asked that working groups identify potential improvements and ensure that the NAFTA work programs reflect current realities and challenges. Consistent therewith during the course of the meeting, the Committee allocated time to discuss, as a Committee, its mandate, vision and future work. This led to a decision to re-

organize the Subcommittees. The Communication/Outreach Subcommittee would continue with 3 Co-Chairs (one from each NAFTA country). In recognition of the overlapping mandates and legal issues of common concern to each Subcommittee, the balance of the Subcommittees were consolidated into one Subcommittee, namely the Legal Issues Subcommittee with 3 Co-Chairs (one from each NAFTA country). This Subcommittee was further organized to allow members to concentrate on the areas of Mediation, Arbitration, and the Prevention of Disputes.

During the discussion, a number of areas of concern were identified by the private sector Committee members. These included a recognition of the excellent Committee talent (academics, private practitioners and members of the business community), the lack of resources provided by the Governments to support the work of the Committee, a desire on the part of the Committee members to have an opportunity to meet with the Free Trade Commission to engage in a broader dialogue regarding trade and private sector dispute resolution, the need for continued administrative support for the work of the Committee, the possibility of video-conference meetings between “in person” meetings, and the need for the Committee to focus some of its work on identifying means for the reduction of costs associated with private sector dispute resolution. It was agreed that further discussion and work was warranted by the Committee to properly establish its future direction and mandate, taking into consideration the prior work of the Committee, the increased awareness of ADR in certain parts of the business community, the role of the judiciary with respect to arbitration and other forms of ADR, changes in domestic and international law, and the changing economic landscape.

In conjunction with the meeting of the Outreach Committee, and with the support of other Committee members, an outreach program was arranged with the local business community entitled, “Doing Business Better Across Borders: Proactive Strategies”. The intent of the program was to focus on dispute prevention and avoidance through better understanding of issues that can affect the business success of cross-border trade and investment and the role of arbitration and other forms of ADR therein. Three panel discussions were held as follows: “Cross Border Challenges: Business Perspectives with an Extractive Industry’s Focus”, “Building Effective Business Relationships” (viewed through the lenses of culture, sustainability and indigenous relations), and “Preserving the Business Relationship: Implementing the Transaction and Anticipating Differences”.

## **19<sup>th</sup> Meeting**

*September 11-14, 2009, Querétaro, Querétaro, Mexico*

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The Committee website was updated with minutes from previous meetings and information concerning NAFTA country institutions on arbitration and mediation.

Mexico reported that the knowledge and practice of mediation has been increasing on a gradual basis in Mexico. There is no federal mediation legislation, but legislation based upon UNCITRAL has been introduced in the Mexican Congress. Furthermore, certain laws in Mexico have been amended to use arbitration only in resolving disputes in contract execution or interpretation.

The United States reported that arbitration law in the United States may be amended through the Arbitration Fairness Act of 2009. This proposed legislation would ban “forced” arbitration clauses in employment, franchise, and consumer disputes, or disputes arising under any statute to protect civil rights. In response hereto, the AAA stopped accepting consumer debt collection cases, and the Bank of America, pursuant to a new policy, stopped requiring customers to resolve disputes via “forced” arbitration.

The United States Supreme Court held that provisions requiring union members to arbitrate claims arising under the Age Discrimination in Employment Act of 1967 were enforceable because the clause was negotiated in good faith and the language is clear. The manifest disregard doctrine is still being upheld as a viable defense by many courts. There is a split between legal authorities regarding the use of pre-hearing discovery in arbitration. 28 U.S.C. section 1782 states that federal courts can compel persons to provide/produce testimony for use in a foreign or international tribunal that may include international arbitration tribunals. It remains to be seen if district courts accept this interpretation.

Canada reported on case law regarding arbitration related to the following topics: enforcement of arbitration agreements, recognition and enforcement of arbitration awards, court intervention during arbitral proceedings, judicial review of the arbitrator’s jurisdictional rulings, and confidentiality. It was also observed that information pertaining to disputes heard in Canadian courts is a matter of public record (except for information that is not disclosed per a confidentiality order).

In response to the increase of Internet usage and information technologies worldwide, the Committee reported on possible mechanisms for online dispute resolution in the NAFTA area. Latin American progress in this area was cited. Specifically, in Mexico, online conciliations are possible and the *Centro de Arbitraje de México* (CAM) has several online dispute resolution projects. Benefits of online dispute resolution include: costs are lower than in traditional proceedings, websites are usually confidential and secure, parties in the proceeding have access to relevant documents online (including evidence), and judgments tend to be shorter and more concise than traditional proceedings.

The Legal Issues Subcommittee indicated that it would take on the following projects: (i) a 15-year retrospective of the “History of the NAFTA 2022 Committee,” (ii) continued annual reporting of developments in ADR in each NAFTA country, (iii) production of judicial educational programs in collaboration with the Outreach Subcommittee, and (iv) other projects as requested or determined.

The Outreach Subcommittee will continue to enhance the Committee website and organize and deliver outreach programs, particularly to small and medium-sized businesses. The Subcommittee noted its goals of having a minimum of three outreach workshops per year, with at least one workshop in each country. It will also plan an outreach program for the next Committee meeting in Houston.

There was also a roundtable with the *Asociación Nacional de Abogados de Empresa* (ANADE), during which various ADR-related topics were discussed, including ADR methods and mechanisms, and the advantages and disadvantages of litigation, arbitration and mediation. Lastly, a presentation regarding arbitration practices in the State of Querétaro was delivered. It was noted that while arbitration was available locally, not all matters could be settled through arbitration (*e.g.*, marital status). An arbitration award must be signed by all arbitrators for it to be binding and valid.

## **20th Meeting**

*June 14-15, 2010, Houston, Texas, United States*

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With respect to legal developments in Mexico in the last year, Mexico reported two ADR laws were enacted in Mexico in 2009 — in the states of Chiapas and Yucatán. The laws enable settlements via mediation to be formalized once an Alternative Justice Center has ratified them. Twenty-two states in Mexico now have a mediation law or an ADR law. However, adoption of the UNCITRAL Model Law of International Commercial Conciliation is still pending in Mexico.

The scope of arbitration has been restricted via legislation in acquisitions, leases and services related to the public sector, as well as in the law on public works and related services. There have been further proposed amendments to arbitration provisions that will bolster arbitration in Mexico.

The United States reported that there have been no major legislative changes. It was observed that certain ADR institutions have been very active during the prior year. For example, the International Institute for Conflict Prevention and Resolution (CPR) has completed the following projects: global accelerated arbitration rules, a disclosure protocol, and a damages protocol. It is also completing a project for dispositive motions in arbitrations. The first three completed projects can be found at [www.cpradr.org](http://www.cpradr.org).

It was noted that the AAA had a record year in 2009 with a total of 836 international arbitration cases. In mediation, however, out of a total of 2110 cases, only 70 were international. The AAA's International Centre for Dispute Resolution (ICDR) concurrent mediation/arbitration clause was identified as becoming increasingly popular and is utilized in various parts of the world.

Regarding investor dispute issues, it was noted that a four-part test had been developed for the definition of investment pursuant to the *Salini v. Jordan* case. It was noted that the Fairness in Arbitration Act could have serious repercussions for international arbitration because of its wording. The need to protect arbitration, both domestically and internationally, was identified. Lastly, two developments were mentioned regarding U.S. law on international commercial arbitration: 1) the ALI project on International Arbitration which focuses on the enforcement of awards; and 2) the ABA efforts to address potential reform and issues affecting the ethics of lawyers in light of technological developments as well as the globalization of the legal profession (the ABA Commission on Ethics 20/20).

Progress in online dispute resolution (or ODR) was reported. Specifically, a colloquium was held in Vienna, hosted by UNCITRAL, regarding ODR. The colloquium was considered a success, and the possibility of a pilot project regarding business-to-consumer and business-to-business issues may be discussed in the next UNCITRAL meeting.

The Legal Issues Subcommittee reported that it wished to involve other Committee members in some of its projects, particularly the current development reports. Second, the 15-year retrospective was discussed and it was decided that it should address in summary form the work the Committee has accomplished to date and what it hopes to undertake in the future. Finally, the Subcommittee will continue to collaborate with the Outreach Subcommittee, particularly with regard to judicial outreach, and will assess the effectiveness of the Committee website, and production of current development reports.

The Outreach Subcommittee reported that the Committee website has seen increased traffic in the past year. The Subcommittee also provided a questionnaire for the entire Committee to assist in identifying and developing future outreach opportunities. An update was provided on the possibility of judicial outreach programs in Reno, Nevada and Montreal, Quebec. The Committee was provided with an update on a successful judicial outreach program in Mexico City. Finally, it was observed that the outreach activities section of the Committee website will be updated, as well as the section on information on arbitral institutions.

Lastly, it was agreed that the Committee should make additional recommendations to the Free Trade Commission. It was observed that the lack of resources limits the effectiveness of the Committee and that it was desirable to draw this to the attention of the FTC. Progress in ODR was identified as an important area to promote and recommend to the FTC. Identifying the FTC's goals and aligning the Committee's efforts with these goals was prioritized. Judicial training programs were also emphasized — specifically, providing substance for the judicial training programs. It was agreed that there is substantial useful information available that would assist with such training.

## **IV. Special Projects and Accomplishments Summary**

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### **A. Legal Issues/Developments Assessments**

A regular function of the Committee, and the primary focus of the Legal Issues Subcommittee, is the assessment of NAFTA country and international legal developments that do or might impact the dispute-settlement processes involving commercial transactions, especially with respect to how they might affect, hinder, or enhance trade among the NAFTA countries. At each meeting of the Committee, members from the member countries highlight and discuss such major developments and their implications. These are frequently summarized in the minutes of each meeting and, more recently, members have prepared written reports that are published on the Committee website. These reports and the discussions that ensue often are the basis for follow-up projects, future programs and other initiatives.

By way of recognition of the essential role each country's judiciary plays in promoting and supporting ADR and the regular assessment of cases and legislation in the ADR area, the Committee identified judicial education as an important focus of its work. Thus, in conjunction with the Outreach Subcommittee, the Legal Issues Subcommittee is working to prepare a curriculum for short courses in each of the member countries to inform judiciaries about the ways in which they can support and appropriately supervise ADR activity.

### **B. Conferences/Local Programs**

In conjunction with a Mexico City meeting of arbitrators in 1999, the Committee, with the support and assistance of the U.S.-Mexico Conflict Resolution Center and USAID, organized a conference on Alternative Dispute Resolution for judges and businesses, which was held in Mexico City in June 1999. This Conference gathered in excess of 350 people, including over 120 Mexican judges, as well as U.S. and Canadian judges, business people, government officials and private lawyers representing the three NAFTA countries.

As indicated below with respect to the discussion of "Outreach", the Committee has been engaged in extensive efforts to deliver local programs regarding ADR.

### **C. Committee Website**

The Committee website ([www.nafta-adr.org](http://www.nafta-adr.org)) has been operational for 7 years with over 20,000 visits, 4,000 of which were in the first year. The Committee website is hosted by the NAFTA Secretariat, and its webmasters work closely with the NLCIFT to enhance and update the website. The NAFTA Secretariat, headquartered in Ottawa and comprised of a Canadian Section, a Mexican Section, and a United States Section, is responsible for the administration of the

dispute settlement provisions of the North American Free Trade Agreement (NAFTA). This Secretariat website is a joint collaborative endeavor of the three national sections. It contains information on dispute settlement proceedings, legal texts and panel decisions and reports regarding the NAFTA.

Included in the NAFTA Secretariat website are decisions and reports regarding Dispute Settlement, as well as legal texts, including the NAFTA, Rules of Procedure, Code of Conduct, and Procedural Forms. A link also provides background information on the NAFTA Secretariat. The Committee website is located within the Alternative Dispute Resolution section, and provides a guide to private sector arbitration and other forms of ADR, information on the mandate of the Committee, minutes of the 2022 Committee meetings, and practical information on dispute resolution.

The following is the current (as of November 2010) Table of Contents for the Committee website:

### **Private Dispute Resolution in the NAFTA Region**

- Overview
- Guide to Private Sector Dispute Resolution
- Advisory Committee on Private Commercial Disputes
  - Terms of Reference
    - Mandate
    - Membership
      - Current Committee Members
    - Agenda for Committee Meetings
    - Meetings of the Committee
    - Coordination with Article 707 Committee
  - Past and Current Sub-Committees
    - Recent Outreach Activities
  - Committee Reports
    - 1996 Report
  - Member Reports
    - Guidance Notes on Arbitrator Conduct for Private Commercial Disputes in the NAFTA Region
    - 2010 Reports on Current Developments
      - Canada
      - Mexico
      - United States
    - 2009 Reports on Current Developments
      - Canada
      - Mexico
      - United States
  - Annual Meetings
    - Minutes of Committee Meetings

- Meeting Materials
      - 2010 Meeting Materials (Houston)
- Methods of Private Dispute Resolution
  - ADR Mechanisms
    - Mediation
    - Arbitration
- Model ADR Clauses
  - Mediation
  - Arbitration
- Arbitration Clause Checklist
  - Arbitration Rules
  - Place of Arbitration
  - Applicable Law/Choice of Legal Regime
  - Composition of the Arbitral Tribunal
  - Language
  - Additional Matters
    - Discovery and Production of Documents
    - Interim Relief
    - Consolidation
    - Relief to be Granted
    - Time Limitations
    - Costs and Expenses
- Principal Arbitration Institutions
  - Canada
  - Mexico
  - United States
  - Multinational
  - Special Focus - Food Producers
- Selecting an Appropriate Arbitration Institution
  - History and Experience
  - Method of Selecting Arbitrators
  - Conduct of the Arbitral Proceeding
  - Cost
  - Services Offered by the Institution
- Public Inquiries
- Notice / Disclaimer

#### **D. Reports to the Free Trade Commission**

Over the course of its fifteen years, the Committee has made a number of recommendations to the Free Trade Commission, pursuant to its mandate contained in NAFTA Article 2022 (*see* Discussion of 2022 Annual Meetings, *supra*). The Committee is committed to continuing to update and engage the FTC, when appropriate, with respect to its work and issues of concern involving ADR in, between, and among the NAFTA countries.

## **E. Outreach Efforts**

### **▪ Role of Outreach Subcommittee**

One of the roles of the Committee is to educate constituencies in NAFTA countries about the benefits and challenges of ADR, especially as these arise in the context of transnational transactions between and among private sector participants in NAFTA countries. The Outreach Committee, which is vested with this responsibility, works in close collaboration with all members of the Committee to effectively deliver education and training programs on ADR in the NAFTA countries.

It is an ongoing process for business representatives, lawyers, and judges to learn about the advantages of arbitration/mediation and to become familiar with these mechanisms.. Many contracts follow a standard form which does not necessarily address ADR or anticipate problems that may arise specifically as a result of the international nature of the transactions. Likewise, many contracts are negotiated by businesses themselves; and small and medium-sized businesses, as well as in-house lawyers, may not be familiar with ADR mechanisms, or may only be familiar with ADR in the domestic (rather than international) context.

Consistent with the Committee's mandate under the NAFTA, the Committee has determined that the business community needs to be aware of the advantages and disadvantages of ADR. It is particularly useful to highlight the use of ADR for specific industry sectors and/or business associations and to tailor the use of arbitration and mediation to the particular needs of their members.

Education constitutes an important part of the Committee's outreach efforts. The Committee has undertaken a number of outreach activities in conjunction with its regularly-scheduled meetings, including panel presentations or meetings with the business community, legal practitioners, and/or members of the judiciary in conjunction with Committee meetings held in Montreal (September 1997), Miami (March 1998), San Francisco (November 1999), Calgary (June 2000), Denver (January 2002), Oaxaca (September 2003), Santa Fe (September 2004), Ottawa (October 2005), Morelia (June 2006), San Juan, Puerto Rico (March 2007), Vancouver (April 2008), Queretaro (September 2009), and Houston (June 2010). In conjunction with a Mexico City meeting, the Committee with the support and assistance of the U.S.-Mexico Conflict Resolution Center and USAID organized a conference on Alternative Dispute Resolution for judges and businesses, which was held in Mexico City in June of 1999. This Conference gathered in excess of 350 people, including over 120 Mexican judges, as well as U.S. and Canadian judges, business people, government officials and private lawyers representing the three NAFTA countries.

Since 2003, the Committee has been working with the NLCIFT to provide additional opportunities for businesses (and their lawyers) to learn more about how they can benefit from the use of ADR in their operations.

- **Annual Summary of Outreach (2003-2010)**

### **2003**

As part of these efforts, the Committee and the NLCIFT have coordinated panel presentations on ADR in various fora. In these presentations, government and private sector representatives from all three NAFTA countries have addressed the importance and benefits of resorting to ADR mechanisms. The first presentation made by Committee members in this format was held on March 18, 2003 in Washington, D.C. in conjunction with a meeting that focused on capital formation and capacity building in Central America as part of the CAFTA<sup>16</sup> negotiations. The meeting was organized by the U.S. Department of Commerce and the NLCIFT, in conjunction with INCAE (*Instituto Centroamericano de Administración de Empresas* in Costa Rica) and the North-South Center at the University of Miami.

A second presentation was made on March 31 and April 1, 2003 as part of a conference sponsored by Belmont Abbey College and Expide Logistics, in collaboration with the NLCIFT and the Council of Logistics Management's Charlotte Roundtable in Charlotte, N.C. The panel, composed of members of the NAFTA 2022 Committee, addressed members of the transportation industry and discussed the desirability of considering the inclusion of an ADR provision in trade and investment contracts in the NAFTA region and, in particular, in the context of the new NAFTA bill of lading and ADR implications for the transportation industry.

The third presentation was held in Washington, D.C. on September 17, 2003 as part of the Small & Medium Enterprise (SME) Congress of the Americas meeting organized by the U.S. Small Business Administration (SBA), as a sub-program within its National Entrepreneurial Conference & Expo.

### **2004**

Three additional presentations were held in the year 2004, one in Mexico (Monterrey) and two in Canada (Calgary and Vancouver). The presentation in

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<sup>16</sup> The United States-Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) is available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta>.

Monterrey was held in conjunction with an international forum (“Let’s Make NAFTA Competitive”) organized by the Border Trade Alliance (BTA) to discuss various aspects of trade relations in the NAFTA countries, including security, transportation, *maquiladora* operations, challenges for specific sectors (including agricultural producers and automotive manufacturers) and ADR. The two presentations in Canada were part of an outreach program organized by the Canadian Association of Importers and Exporters (IE Canada) to address trade and customs issues.

## **2005**

In 2005, the NAFTA 2022 Committee, with the assistance of the NLCIFT, held two outreach sessions in Mexico City — one in October and one in November.

The first presentation in Mexico City (October 2005) was held in coordination with the Texas-Mexico Bar Association and The University of Texas School of Law, and their program on “Current Legal Developments in U.S.-Mexico Trade and Investment.” The Mexico City presentation continued a trend of ADR outreach to a wide audience (including judges, lawyers, business executives, logistics specialists, import-export specialists, trade association representatives and academics); this particular program attracted both Mexican and U.S. participants representing both the public and private sectors. The audience evidenced a deep understanding and knowledge of some of the legal challenges facing the use of ADR mechanisms vis-à-vis cross-border cases, and panelist presentations were followed by pointed questions by audience members and additional discussions and analysis by panel members. Audience members received a pragmatic presentation of ADR mechanisms (arbitration and mediation), their respective positives and negatives, cost issues, enforcement of judgment issues, etc. Special attention and consideration were paid to the importance of including ADR clauses in cross-border contracts (with attention being drawn to model language included on the Committee website produced by the NLCIFT in collaboration with the 2022 Outreach Subcommittee and which can be tailored to industry specifics) — well before disputes arise.

The second presentation in Mexico City (November 2005) was organized and delivered by the NLCIFT in collaboration with the 2022 Committee, as well as with the World Trade Center (WTC) in Mexico City. Panel presentations were followed by a lively Q&A session where audience members inquired about a number of issues, including the cost of ADR (as contrasted with judicial procedures), the duration of arbitration/mediation procedures, practical aspects related to the enforcement of arbitral awards in Mexico, the role of governments, and the significance of ADR in the framework of U.S./Mexico trade relations.

Information regarding the Committee, including the website and outreach initiatives, was also presented at a May 2005 seminar in Tucson, Arizona (held at the NLCIFT's offices) which focused on U.S.-Mexico cross-border legal issues, developments and updates in the financial, energy and real estate sectors.

## **2006**

A broad ADR presentation was delivered by members of the Committee in June 2006 to legal practitioners as part of a panel on international legal developments organized by the International Law Section of the Arizona Bar Association in Scottsdale, Arizona. This panel presentation highlighted CAFTA developments, the work of the Committee, and its website.

Later in 2006, the NLCIFT participated in a series of meetings, discussions and presentations with members of the academic, legal, and business communities in Guadalajara, Mexico. Laying the groundwork for future outreach sessions by the Committee, presentations were made on ADR, the work of the Committee and the Committee website at the Autonomous University of Guadalajara, the Guadalajara campus of the Tec de Monterrey, and at meetings with representatives of the furniture design, manufacturing, and export sectors.

## **2007**

Following these 2006 meetings, in early 2007 members of the Committee made a presentation at the annual meeting of the North American World Trade Centers in Guadalajara, Mexico — where there was significant representation by WTC's throughout Mexico.

In March 2007, in conjunction with the 17<sup>th</sup> Meeting of the Committee, a one-day event was held at the University of Puerto Rico. This event — which included both outreach sessions by Committee members to the local community as well as presentations by various local interest groups to the Committee — gathered in excess of 100 people, including government officials, judges, business people, private lawyers, academics and students. This venue provided an excellent opportunity for Committee members to share their expertise and practical perspectives on dispute resolution in the NAFTA region and for the local community to analyze the state of ADR law and practice in Puerto Rico, explore the problems and issues to be addressed in the international context, and identify specific business sectors that have an interest in further developing access to ADR.

In June 2007, a panel program was organized by the NLCIFT, with support from members of the Committee, at the annual convention meeting of the Arizona State Bar in Phoenix, Arizona. Key topics included ADR clauses for

cross-border business contracts, considerations for selection of arbitrators, and enforcement of arbitral awards.

To advance the promotion of ADR and conduct ADR outreach among the judiciary in the NAFTA region, the Committee members initiated discussions with The National Judicial College (“NJC”) in Reno, Nevada. The NJC, in its 45th year, provides judicial education and continuing professional development to the judiciary in the United States as well as to judges from other countries. The NJC has an ongoing Dispute Resolution Skills program and is interested in collaborating with the 2022 Committee and NLCIFT on cross-border ADR outreach/education/training for judges – particularly in the context of existing NJC education programs where a Committee outreach program could be inserted as an additional module or component.

## **2008**

In March 2008, an outreach session was organized in conjunction with the Eighteenth Meeting of the Committee in Vancouver, British Columbia. Given that Vancouver is the hub for the Canadian mining/extractive industry, outreach activities focused on that sector and the challenges it faces. The sessions provided an interactive component, by having attendees participate in small group discussions and share their experiences — followed by a plenary session where reporters from each group related the relevant experiences to the whole group. A separate panel also addressed the need to build effective business relationships, and the impact that cultural differences have on creating sustainable business relationships.

In April 2008, the NLCIFT took initial steps to lay the groundwork for launching ADR development and outreach in the CAFTA context, modeled after the NAFTA experience and the efforts of the Committee. In this regard, representatives from the NLCIFT, who are also members of the Committee, met in Honduras with representatives of the Tegucigalpa Chamber of Commerce (*Cámara de Comercio e Industria de Tegucigalpa* – CCIT) and the Cortés Chamber of Commerce (*Cámara de Comercio e Industrias de Cortés*) to discuss a potential program of sectoral ADR in Honduras – which could serve as a model for the CAFTA region.

In October 2008, the Committee delivered a presentation at an international trade forum on “Governments’ and Non-Governmental Organizations’ Efforts to Develop International Trade Opportunities in Arizona.” The trade forum was organized by the State Bar of Arizona International Law Section, and was attended by businesspersons and lawyers primarily from Tucson and Phoenix.

## **2009**

In August 2009, the NLCIFT, in cooperation with Committee members, organized workshops in Mexico City in the area of administration of justice to specifically address the need to diagnose and address institutional concerns and shortcomings with respect to the adjudication of commercial cases by courts of first and second instance in Mexico. One of the workshops included an ADR outreach panel session that targeted the members of the judiciary (judges and court clerks) who were in attendance. Panel presenters included a member of the Committee who analyzed the use of ADR mechanisms in Mexico. This presentation analyzed how ADR mechanisms (including conciliation, mediation and arbitration) are used by various sectors in Mexico — including the construction sector, public works and public procurement, the energy sector and cases pertaining to State-investment disputes. Some of these sectoral dispute resolution mechanisms involve highly technical disputes and pose special challenges vis-à-vis the taking of evidence, as well as fact-intensive proceedings that may at times require judicial assistance and support. Also detailed were the circumstances under which a court's participation should be required — including in matters pertaining to the validity of the arbitral clause, certain (limited) appeals, assistance in evidentiary proceedings, preventive measures, recognition and enforcement of arbitral awards and annulment of arbitral awards. Finally, the presentation indicated a number of issues to be addressed in future reform efforts to encourage the use of ADR mechanisms that could be proposed as a joint and collaborative effort between the ADR community and the judiciary. These included:

- a proposal for the adoption of the UNCITRAL Convention on International Commercial Conciliation;
- additional precision as to the consequences and validity of an agreement reached as a result of mediation;
- increased support for private mediation; and
- reforms to Title IV of Book Five of the Commercial Code.

In September 2009, the Committee also held an outreach session in conjunction with the nineteenth meeting of the Committee in Querétaro (Mexico). The outreach session was organized in collaboration with ANADE (Mexico's National Association of Corporate Lawyers). ANADE was holding its annual training conference in Querétaro, and part of its activities included a roundtable session (held on September 14, 2009) with Committee members to discuss topics pertaining to benefits of arbitration and mediation, as well as to the enforcement of arbitral awards in the NAFTA region. Presentations included the following: 1) an overview of ADR in Mexico; 2) the benefits of arbitration and mediation and the enforcement of foreign arbitral awards in the NAFTA region; 3) an overview of ADR in Canada; and 4) recognition and enforcement of arbitral awards in Mexico.

## **2010**

In 2010, the Committee and the NLCIFT continued their outreach to the judiciary. In this connection, members engaged and involved the Mexican judiciary in ADR-related efforts. Consequently, the NLCIFT and members of the Committee have collaborated with the Mexican *Instituto de Estudios Judiciales del Tribunal Superior de Justicia del D.F.* (Institute for Judicial Studies of the Superior Court of Justice of the Federal District – the Institute) and the Center for Alternative Justice (CAJ - also within the Superior Court of Justice) with respect to their efforts to promote private mediation — including a recently instituted program to certify private mediators such that agreements reached by these mediators become enforceable without the need for any court proceedings. The first such certification program undertaken by the Institute and the CAJ began in November 2009 — and approximately 15 mediators have been certified to date.

In May 2010 in Mexico City, members of the Committee, with the support of NLCIFT, met with representatives from the Institute, the CAJ, law faculty and the judiciary for a working session related to ADR in the context of commercial matters. A broad range of ADR issues were discussed.

Also in May 2010 in Mexico City, the Committee organized, under the auspices of the NLCIFT, an ADR program with members of the Mexican judiciary in the context of a larger program on commercial law reform in Mexico and development of model contracts and best practices for the real estate sector. Approximately 140 persons attended this program, including several members of the Mexico City judiciary.

At this May 2010 event, the Committee panelists discussed some recommendations for provisions to be included in an arbitration clause which is part of a written contract between the parties, with special emphasis on international transactions contracts. The Committee panelists also emphasized the importance of inserting in contracts progressive ADR clauses — meaning that the parties must first attempt to resolve their dispute via the initial process/step, which can in many cases be mediation, and then if the parties do not successfully reach an agreement in mediation, they then move to the second step, which would typically entail arbitration.

In June 2010 and in connection with the 20<sup>th</sup> meeting of the Committee in Houston, the NLCIFT and the Committee organized: 1) an outreach session for the judiciary; and 2) an outreach session for lawyers, businesspersons, and members of the academic community.

## V. Future Plans

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The following communiqué, issued by the Free Trade Commission in response to the Committee's recommendation to it in 2009, recognizes the importance of the Committee's work with the judiciary in each member country and its continuing mandate to advance ADR for the resolution of commercial disputes in member countries:

“We recognize that the availability of private commercial dispute resolution procedures plays an important role in creating competitive conditions for trade in goods, services and capital and that the judiciaries of each country have an important role to play in effective private commercial dispute resolution procedures. We are encouraged by the work of the NAFTA 2022 Advisory Committee on Private Commercial Disputes and endorse its intent to focus forthcoming outreach activities on the judiciaries of each country to promote alternative dispute resolution mechanisms in the Free Trade Area.”

Thus, during its first 15 years, the NAFTA 2022 Committee has effectively carried out its fundamental mandate: to promote awareness of and use of ADR in the NAFTA region as a means of enhancing trade and investment. In recent years, the development of the Committee website has expanded the Committee's profile and has provided a platform for further outreach. With this successful background, what should be the future focus of the Committee's efforts? At the 20<sup>th</sup> Meeting of the Committee in Houston in June 2010, a number of ideas were discussed that warrant further discussion by the Committee. Among them:

- 1) Judicial outreach and training: informing judges of the benefits of ADR, how it works, and the relationship to the judicial process.
- 2) Outreach to small and medium-sized businesses: focusing on those sectors that could benefit significantly from ADR but may be relatively unaware of its value or availability.
- 3) Outreach to educational institutions: exploring means of improving contacts between the Committee and law schools.
- 4) Enhancing the content of the Committee website, with a focus on specific legal issues, e.g., enforcement, annulment of awards, and evolving doctrines of the relationship between arbitration and the judicial process.
- 5) Development of new materials related to the Committee's work for dissemination to the public through posting on the website or publication.

- 6) Coordination as appropriate if an analogous committee is established by the parties to the United States-Central America-Dominican Free Trade Agreement (in accordance with Article 20.22 of that agreement).
- 7) Review of the frequency of reporting to the NAFTA Free Trade Commission and exploration of possible coordination with other NAFTA Committees.

At each annual meeting, the Legal Issues and Outreach Subcommittees should map out specific objectives for the coming year. For the Legal Issues Subcommittee, this might be the identification of specific legal trends that warrant further analysis of particular problems that would benefit from further consideration in the NAFTA region or an international forum (e.g. UNCITRAL). The Outreach Subcommittee might identify particular events that seem to be promising vehicles for ADR presentations.

Both Subcommittees would continue to contribute to the development of the Committee website. Reporting to the FTC and possible interaction with other NAFTA committees could make the Committee more visible and help spread the ADR message. The Committee's overarching goals and objectives are: to promote ADR as a dependable and effective method of dispute resolution; and to encourage greater cross-border trade and investment as the economies of the NAFTA countries rebound from the global economic distress of the past couple of years.