

# **NAFTA 2022 ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES**

## **Minutes of the 20<sup>th</sup> Meeting of the Committee Houston, Texas – June 14-15, 2010**

Hyatt Regency Hotel – Houston, Texas

The meeting was preceded by an evening reception on Sunday, June 13, 2010, hosted by the Law Offices of King & Spalding, to welcome all members of the Committee to Houston.

### **I. Welcome and Introduction by U.S. Chair**

U.S. government co-chair Keith Loken welcomed Committee members to Texas for the 20<sup>th</sup> meeting, and introduced two new members of the U.S. delegation, Ann Ryan Robertson and Steven Andersen. Members attending the meeting included six representatives from the Canadian delegation, five representatives from the Mexican delegation and thirteen members from the U.S. delegation (the list of attendees is attached at Annex I). Following the introductions, members reviewed the schedule of activities and received a notebook with background materials for the meeting (the “Notebook”). Mr. Loken drew the attention of participants to the Joint Statement of the 2009 NAFTA Free Trade Commission (FTC) Meeting (included in Tab 7 of the Notebook), which endorses the work of the NAFTA 2022 Committee and in particular the focus of this group on outreach to the judiciaries in each country in promoting ADR. Mr. Loken also noted that the Committee needed to think about the kind of report and/or request to the Commission that it might want to make following this meeting. He then turned to the co-chairs of the subcommittees for a report on the activities since the Querétaro meeting.

### **II. Reports from Subcommittees**

#### **A. Legal Issues**

Robert Lutz (U.S.) reported that the Legal Issues Subcommittee has worked on a number of projects since the Querétaro meeting. One of the goals of the Subcommittee was to expand the participation in the projects to involve other members – including in the reports of current developments, which will ultimately be uploaded to the Committee website. A second area of effort had to do with the preparation of a 15-year retrospective of the work of the Committee to be submitted to the NAFTA Free Trade Commission. This project has been ongoing and a partial draft of the Retrospective was also included in the Notebook (Tab 9). This draft only incorporates a description of the highlights of the work of the Committee on a yearly basis; it is contemplated that the Retrospective will contain other sections also. Work on the Retrospective will continue, and ultimately the document will include both what the Committee has done and what it hopes to do in the future.

Finally, the Subcommittee has worked and will continue to work with the Outreach Subcommittee on judicial education, including the preparation of the outreach sessions to be

conducted in conjunction with this 20<sup>th</sup> Meeting. This includes the evening session (June 14) to be hosted by Fulbright & Jaworski L.L.P., where the Committee invited judges and will conduct some judicial education – including discussions as to what the courts and the legislature think the judicial role is with respect to ADR. The Legal Issues Subcommittee will also continue to work on a curriculum for judicial training and will collaborate with the Outreach Subcommittee to continue to plan judicial education events in each country.

## **B. Outreach**

Kevin O'Shea (U.S.) reported on three areas of activity: 1) continued development and enhancement of the website; 2) outreach activities; and 3) a questionnaire that has been developed since the last meeting and that has been inserted into the Notebook (Tab 21) for consideration by Committee members.

The Outreach Subcommittee circulated updated statistics on the website (Tab 22 of the Notebook). Statistics reflect a continuing increase in visits to the site, which in some categories has been quite significant, *e.g.*, including ADR clauses, checklists for attorneys and businesses to consider for the development of ADR clauses, outreach activities, and ADR institutions. The Subcommittee continues to update the website with new materials. Website administrators are also working on ways to better identify who website visitors are (including from the academic sector, business sector, etc.).

The Outreach Subcommittee also developed a questionnaire (Tab 21) to involve the entire Committee and so that Committee members can assist the Subcommittee in identifying outreach opportunities. The idea would be to identify organizations, groups, and/or existing conferences that would be receptive to an ADR panel or module.

With respect to outreach activities, Mr. O'Shea reported that the Subcommittee had been mindful of the mandate to reach out to the judiciary. The Subcommittee has made contact with the National Judicial College in Reno, Nevada, and they are receptive to working with the NAFTA 2022 Committee for targeted outreach to the judiciary, either in Reno or in training programs they conduct throughout the country. In Canada, members of the Outreach Subcommittee have discussed with Frederic Bachand (Canada) a possible first pilot project with judges in Montreal, and they will continue to explore this possibility. In Mexico, the Outreach Subcommittee has taken advantage of a program that the National Law Center for Inter-American Free Trade (NLCIFT) has with USAID in Mexico in the area of administration of justice, and Committee members have worked with courts in the D.F. on some judicial modernization items and commercial law reform programs. As part of various programs and discussions in these areas, Committee members delivered presentations on ADR. These programs have been very well attended by judges in Mexico. Two programs were conducted in Mexico City during this calendar year. Phil Robbins (U.S.) noted that one of these programs gathered 150 judges, lawyers and government representatives.

Kevin O'Shea also noted that the information on outreach activities that is available on the Committee website needs to be updated, and Committee members are working on that. The updated outreach report will also be included as part of the 15-year Retrospective.

Selma Lussenburg (Canada) further clarified that there are other materials that need to be added to the website — including information on enforcement, which is a topic that Committee members have discussed for many years. She further noted that some information on the website needs to be updated — including information on arbitral institutions. Reports that have been prepared by the 2022 Committee also need to be uploaded to the website, including reports submitted to the Free Trade Commission. (It was noted that only one report has been prepared thus far (in 1996), and that report is available on the website.)

Carlos McCadden (Mexico) proposed that a report be submitted to the FTC on a yearly basis. Some discussions ensued as to whether or not this would be feasible and what the content of such reports might be to warrant the attention of the ministers.

Committee members then moved on to the next item on the agenda (reports on legal developments in each country), and agreed to come back later to a discussion on reporting activities, as well as questions that had been raised by some members regarding the structure of the Committee and Subcommittees.

### **III. Update on Legal Developments in each NAFTA Country**

#### **A. Mexico**

Sofía Gómez Ruano (Mexico) referenced the written report on legal developments in Mexico (Notebook, Tab 12), and provided a summary of those developments. With respect to mediation, she reported that in 2009 two alternative justice state laws were enacted in Mexico – in the states of Chiapas and Yucatán. These laws establish alternative justice centers in both states. The laws also make it possible for settlements reached through mediation to be formalized as *res judicata* once the alternative justice centers have ratified them. Following these new state laws, there are now 22 states in Mexico that have a mediation law or an ADR law. Alternative justice centers have also recently been established in the states of Zacatecas and Baja California. In Mexico City, the *Consejo de la Judicatura* and the High Court of Justice, both of the Federal District, inaugurated the first course on mediation for private mediators, with a focus on civil and commercial matters. Agreements reached through mediators certified under this program can be formalized as *res judicata*.

Also in the area of mediation, adoption of the UNCITRAL Model Law on International Commercial Conciliation is still pending in Mexico.

With respect to arbitration, there were some relevant legal reforms in 2009, which affected the Law on Acquisitions, Leases and Services of the Public Sector and the Law on Public Works and Related Services. Because of the amendments to these laws, the scope of application of arbitration in those areas has been restricted.

Carlos Loperena (Mexico) also noted that amendments to arbitration provisions in the Federal Commercial Code have also been proposed. The proposed amendments would not affect

existing provisions of the commercial code that are consistent with the UNCITRAL Model Law on International Commercial Arbitration. The amendments would provide supplementary rules with respect to matters of judicial assistance. Another amendment that has been proposed would make the *amparo* procedure a 1-instance process, instead of 2 instances (as it is currently interpreted to be, based on the *InfoRed* case). In the context of *amparo* proceedings, Carlos Loperena also noted a recent Supreme Court decision that has an impact on the nature of decisions issued by arbitrators. By virtue of this decision, arbitrators are not considered “authorities” and, consequently, their decisions (awards) cannot be subject to an *amparo*. This is consistent with the interpretation by Mexican Committee members, and it is a very positive development.

Sofía Gómez Ruano also reported that the new rules of the Arbitration Center of Mexico (CAM) entered into force in July 2009.

## **B. Canada**

Canadian members in attendance at the Houston meeting were not in a position to provide an update. Matthew Kronby (the Canadian government co-chair) said that they would undertake to provide a report after the meeting. When the report is available, it will be uploaded to the Committee website.

## **C. United States**

Various members of the U.S. delegation reported on developments in the United States that affect ADR at the domestic level, as well as developments that affect transnational commercial dispute resolution.

Lorraine Brennan (U.S.) reported on arbitration and arbitral institutions. The International Institute for Conflict Prevention and Resolution (CPR) has undertaken various projects, including in the area of: 1) global accelerated arbitration rules (which provide for 6-month arbitration); 2) a disclosure protocol (which provides for various levels of discovery, based on what the parties need for each particular case); 3) a damages protocol (to assist arbitrators and the parties); and 4) dispositive motions in arbitration (guidelines on appropriate dispositive motions). The first three projects have been completed (the relevant protocols are available at [www.cpradr.org](http://www.cpradr.org)), and number 4 is ongoing.

The ICC is currently working on updating its 1998 Rules. The ICC has also issued a checklist for drafting arbitral awards. At the request of users, the ICC also currently requires a statement by arbitrators to alert parties of other cases they may be working on, for availability purposes (to avoid unnecessary delays).

Lorraine Brennan also reported on recent decisions, including in the areas of class actions, personal jurisdiction and manifest disregard (Notebook, Tab 13).

The Fairness in Arbitration Act has been introduced in this 111th Congress, but there have been no recent developments in this area. The Act is really designed to protect consumers, but

because of its wording, there could be very serious repercussions for international arbitration unless the language is more clearly defined. Various groups, including the Section of International Law of the ABA, are weighing in on this Act. Steven Andersen (U.S.) also agreed on the need to protect arbitration, both domestically and internationally.

Steven Andersen further discussed some statistics on mediation and arbitration. The AAA had a record year in 2009 for international cases, with a total of 836 arbitration cases. Within the international caseload, there were 147 Canadian participants, which is a jump from the previous year, and also 36 Mexican participants. In the area of mediations, out of a total of 2110 mediations, 70 were international. There was also participation from Canada and Mexico as well in mediation.

In the area of mediation, Steven Andersen noted that there had been no major legislative changes, but he reported on some interesting cases, including in the areas of confidentiality, the concept of good faith, condition-precedent mediation, settlement agreements and oral agreements to mediate (Notebook, Tab 10). With respect to the issue of the condition-precedent mediation, Mr. Andersen also made reference to the ICDR concurrent mediation/arbitration clause, a practice that has become very popular and utilized throughout various parts of the world.

Doak Bishop (U.S.) provided an update on investor dispute issues (Notebook, Tab 14). Pursuant to a recently published UNCTAD report, in 2009 there were at least 32 investor-state cases filed. According to UNCTAD, there were 44 decisions issued last year, including: 20 awards on the merits, 7 jurisdictional decisions, 4 decisions on arbitrator challenges, and 3 annulment decisions at ICSID.

Mr. Bishop reported on cases that addressed: the definition of investment (based on various interpretations of the *Salini v. Jordan* case which developed a 4-part test on the meaning of the definition of investment); jurisdiction; ICSID annulment cases; effective means of asserting claims and enforcing rights; and fair and equitable treatment.

Mexican delegates noted that last year in Mexico two decisions were issued under the NAFTA investment chapter, and they are currently under judicial review. There are no other NAFTA Chapter 11 cases pending in Mexico.

Keith Loken noted that he would check with his colleagues who deal with NAFTA Chapter 11 on the status of cases involving the United States.

Dana Haviland (U.S.) completed the U.S. report on current developments by providing an update in the area of online dispute resolution (ODR). This topic had also been discussed during the 19<sup>th</sup> Meeting of the Committee, in Querétaro. Ms. Haviland referenced Tabs 15, 16 and 17 in the Notebook, which respectively include information pertaining to: ICDR's Online Dispute Resolution Program for Manufacturer/Supplier Disputes; developments and proposals before the Organization of American States (OAS); and the AAA's Online Case Filing and Management Service.

In the context of ODR, Keith Loken also made reference to a colloquium that was held in Vienna in March 2010, hosted by UNCITRAL. The colloquium was very successful, and the topic of ODR will be considered by an upcoming UNCITRAL commission meeting. The possibility of a pilot project has been suggested — and this would include both business-to-consumer (B2C) and business-to-business (B2B) issues.

Finally, Bob Lutz (U.S.) also referenced two additional developments that have potential implications for the Committee: 1) the American Law Institute's effort to restate U.S. law on international commercial arbitration (a draft that focuses on the enforcement of awards was published in March 2010); and 2) the American Bar Association's efforts to address potential reforms and issues that affect the ethics of lawyers in light of technological developments and the reality of globalization of the legal profession.

#### **IV. Additional Discussions – Committee Mission, Structure and Reporting**

Before breaking into subcommittee discussions, the plenary session decided that it needed to address: 1) the mission of the Committee, and its vision for the future; 2) the structure of the Committee (and whether it might be necessary to revisit such structure); and 3) the scope and frequency of reports to the Free Trade Commission.

##### **A. Mission**

Some Committee members (including Glenn Sigurdson – Canada) emphasized the need to reassess the mission of the Committee, including establishing a direct link with the NAFTA Free Trade Commission and its priorities.

Members emphasized the need to comply with the Committee's mandate, as set forth by NAFTA Article 2022. Doak Bishop (U.S.) noted that one of the goals of the Committee is to establish a culture of ADR among the NAFTA countries; and the Committee has done that quite well by providing outreach to the judiciary in all countries, to small businesses, and to other professionals — particularly those who do not come into frequent contact with ADR. Mr. Bishop also noted that reporting on developments in ADR within the relevant countries is also within the mandate. Reporting on structural problems in ADR within the relevant countries is also one component of this reporting — and this includes identifying what the problem areas are, what can be done, and alerting the Free Trade Commission of those problem areas and suggestions.

Matthew Kronby (Canada) agreed that things are working well from the perspective of outreach activities. He further emphasized the need to remain conscious of the overall structure of the Committee and where it fits into the NAFTA scheme. NAFTA is about promoting trade and investment; trade ministers are not focused on alternative dispute resolution as such, but rather they are focused on trade and investment. They are looking for recommendations (including in the area of ADR) that will advance trade and investment.

Selma Lussenburg (Canada) paraphrased the mandate of the Committee, which is set forth by Article 1.2 of the Terms of Reference of the Committee. Article 1.2 lists the matters that the Commission refers to the Committee for report and recommendations to the Commission, including: compilation, examination and assessment of existing means for the settlement of private international commercial disputes; identifying sectors that would benefit from ADR; promoting ADR; facilitating ADR; opportunities for expanded cooperation; and issues relating to the enforcement of arbitration agreements and awards.

Committee members noted that there may be a need to refocus and perhaps look closely at Article 1.2 and decide what to do specifically within that mandate. An area that both the Commission and the Committee have identified as being of significance has been that of small and medium-sized enterprises. The judiciary has also been identified as a target area. Another possible area could be ODR. The Committee has not made recommendations to the Commission on ODR, and this could be an important area because businesses want effective and cost-efficient dispute resolution mechanisms.

Some members in the U.S. and Canadian delegations noted that the list is overwhelming, and there is a need to narrow it down with specific focus on certain issues. Phil Robbins (U.S.) expressed his hope that the Committee could continue with the approach it has taken with respect to outreach activities. Bob Lutz (U.S.) remarked that the mandate provides ample opportunity for projects; the key is to identify problems and areas of concern.

Glenn Sigurdson (Canada) emphasized the need to address shifting realities and priorities — specifically, by identifying what it is that the Free Trade Commission is trying to achieve, and how the 2022 Committee can connect with those goals. Various NAFTA working groups have been established, and it could be useful for the 2022 Committee to collaborate with those groups — for example, the working group on medium and small-sized businesses. The Committee needs to be linked to these working groups, and have access to the information produced by those groups.

Keith Loken noted that if there are a number of such NAFTA working groups, it would be worthwhile to explore what their scope is, what their mandate is, and what their resource base is, for purposes of determining where the 2022 Committee could bring the best value added.

Phil Robbins (U.S.) commented that the work of the Committee is handicapped by the lack of budget resources.

## **B. Structure**

Questions were also raised regarding structural issues — *i.e.*, how the Committee conducts its business through the existing subcommittees, and whether more subcommittees (and smaller subcommittees) would be advisable. Dana Haviland (U.S.) noted that up until the Vancouver meeting (2008), there were approximately five subcommittees. Sometimes smaller subcommittees make it easier to focus on specific projects, and for people to focus on particular areas they are interested in. It is also easier to come up with recommendations as to what should be done. Lorraine Brennan also expressed her support for smaller subcommittees. Ms. Haviland

further clarified that people should also be encouraged if they want to participate in more than one group — *e.g.*, ODR and outreach.

Several members noted that, from a practical standpoint, every member of the Committee is a member of the Outreach Subcommittee — everybody fits into outreach, and the Outreach Subcommittee needs the support and feedback of all members. In this regard, Kevin O'Shea (U.S.) reminded members of the importance of providing responses to the questionnaire. In addition to the hard copy that has been included in the Notebook, Committee members will also receive an electronic version of the questionnaire, via email.

Keith Loken suggested that each subcommittee decide what its priorities would be and what it would want to do between this meeting and the next meeting in Canada — this includes whether or not to subdivide into smaller groups.

### **C. Reporting**

Keith Loken noted the need to reach an agreement as to how to go about reporting — not only reporting to the NAFTA Free Trade Commission, but also reporting on the proceedings of the annual meetings (*i.e.*, minutes), and how best to achieve that. It was noted that reports would also be published on the website.

Matthew Kronby (Canada) inquired about the need to prepare and circulate the legal reports in advance of the annual meetings, so that Committee members would have an opportunity to read them, prepare questions, identify trends and developments, and also make recommendations that the Committee could adopt — in light of those developments — and submit to the Free Trade Commission. He also noted that this may or may not be done on a yearly basis.

Carlos McCadden (Mexico) noted that reports could be summarized — one page for the report, and one page for recommendations (with appendices and/or attachments, as necessary). This kind of report can be produced on a yearly basis, at the end of each Committee meeting.

Allan Stitt (Canada) questioned the value of preparing and submitting reports that barely “scratch the surface” and that will not get read. A discussion ensued about the content of the reports, and Carlos McCadden noted that, typically, the reports submitted at the annual meetings go well beyond “scratching the surface” and delve into very significant issues and concerns. Mr. McCadden also expressed his frustration about the fact that, ultimately, those reports do not get submitted to the Free Trade Commission. Matthew Kronby emphasized the significance of including recommendations to address the concerns identified in the relevant reports, and he noted that if the Committee were to make such recommendations to the Commission on useful steps that could be taken to advance ADR and the broader objectives of the Commission, then he and other government officials would be prepared to endorse such recommendations.

Bob Lutz (U.S.) agreed with the notion of incorporating recommendations into the reports.

Allan Stitt (Canada) referenced the example of ODR — and how that could be turned into an initiative, if the Committee were to consider it should endorse it, and then develop ideas as to



possible implementation. ODR may not be the answer, but it is a good example of recommendations that could be submitted to the FTC.

Doak Bishop (U.S.) cautioned Committee members about the types of recommendations that government representatives would feel comfortable making. Some of the issues discussed during the meetings have to do with pending legislation — *e.g.*, the Fairness in Arbitration Act in the United States. From past discussions, it has become clear that the Committee has not been comfortable making recommendations regarding pending legislation. Another possible avenue would be to make recommendations about specific cases or issues in specific cases — perhaps along the lines of an *amicus curiae* brief. Committee members may not be comfortable doing that, but it could be an area worth exploring. Yet another area that has been discussed in the past has to do with drafting soft law guidelines or codes.

Steven Andersen (U.S.) noted that delegations could prepare various proposals in advance of the annual meeting of the Committee. Those proposals could then be addressed by the Committee during the meeting, and there could be some action on those initiatives.

Carlos Loperena (Mexico) underscored the need to identify the audience or audiences for these reports. He noted that this is not merely the executive branch. There is a need for coordinated action, a need to push various government agencies to amend the laws, and/or to change the interpretation of the laws — as evidenced by court decisions referenced in the country reports. This may mean explaining to judges or supreme court justices what these concepts mean. International treaties also bind the courts, and not merely the executive branch. Indeed, Lic. Loperena noted that this Committee has done some significant work for arbitration and ADR in the three countries. Committee members have prepared programs, written books and articles on arbitration and ADR in the free trade area, and the FTC may not be aware of all of this.

Keith Loken noted that there seems to be a general consensus that the Committee needs to report to the FTC more regularly. However, the frequency and the content of that reporting remain under discussion. In summarizing the discussion, he said that there also seemed to be agreement on: (1) being faithful to the mandate of the Committee; (2) the existence of many opportunities for Committee work; and (3) the value of the Committee's outreach programs.

## **V. Reports from Subcommittee Breakout Sessions**

### **A. Outreach Subcommittee**

As a threshold question, Subcommittee members noted that they would be comfortable continuing to have an Outreach Subcommittee. They also identified that there was no need for subdivisions within the Subcommittee. Outreach is really an overarching committee, and the work of other subcommittees feeds into outreach activities. Every Committee member is encouraged to participate in outreach activities.

All participants were in favor of continuing to do outreach to the judiciary — albeit not exclusively. The Subcommittee will also focus on small and medium-sized businesses, trade-

related organizations (including sectoral organizations), professional groups (*e.g.*, accountants, management consultants) and students (including law students and international business students). Glenn Sigurdson (Canada) pointed out that some larger businesses should also be approached — including in the context of environmental disputes, mining activities, etc.

Phil Robbins (U.S.) noted that there is no shortage of audiences; the challenge is to identify relevant events. Some of the new Committee members noted that they could provide helpful contacts, and the Subcommittee will explore possible venues and audiences. Kevin O'Shea (U.S.) indicated that the NLCIFT will also have a student/intern research upcoming meetings and venues. Phil Robbins emphasized that, typically, these audiences are not interested in highly-sophisticated or esoteric issues; they want to know the basics of ADR: what are the components; advantages; disadvantages; cost; enforcement. In the case of judges, they need the basic parameters of what happens when they have an international arbitration award that needs to be enforced, or when a party wants an injunction in the midst of an arbitration proceeding. These are typically short presentations — less than half a day.

Jim Nelson (U.S.) reported that the World Trade Center (WTC) associations are getting reorganized, and new authorities would be receptive to presentations by Committee members.

In the context of reaching out to other NAFTA working groups, Subcommittee members concluded that government co-chairs would be better situated to initiate that dialogue. The need for inreach was also discussed — the Committee needs to get feedback from industry to find out what they need. A good link to this kind of information could be provided by the Association of Corporate Counsel (ACC), which typically holds regular meetings. Most ACC members are single in-house counsel, which is an audience the Committee should be targeting. Subcommittee members will approach the President of the ACC. Ann Robertson (U.S.) noted that local Chambers of Commerce could also be a good audience. The NLCIFT will circulate to members a template invitation/flier that it has used in the past for purposes of reaching out to various groups.

Subcommittee members were also in favor of including ODR as a possible topic to be discussed in the context of outreach presentations. ODR could be significantly more cost efficient for smaller businesses than traditional ADR. There are various issues that could be included as part of a discussion on ODR, including model clauses that enable the use of ODR and legal issues related to the enforcement of ODR awards, among others.

Subcommittee members agreed on a workplan that would be two-fold: 1) continued development and enhancement of the Committee website; and 2) delivering targeted outreach programs to various groups.

The development and enhancement of the website will include: making it more user-friendly, adding more content (including on ODR), and updating some sections (*e.g.*, arbitral institutions). Selma Lussenburg (Canada) also reminded Subcommittee members that a paper on enforcement is needed, even if it is a basic document. This will need to be coordinated with the Legal Issues Subcommittee. There was also some discussion about adding a FAQ page to the website.

## **B. Legal Issues Subcommittee**

Legal Issues Subcommittee members discussed various projects. The first project that was addressed had to do with the 15-year Retrospective. A draft retrospective has been included in the Notebook (Tab 9). At present, this document provides a historical review of the highlights of previous Committee meetings. Concerns were raised that, instead, the Retrospective should be approached more as a report and recommendation to the Free Trade Commission that would contribute to the broader goals of NAFTA — not merely a historical document. The Subcommittee will continue to work on the Retrospective, and will structure a process to gather input from the rest of the Committee members as to the future of the Committee and what should be accomplished in the next 5 years. Allan Stitt volunteered to structure this process over the next year. The goal would be to have a fairly solid draft of the Retrospective by the next meeting, which will then be discussed and finalized for presentation to the Commission.

The second project discussed by Subcommittee members was a follow-up on previous discussions with respect to the enforcement of arbitral awards. It was identified that there were certain impediments structurally in the systems of the NAFTA countries, and it might be useful to make some specific recommendations in this regard. The Subcommittee will study this issue further and develop specific recommendations.

As a third project, the Subcommittee will undertake a review of the website to assess its usability, access, content and organization. Carlos McCadden (Mexico) will take the lead in this area and provide suggestions. The Subcommittee will work with the Outreach Subcommittee on this task.

The fourth project that was discussed had to do with current development reports. The Subcommittee has been working on these reports over the years, and there are a number of excellent reports that have been produced. These will need to be published on the website. The Subcommittee also intends to expand this process so that it goes beyond the identification of developments in each country, to also specifically identify the implications of those developments and recommendations in light of those developments. Members from each country were identified for purposes of preparing the relevant reports, as follows: Francisco González de Cossío and Sofía Gómez Ruano (Mexico); Frederic Bachand (Canada); Doak Bishop, Steven Andersen and Lorraine Brennan (U.S.). The reports would need to be finalized at least a month before the annual meeting and circulated to Committee members for purposes of identifying recommendations. The reports and resulting recommendations would be presented at the annual meeting, for full plenary discussion and, ultimately, for purposes of reaching a decision as to whether or not the relevant recommendations should be submitted to the Free Trade Commission.

Finally, the Subcommittee also discussed its role with respect to judicial training — with a particular emphasis on providing the substance for judicial training programs. There is a significant volume of materials that could be used, and it will be necessary to go through a process of selection of materials or outlines on the relevant subject areas. Members from each country were also identified for purposes of going through this selection process: Carlos McCadden and Julián Treviño (Mexico); Fred Bachand and Jeff Talpis (Canada); Lorraine

Brennan, Steven Andersen and Bob Lutz (U.S.). Also from Canada, Richard Weiler was identified in the area of mediation.

## **VI. Outreach Activities**

### **A. Outreach to the Houston Judiciary**

On the evening of Monday, June 14, an outreach session to the judiciary was held at the offices of Fulbright & Jaworski. Robert Lutz (U.S.), Julián Treviño (Mexico) and Allan Stitt (Canada) discussed the judicial role in the context of ADR. Bob Lutz focused on the U.S. legal system and where ADR is in the process in the United States. He made reference to the Federal Arbitration Act as well as to state arbitration acts. Some states (including Hawaii, California, Texas and Florida) have also enacted international arbitration acts. In addition to U.S. rules, there are also international conventions, as well as specific rules of the institution that may be managing the arbitration. The U.S. Supreme Court has also provided guidance which to a large extent has conferred upon courts a supervising role vis-à-vis arbitration, as well as a reticence to get courts actively involved in evaluating or reviewing arbitration outcomes. There are two main areas in which courts have an *entrée* to play a role in the arbitration process: 1) enforcement of contracts/clauses to arbitrate; and 2) enforcement of awards. Professor Lutz referred to some of the issues that have arisen in the context of these two areas, including concerns with respect to unconscionable clauses, class actions and ethical issues affecting the arbitrators or the process of arbitration. He also referenced awards made in manifest disregard of the law.

Julián Treviño provided an overview of ADR in Mexico. In 1993, Mexico incorporated into its legal system the provisions of the UNCITRAL Model Law on International Commercial Arbitration, which apply to both domestic and international commercial arbitration. Mexico has also ratified the most well-known international treaties in the area of arbitration — the New York Convention on the Enforcement of Arbitral Awards and the Inter-American (Panama) Convention. Lic. Treviño noted that, in general, the judiciary in Mexico has been very favorable to arbitration — both at the federal and state level.

Allan Stitt discussed mediation — including the role of the judges in mediation in Canada. There is court-annexed mediation, where the court sends the parties to a mediation center that is run by the government. There are also some provinces where the judges themselves actually conduct the mediation. Mr. Stitt relayed how the process works in these instances, and emphasized the advantages of mediation, as opposed to arbitration.

An interactive Q&A session followed. Audience members and panelists discussed differences in the legislation and policies in the three NAFTA countries. There were also questions regarding the ICSID Convention, the Panama Convention, and new/additional free trade agreements.

### **B. Outreach Presentation at South Texas Law School**

The outreach program at South Texas Law School, consisting of three panels, was developed for practitioners, professors, businesspersons and students interested in ADR. The first panel

provided an introduction to ADR in the NAFTA region and some background information on the activities of the NAFTA 2022 Committee. Panelists included Selma Lussenburg (Canada), Sofía Gómez Ruano (Mexico), and Philip Robbins (U.S.).

The second panel focused on how to draft a “bullet-proof” ADR clause, and lessons learned. Experienced local practitioners and Committee members provided advice on essential elements to include and pitfalls to avoid when preparing effective ADR clauses — including multi-tiered clauses (which provide for a combination of negotiation, mediation and arbitration). Model clauses analyzed included the ICDR clause, the ICC model clause and the LCIA clause. Some of the pitfalls addressed by panelists included problems with conditions precedent, enforceability concerns and pathological clauses. Panel speakers included Professor Stacey Barnes (South Texas Law School – Lewis, Barnes & Lewis), Grant Dorfman (Nabors Industries), Estuardo Sierra (ExxonMobil) and Doak Bishop (U.S.). The panel was moderated by Lorraine Brennan (U.S.).

The third and final panel addressed enforcement issues and challenges in the NAFTA countries. Carlos McCadden provided an overview of the *amparo* system in Mexico. James Redmond (Canada) gave a brief outline of the law and legal principles that apply in Canada with respect to recognition and enforcement, and referenced recent cases where statutes of limitations have been an issue. Dillon Ferguson (Andrews Kurth) and Guy Lipe (Vinson & Elkins) discussed enforcement issues in the United States — including cases that involve issues pertaining to the Foreign Sovereign Immunities Act; issues of personal jurisdiction and *in rem* jurisdiction; public policy considerations; and *forum non conveniens* considerations. The panel was moderated by Ann Ryan Robertson (U.S.).

## **VII. Final Plenary Session**

Following the outreach program at South Texas Law School, the Committee reconvened for a final wrap-up session.

Keith Loken asked subcommittee representatives to share their goals, with benchmarks, for the next 12 months. Bob Lutz (U.S.) noted that the Legal Issues Subcommittee had mapped out a preliminary process, and he will circulate a chart outlining that process.

Selma Lussenburg (U.S.) noted that the Outreach Subcommittee had also laid out its workplan the previous day, and it would be a continuation of activities that have been conducted in the past. The Subcommittee will continue to do outreach sessions, both to the judiciary and the business community. Ms. Lussenburg noted that, as far as identifying benchmarks, those will be the actual outreach programs. Additionally, the Subcommittee has recognized that there are parts of the website that need to be updated. The Subcommittee will work on updating the website in preparation for the next Committee meeting. In this regard, the Subcommittee will also await the input from the Legal Issues Subcommittee. The Outreach Subcommittee would also want to receive a document on enforcement from the Legal Issues Subcommittee that could be uploaded to the website (this would be a statement to the effect that arbitral awards can be enforced in the NAFTA countries, and the steps that need to be taken – in very general terms).

Additional materials to be added to the website include materials from this meeting — including documents in the Notebook and powerpoint presentations from the outreach sessions.

Keith Loken reminded Committee members that the goal would be to have a minimum of three outreach events before the next meeting — one in each country.

Phil Robbins (U.S.) noted that another issue for follow-up would be the outreach questionnaire, and emphasized that the Outreach Subcommittee would welcome ideas and suggestions from Committee members. The questionnaire will be sent out to all members electronically.

There was discussion as to how the minutes of the annual meetings should be handled. It was proposed that the draft minutes be prepared and circulated by the host government within 60 days, if possible, of the conclusion of the meeting, and that the other delegations then be given a 30-day period in which to comment on the draft. Keith Loken noted that his office would endeavor to prepare an initial draft of the Houston minutes within 60 days, and no later than 90 days. There was agreement that the minutes should be formally adopted at the beginning of the 2011 meeting, and that this procedure should continue.

A question was raised regarding the coordination between the 2022 Committee and the NAFTA Article 707 Committee, which was created to address private commercial disputes regarding agricultural goods. Committee members noted that the last interaction had been in 2005 (Ottawa meeting). The government co-chairs undertook to explore the current status of the Article 707 Committee with their respective trade offices.

Matthew Kronby (Canada) expressed his appreciation to the U.S. government co-chairs, and noted that the next meeting, in Canada, would likely be held in June 2011. Additional information on timing and venue will be forthcoming.

Glenn Sigurdson (Canada) proposed some language that could be submitted to the FTC to report on current work of the Committee and to further joint and collaborative activities. Matthew Kronby suggested that the language be sent to him first for review before circulation to the other delegations. Keith Loken said he would be prepared to review the text and to consult with the Office of the U.S. Trade Representative on it.

Bob Lutz clarified that the 15-year Retrospective would not be submitted to the FTC until next year. This document will also include an updated version of the outreach activities that the NLCIFT is going to finalize. Selma Lussenburg noted that it would be helpful to include references to some of the outreach programs that have been conducted in conjunction with annual meetings; she recalled that, for example, there had been an outreach program right before the annual meeting in Calgary (2000), but unfortunately there is no reference to this in the minutes of that meeting.

Selma Lussenburg also noted that even though it would be helpful to have the 15-year Retrospective submitted to the FTC next year, there may be steps that could be taken this year to start a program of collaboration — including getting information from the FTC regarding small

and medium-sized businesses in the NAFTA region, and sharing information with the FTC regarding outreach programs and the Committee website.

Finally, on the question regarding the structure of the Committee and subcommittees, Keith Loken noted that there had not been any specific recommendations. He further suggested that this be considered by the existing subcommittees and that specific proposals be developed for presentation to the group next year. It was decided that a question on the structure of the Committee / subcommittees would be added to the outreach questionnaire to be circulated to all members.

The 20<sup>th</sup> Meeting of the NAFTA 2022 Committee was adjourned.

Annex I

Twentieth Meeting of the NAFTA 2022 Committee

List of Attendees

**Canada**

Matthew Kronby  
Cecilia Delfino  
Selma Lussenburg  
James Redmond  
Glenn Sigurdson  
Allan Stitt

**United States**

Keith Loken  
Tricia Smeltzer  
Steven Andersen  
Doak Bishop  
Lorraine Brennan  
Dana Haviland  
Robert Lutz  
Dana Nahlen  
James Nelson  
Kevin O'Shea  
Philip Robbins  
Ann Ryan Robertson  
Mariana Silveira

**Mexico**

Aristeo López Sánchez  
Carlos Loperena  
Carlos McCadden  
Sofía Gómez Ruano  
Julián Treviño