

**Eleventh Meeting of the NAFTA Advisory Committee  
on Private Commercial Disputes  
January 28-29, 2002**

The NAFTA Advisory Committee on Private Commercial Disputes (Committee) convened its eleventh meeting on January 28-29, 2002, in Denver, Colorado. The meeting was chaired by Jeff Kovar, Assistant Legal Adviser for Private International Law at the U.S. Department of State, and Kathryn Nickerson, Attorney-Advisor, Office of the General Counsel, U.S. Department of Commerce. The Committee applauded U.S. Committee member Jim Nelson for all of his excellent work in organizing a very successful meeting in Denver.

**I. Work of the Subcommittees**

*Subcommittee III: Outreach*

The Chair of Subcommittee III, Canadian member Selma Lussenburg, explained that most of the Subcommittee's work had focused on the Committee website and updating the Committee brochure on alternative dispute resolution (ADR) in international contracts. At the last meeting in Mexico, Subcommittee III had been tasked by the full Committee to further explore creating the website, which would contain outreach material as well as material that would reflect the broader work of the entire Committee.

Ms. Lussenburg began by asking for a report from the Canadian co-chair, who had been tasked with examining whether the governments could host the website on the NAFTA Secretariat website. The Canadian co-chair confirmed that the Canadian national section, which currently administers the NAFTA Secretariat website, would be able to develop and host a website for the Committee and that it could do so at little cost. The website would not be subject to Canadian language regulations, and the NAFTA Secretariat would not take on any editing role. The U.S. and Mexican co-chairs explained that their NAFTA Secretariat members had been equally supportive. The Canadian delegate said that as the NAFTA deputies are meeting in April, followed by a meeting of the NAFTA Commission in May, a formal website proposal would be needed as soon as possible to obtain final confirmation from the NAFTA Commission at that time. A) /

Ms. Lussenburg then provided a report on Subcommittee III's findings concerning the potential content of the website. Subcommittee III reported that in deciding on content, the Committee should be guided by two key principles. First of all, the group agreed that the website must be basic and simple. The Subcommittee emphasized that the Committee does not want to compete with the multitude of other existing websites, many of which are very good, that focus on ADR. Instead, the website could simply link to other websites. Second, Subcommittee III also agreed that the focus of the website should reflect the Committee's goals and work, and therefore would logically present an introduction to ADR. Other subjects that the website could address are: B) ① ②

- C)
- Lists of ADR organizations and institutions in the NAFTA region. ✓
  - Possible links to and from such institutions and the NAFTA 2022 website. ✓
  - Outreach: The website should provide information that is pragmatic and business friendly, ✓ such as tips on basic ADR questions for smaller companies (e.g. costs and where to begin).
  - NAFTA 2022 Committee Chat Room: the Subcommittee believes that it may be useful for the Committee to have a chat room, whether it would be internal or for a broader audience would need to be determined. ]
  - Reports to Ministers to date. ✓

The Subcommittee was not persuaded at this point that going further than such basics is needed, and that enhancements could be considered once the website is up and running. Then the Committee would decide who would take on the responsibility for updating website material. The U.S. co-chair suggested that it would be very useful for Committee members to also provide specific documents (e.g. summaries of cases relating to ADR developments in Mexico, Canada, U.S. etc.) for placement on the website. Subcommittee members resisted this idea, and argued that the project should be modest at its inception before such summaries or papers would be posted. Concerns were raised about the resources that would be required for updating such documents if posted to the website. There were also questions about whose material the Committee would place on the website other than that of Committee members, and if the Committee did accept materials from outside of its membership, who would assess the quality of such material before its placement on the site.

Ms. Lussenburg admitted that more information would be needed on the technical aspects of developing the website. Jose Maria Abascal raised the question of the website's domain name, but Committee members responded that such issues were premature at this time. The U.S. co-chair brought up whether the website would include "metatags" so that users searching for information on ADR would be able to find the Committee's website. The group agreed that all of these technical issues needed further exploration by the Subcommittee. D)

3 Concerning website disclaimers, Subcommittee III concluded that the website would need at least three: one providing that the NAFTA governments were in no way responsible for the content of the website; another making clear that the material on the website is not intended to constitute legal advice; and, finally, a disclaimer for any third-party materials clarifying that the Committee did not endorse the content of such materials, but that it was provided for informational purposes only. Disclaimer X

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Subcommittee III then reported on the subject of updating the Committee ADR brochure. The Subcommittee had reviewed the brochure and surveyed the entire Committee on the status of its contents. This examination revealed that while the brochure is not inaccurate, it could use expansion, modernization, and website exposure. The Subcommittee also suggested that the brochure undergo a second printing if updated substantially, and that in the meantime a flyer

insert could be included in the existing brochure that would simply provide for an updated list of ADR institutions, particularly their addresses and websites, many of which are now outdated in the current version of the brochure.

#### Subcommittee IV: Legal Issues

The members of Subcommittee IV delivered reports on recent legal developments concerning ADR in the NAFTA region. Mexican member Luis Enrique Graham delivered a report on the enforcement of arbitral awards. Carlos Loperena reported on seminars for judges in Mexico.

U.S. member Bob Lutz provided background on a Code of Ethics for Arbitrators which was originally drafted by the American Bar Association (ABA) in 1977 and is now being updated by the ABA and the American Arbitration Association (AAA). The draft Code engendered much debate among Committee members, primarily concerning the issue of "partisan arbitrators." The draft code dealt with the issue by including a supplementary code acknowledging partisan arbitrators when desired by the parties.

The Committee recognized that partisan arbitrators do exist in certain situations, particularly in healthcare, insurance relationships, labor arrangements, and specific situations in international arbitrations in State-to-State arbitrations (i.e. Iran-US claims tribunal, International Court of Justice), however, they disagreed on how a draft code should address the issue. Some argued that in private commercial law disputes, the general rule has been that partisan arbitrators devalue a particular award, and that the draft code should follow this international trend. Concerns were raised about parties to such disputes having sufficient information about the role of such arbitrators. Others argued that arbitrators should not be subject to separate rules for domestic and international situations. Several members criticized the current draft as it purports to be international, but it only has input from U.S. practitioners. Still others raised concerns about the draft code providing a basis for invalidating arbitral awards, and suggested that the code be renamed either "guidelines" or "a mission statement" for arbitrators.

Mr. Lutz also briefly discussed the Uniform Mediation Act (UMA). He explained that the UMA was adopted by National Conference of Commissioners on Uniform State Law in the Fall 2001, after several years of development. There are questions as to whether the UMA applies to international mediation as well as domestic mediation. The UAA will be further examined by the ABA at its mid-year meeting in Philadelphia.

Canadian member Pierre Bienvenu delivered a report on recent developments in Canadian case law, which he committed to provide to the Committee in a paper. Similarly, U.S. member Doak Bishop highlighted recent developments under U.S. case law.

### Subcommittee V: Dispute Avoidance and other Forms of ADR

Subcommittee V reported that all of the subjects in its Workplan had already been reported upon by other members. It committed to continuing its ongoing work. (See below for Subcommittee V's updated Workplan.)

### Subcommittee VII: Resolution of Small and Simple Disputes

In lieu the traditional Subcommittee report, U.S. member Dana Haviland on behalf of Subcommittee VII gave a presentation on an electronic commerce alternative dispute resolution (E-ADR) "pilot project" for small and simple disputes. The Subcommittee has made substantial progress on developing the pilot project, for which a domain name, "NAFTAdisputes.com" has already been reserved. The website will offer negotiation, arbitration, and mediation services for small and medium size enterprises (SMEs) on-line. The site is comprised of a home page and several "rooms" for different types of dispute resolution which are accessible using a password. The pilot project website will be accessible in all three of the NAFTA country languages. The "welcome page" emphasizes that its focus is on business disputes in NAFTA region. The technology comprising the site is advanced: it would include instant messaging, chat rooms, document storage, and even video-conferencing.

Apparently six arbitration institutions, two from each of the NAFTA countries, have already indicated their desire to participate in the pilot project, although at this stage more could be added or the present ones could be deleted. It was noted that the Mexican Chamber of Commerce may also be interested in participating in the project.

The main theme of the pilot project website is that it should be easy for SMEs to use. It provides instructions on getting started, such as how to contact the other party to the dispute. As constructed at present, the pilot project website contains simple rules, such as: users must voluntarily agree to cooperate in good faith; parties must agree not to publish libelous information or information that would infringe upon the intellectual property of others; negotiations will be confidential; there will be no written record of negotiations, and parties will ask negotiators to delete any existing records after the negotiation is over; settlements cannot be admissible in subsequent ADR proceedings, and no profanity will be permitted during the process.

The pilot project site also contains a confidentiality statement and privacy statement. Concerning the rules for the procedures, the Subcommittee concluded that it needed to discuss whether it would use "off the shelf" rules from participating institutions or make up its own. Whatever choice is ultimately made, Ms. Haviland emphasized that the goal of the pilot project website is to be simple and to use simple rules. (See continued discussion on the pilot project website below during the presentation of Subcommittee VII's future Workplan.)

United Nations Commission on International Trade Law (UNCITRAL) Working Group on Arbitration

Members of Subcommittees IV and V reported to the Committee on UNCITRAL developments, in particular a summary of the Working Group on Arbitration's work and future agenda. The UNCITRAL Working Group met to finalize the draft model law on conciliation and mediation, which is now being sent to governments and international organizations for comments and should be ready by the next plenary for adoption. Jose Maria Abascal expressed his view that the model law is quite good and needs only a few remaining changes. Mr. Abascal reported that the UNCITRAL Working Group is going to meet on March 4-8 to consider enforceability of interim measures and possibly the necessity of a writing requirement, followed in June 17-21 by a general meeting in which it hopes to adopt the draft text on conciliation. The Committee decided to provide comments on the model law by the end of April. Cecil Branson reminded the Committee that he had sent out an e-mail on the writing requirement issue as it was his understanding that it would be discussed at the March meeting, and asked that the members of the Committee consider his request in the e-mails. The U.S. co-chair brought to the attention of the Committee a paper written by Committee members Nancy Oretskin and Luis Miguel Diaz which compares and contrasts the draft UNCITRAL Model law with the U.S. Uniform Mediation Act.

**II. Developments in the Field:**

Free Trade Area of the Americas (FTAA): The Mexican co-chairs prepared a summary one-page document on the status of ADR in the FTAA negotiations. The Mexican co-chair reported that despite the three NAFTA delegations' attempts, very little movement has occurred on ADR in the FTAA Negotiating Group. Moreover, few of the countries involved have submitted their responses to a questionnaire which requested countries to list their basic laws on arbitration. Most countries have submitted the NAFTA text as model text for the FTAA chapter on dispute settlement but the negotiators have not yet reached the discussion of a provision on private sector disputes. The Mexican co-chair noted that it may prove difficult to achieve a similar NAFTA 2022 Committee structure among the 34 FTAA countries.

Draft Hague Convention on Judgments: The U.S. co-chair delivered a short report on the draft Hague Convention on Recognition and Enforcement of Foreign Judgments. The negotiating parties to the draft Hague Convention last met in June 2001 for the first of a two-part diplomatic conference where it expanded the working text of the Convention from the previous 1999 draft. The U.S. co-chair explained that this expansion indicates that there have been many problems with the earlier text, which would generally cover all civil litigation and create required rules of jurisdiction out of which recognition and enforcement would flow. However, the project has been significantly stalled because of problems relating to how to determine jurisdiction in cases involving the Internet (e.g. how to apply jurisdictional rules to transactions that occur on-line) and intellectual property. The current draft text is available on the Hague conference website, at <http://www.hcch.net/e/workprog/jdgm.html> After the June meeting, countries were unable to

agree on a way forward with the second part of the diplomatic conference, so governments have been engaged bilaterally and are scheduled to meet again on April 22-23 in the Hague, where the principal focus will be on how to salvage the project, such as by narrowing the jurisdictional provisions (e.g. by including only choice of forum clauses in business contracts, like the New York Convention).

Mexican Committee member Carlos Loperena raised questions such as whether bilateralization and corruption were still relevant issues in the negotiations. The U.S. co-chair explained that those same issues still posed problems, which could be avoided if the parties decided to go forward with a Convention that only covered choice of forum clauses in international business contracts. Mr. Loperena stated that Mexico had implemented the Inter-American Judgments Convention, whereas the U.S. had not even ratified it. He said that other countries do not have problems getting their judgments recognized and enforced in Mexico. Canadian member Jeffrey Talpis reminded the Committee that there was a proposal to make amendments to the exclusion of arbitration provision in the draft text, and that the Committee needed to monitor future developments.

NAFTA Chapter 11 Cases: The Canadian co-chair presented a brief factual overview of developments concerning NAFTA Chapter 11 cases. Doak Bishop also presented his paper on the subject, which summarizes the NAFTA Chapter 11 cases to date.

### **III. Denver Outreach Efforts**

#### Luncheon Address

Former mayor of Denver and Secretary of U.S. Departments of Energy and Transportation Federico Pena addressed the Committee on international trade issues during the luncheon. Mr. Pena stressed the importance of the Committee's work, and emphasized that public-private partnerships were key to development in the region. He praised free trade generally and advocated on behalf of passing Trade Promotion Authority (TPA). Committee members asked him questions about E-ADR, which in his opinion would be a crucial development in Internet business.

#### Panels on Avoiding and Managing Dispute Resolution in the NAFTA Countries

The Committee agenda included an afternoon outreach session composed of two panels who delivered presentations on "Avoiding and Managing Dispute Resolution in NAFTA Countries." The local audience invited to the outreach session included members of the American Corporate Counsel Association, International Section of the Colorado Bar Association, and the Rocky Mountain World Trade Center.

### **IV. Future Work**

### Future Work

On the second day of the meeting, the U.S. co-chair asked that each of the Subcommittees to leave a written workplan with the governments before the end of the meeting. He then informed the Committee that it was time they submitted a written report of their work to the NAFTA Commission. He tasked each subcommittee with composing a short report, of 1-2 pages maximum, consisting of three parts: 1) a brief overview of the work the subcommittee has done to date; 2) a brief description of the future direction of the subcommittee; and, 3) any recommendations that the subcommittee would like to make to the NAFTA Commission. He asked that the subcommittees, working through their chairs, send the report by February 15 to the government representatives, and then the governments would put all of the reports together in a package and send them back out to the Committee by March 1<sup>st</sup>. Then the Committee would send comments back by March 8, after which time the government representatives would try to have a finished product by March 15. The government representatives will summarize the overarching Committee issues in an introduction as well as put in something about subcommittees that have finished their work.

The Subcommittees then submitted their Workplans, which are described in chronological order below.

### Workplan for Subcommittee III:

→ Website: Selma Lussenburg distributed a draft workplan and outline for the website page. The workplan focused on the website and developing its content. The Subcommittee will work with the Canadian government webmaster to understand what restrictions will be placed upon the site, and to get the technical perspective necessary to get the site up and running. The Subcommittee committed to having a conference call with the webmaster within the first two weeks of February. The Subcommittee will then prepare an outline for the Commission proposal to be submitted by government co-chairs. The Subcommittee will try to get a draft to the government co-chairs by early March for their initial review and then a revised version by mid-March. The Subcommittee said that it will also draft disclaimers, and asked the Committee to send examples. The Subcommittee chair explained that the Committee will also need to discuss what other websites should potentially be linked to the site.

→ Brochure: According to the Subcommittee's findings, the brochures needs to be rewritten and updated. The Subcommittee may solicit more comments from other parts of the Committee and will circulate a draft to the whole Committee for comment. The Subcommittee also suggested that the Committee determine whether the brochure should be a paper-based document. As there

is information in the booklet that is incorrect, the Subcommittee suggested a slipsheet to put in the remaining brochures, and that the website be updated. The Subcommittee hopes to achieve

this by the end of February.

Workplan for Subcommittee IV:

Doak Bishop, the Chair of Subcommittee IV said that it has eight items on its Workplan:

--Bob Lutz will take the ABA/AAA code of ethics draft, delete the references to partisan arbitrators and codes of conduct, and from that will develop a set of guidelines for arbitrator ethics for Committee discussion at the next meeting.

--Carlos Loperena and Doak Bishop will do a report on enforcement of judgments and particularly, on amparo actions.

--Bob Lutz will continue to report on the status of the Uniform Mediation Act.

--The Subcommittee will ask its member Carolyn Lamm to report on the status of the Uniform Arbitration Act.

--Canadian member Cecil Branson will continue to work on the UNCITRAL Working Group and report back to the Committee.

--Mexican member Luis Enrique Graham will develop a list on selected noncontroversial issues for the Committee to summarize and hand out as an education tool.

--The Subcommittee will also do an inventory of international arbitration legal issues in the courts of each of the NAFTA countries.

Workplan for Subcommittee V:

Jeffrey Talpis reported on behalf of the Subcommittee, explaining that the workplan is ongoing and not yet finalized, but at this stage includes:

--Mediation: the Subcommittee will prepare a note on the adoption and implementation of the UNCITRAL model law.

--The Subcommittee would like to examine and explore the role of culture in mediation and in prevention of disputes

--The Subcommittee would like to prepare a status report on the enforceability of agreements to mediate and negotiate and mandatory mediation.

--The Subcommittee would like to explore how methods other than arbitration and mediation could function to resolve disputes crossborder.

--Concerning preventive law and mediation issues: in order to recommend and promote measures to prevent international disputes, the Subcommittee proposes to obtain an empirical study on international disputes and how they arise. This research will include disputes litigated, arbitrated or mediated by lawyers or parties or otherwise. This research will also enable the

subcommittee to discuss at a future time when each method of ADR is appropriate. This is a major task and the Subcommittee needs to explore some way to do this: it is contemplating some grants or some other measures for funding. (Kathleen Kelly suggested Hewlitt foundation.)



Workplan of Subcommittee VII:

Scott Donahey made an announcement about the Internet Corporation for Assigned Names and Numbers Uniform Domain Name Dispute Resolution Policy (ICANN UDRP). Their charge was to develop a policy for disputes for registered domain names and has now produced many decisions on such cases. There is a task force studying the policy and the rules, and a questionnaire is available at [www.icann.org](http://www.icann.org) that Mr. Donahey suggested Committee members respond to.

Subcommittee VII discussed its Workplan which focused in large part on its pilot project website. Dana Haviland noted that many questions had been raised by government co-chairs in various conversations with her about what kind of relationship the Committee should have with the project. She suggested that the Committee members could:

- Act as a "neutral" in mediation or arbitration, or refer someone else who may be interested.
- Promote the pilot project. Ms. Haviland said that the government has valid concerns about the Committee sponsoring the pilot project, particularly since the company that has offered the technology for the site Online Dispute Resolution, Inc. (ODR) is a commercial company. But she explained that there are a number of E-ADR initiatives already out there that may also want sponsorship. One possible solution is that this project could be made into a nonprofit one.
- The Committee could have a lot of contacts that would be helpful in spreading the word about the pilot project. She repeated some of the good points raised by Mr. Abascal during breakfast with the government representatives: even if the Committee couldn't "sponsor" the project, it could provide information about the project to the outside world.
- Similarly if the Committee wants to make references to other initiatives going on, that would be fine too (but this is a new trend, so there may not be others out there).

To use technology requires capital and money to keep it going. Ms. Haviland noted that although the governments think that the effort is an excellent project on the merits, they do have valid concerns. Her subcommittee would like to solve them and believes it's possible to do so. She stated that the Subcommittee needs to caucus and determine if there's an alternative workplan related to the pilot project.

Scott Donahey suggested that one other use of the project would be for the Subcommittee to explore whether the lack of body language or other methods that are left unsaid in writings would cause a difference in the outcome of ADR cases in the on-line world. There is no research on this issue, and such a tool would be helpful to see what works and what is counterproductive.

U.S. member Philip Robbins stated that the project is potentially one of the most valuable things the Committee has done or may ever do. Although he understands the governments' concerns with sponsorship, he wondered whether there was some way we could alleviate concerns and allow this to go forward. The Committee has no budget, and unless we find some way to team

with Dana Haviland to make it happen, it won't.

Canadian member David Haigh concurred, as did U.S. member Dana Nahlen. Mr. Haigh said the effort is to be highly commended and shouldn't be squelched even though these are legitimate concerns. Luis Miguel Diaz recognized that although government concerns are valid the Committee needed to find a way to promote such a pilot project. Mr. Abascal mentioned that the Committee has produced things, like the mediation agreement, because it thought it was needed to do something that didn't exist. He sees this project as more or less the same thing. There is nothing for on-line dispute resolution for SMEs, and so the work is similar. He suggested that the Committee should do this and use the knowledge and resources that it has. This pilot project could be put in the website as a resource. If there are others that exist, then the Committee could post those too. That way we can do something to promote ADR, which is the mandate of the Committee.

Selma Lussenburg said she didn't understand that this pilot project would be an exclusive relationship. She said that she didn't understand all of the concerns because if someone else comes to the Committee with the same sort of thing and the Committee would be comfortable with what they're doing, then the Committee could identify them to the extent it was aware of them. Committee participation is not the same thing as mandating its use, but the Committee here is just doing a pilot project that reflects the Committee's work in the new century. One of the Committee's abilities is to make an assessment of looking at legal developments, and it has recognized a need for SMEs. The perception of barriers precludes SMEs from doing business because they are afraid of the justice system in the other country. So the small businessman is not a sophisticated trader - and he or she won't do the deal if too costly to enforce. Legal regimes that are not receptive to enforcement are barriers to international trade. Using internet access dovetails exactly into that and the Committee shouldn't be concerned about endorsing it. It's just like mentioning an arbitral institution.

The U.S. co-chair agreed with many of the points raised. He said that the more specific question is what the Committee should do with the project. The governments do not intend to squash it, in fact just the opposite. He said that the governments think the presentation was inspiring and did everything the Committee would want it to. It is the future and it would be great that the Committee has been the catalyst. The key question is: what role or relationship does the Committee have to this project? He recommended that what has been sketched out is a great model for Subcommittee VII's Workplan. He said that the Committee could make many things available, such as rosters etc., but that the actual nuts and bolts of how the pilot project organizes itself must be done outside of the Committee. There are institutions out there who are interested, and those groups should be able to work together and make this go.

Dana Nahlen said that Committee members are having a hard time grasping the government concern. People refer and compare this to the clauses put out by the Committee, and like those products anyone can come and use this. So is it correct to say that if we support this it becomes public information? The U.S. co-chair explained that he suggested the opposite: that the site

shouldn't be linked to the Committee because if it is, then it would have to be public despite the fact that has proprietary aspects to it. That's why the development of the nuts and bolts has to be done outside the Committee.

Jeffrey Talpis noted that one concern he has is how the Committee could go into partnership with the pilot project. He agreed that the Committee cannot endorse one commercial entity. The Committee could support operations like it, but cannot endorse one company.

The U.S. co-chair then suggested that the Committee private sector members sponsor a conference on E-ADR, but invite everybody. The U.S. co-chair reassured Committee members that the governments are certainly not trying to "shut down" the pilot project by any means. The governments are willing to work with the Committee to figure out how to go forward. The pilot project could be a link to the Committee website, or it could include a page with description of how the effort grew out of Subcommittee VII. Other institutions with whom the project is partnering could also advertise, the Committee doesn't need to do that. The Canadian co-chair agreed that this is a fantastic project. She said that she liked the U.S. co-chair's idea of a conference to promote E-ADR. She suggested that the idea of a conference could perhaps occur alongside the next Committee meeting in Canada. The Mexican co-chair agreed that the governments had never questioned the merits of the project pilot-and don't want to be perceived of not supporting the project. However, the governments do need to look at the details.

Philip Robbins said that Committee III will get the outreach website up and running and it would be appropriate to identify the existence of this pilot project program on that site. It's an important bit of information to make available to the small business community and the Committee clearly needs to go forward with it. One of the Committee's main functions is not just helping people with disputes, but giving them the confidence so that they will participate in international commerce in the NAFTA region. The Committee has an important mission, but no budget, so it's got to be imaginative and figure out how to accomplish something. Mr. Talpis agreed, but said that if we post information about the pilot project we must post such information about other companies as well. The Committee cannot offer to support just one. The U.S. co-chair suggested that if a Committee member wished to write a paper on E-ADR institutions, and it were posted on the website with the appropriate disclaimers, there should not be any problem with making such information public. Others warned that the Committee needs to be careful about blanket endorsements. The Committee does not want to mislead users, so there needs to be some sort of vetting mechanism.

Ms. Lussenburg raised some concerns on posting papers on the Committee website. She said that in the first instance, noncontroversial information will be on the website. She also said that it would not be used to promote any private ADR institutions. She expressed concerns with keeping the website up to date. In terms of endorsing E-ADR, she agreed that the Committee could endorse E-ADR generally, and if institutions do that, then the Committee can link to websites that provide further information. This is a pilot project, not yet a commercial initiative.

The U.S. co-chair agreed that suggestions about linking the information through the websites of nonprofits is a good one. He also agreed with the idea about a general paper that could list specifically some commercial E-ADR providers, and that if the Committee referred people, it must be only to nonprofit institutions. Ms. Lussenburg responded that she was wary of committing to publishing papers on the website, and that it should be limited to generic information to start with. The U.S. co-chair expressed the view that there are useful papers that could be on the website, but there should be guidelines for when stale items are removed. Sunset dates can be provided, but it would be useful to post papers on the website on issues relevant to the Committee's work.

Dana Nahlen said that there exists within the Committee private sector membership some frustration because it's a mystery to them where the lines are for what the governments' expectations are for what the Committee can and can't do. She complained that there appears to be an effort to do something, and once the work is done the governments say the Committee can't follow through with it. She stated that the private sector members need to know where those lines are or there needs to be more transparency so they know how to function. The Mexican co-chair noted that the Committee's terms of reference set forth clearly what the limits for the Committee's work are, and that doesn't include endorsement. The work that has been done is great and the lines are delineated. The Committee needs to do what the mandate says within the framework of the terms of reference.

Dana Haviland said that she was personally very appreciative of the efforts the government has made and happy that they will work with the Committee to find the way to go forward. The development and funding ought to be done by the participating institutions, and she agreed with Mr. Donahey's suggestion of a study. But she said that the pilot project does need to get promoted so that SMEs will know about it and use it. What could be done is that the participating institutions could announce the formation of the pilot project and state that it will be part of a research project sponsored by the NAFTA 2022 Committee. She also agreed that doing an E-ADR conference would be a great idea. She said that she is gratified and will try to get a report to the governments per the U.S. co-chair's request.

Scott Donahey asked the governments whether it was all right for the Committee members to get private funding to do Committee work, as was suggested by Subcommittee V's Workplan of getting a nonprofit institution to sponsor research on causes of conflict. He said that it would be helpful to receive a set of guidelines from the government co-chairs on such issues. The Mexican co-chair explained that if outside funding is involved, then a proposal regarding such funding must come through the government co-chairs. The U.S. co-chair agreed, and said that if Subcommittee V intends to obtain such funding for its Workplan, then it needs to submit its proposal through the governments.

The U.S. co-chair said that in the world of ethics and conflicts there are technical legal issues and questions of appearance and propriety. This Committee cannot endorse a particular institution. He said that Ms. Haviland had indicated that she has been listening to the government co-chairs

very carefully, and if the ADR institutions take the project forward, in conjunction with institutions in the NAFTA region, and the Committee does background work on E-ADR, then that would be appropriate. The U.S. co-chair then asked Ms. Haviland to do a workplan on the pilot project by the end of the week. He stressed that it should focus on who should be running the pilot project and what the role of the Committee will be.

Cecil Branson noted that we do have a precedent with the conference the Committee put on in Mexico, which had private sponsorship and publication of materials. The U.S. co-chair explained that members needed to realize that the Committee is a unique NAFTA entity, and to a certain extent is forging new ground. There are no pre-written NAFTA 2022 codes of ethics for the Committee to work under: the governments need to look at each proposal on a case-by-case basis.

#### **V. Next Meeting**

The Canadian co-chair informed the Committee that the next meeting would be in Quebec, and suggested October 17-18. Members are to report back to their co-chairs whether that date would be feasible for them.