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Mediation Furthers the Principles of Transparency and Cooperation to Solve Disputes in the NAFTA Trade Area

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MEDIATION FURTHERS THE PRINCIPLES OF TRANSPARENCY AND COOPERATION TO SOLVE DISPUTES IN THE NAFTA FREE TRADE AREA[†]

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INTRODUCTION

The authors intend to introduce mediation as a legal tool to prevent and solve international business disputes between private parties in the free trade area created in the North American Free Trade Agreement (NAFTA).[1] We will demonstrate that the use of the principles of transparency and cooperation to solve international disputes in the NAFTA area are key objectives, and that mediation furthers those principles concerning private disputes.[2]

THE TRANSPARENCY PRINCIPLE AND CONSULTATIONS

The transparency principle guided the negotiators in their

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1. "The Parties to this Agreement, consistent with Article XXIV of the *General Agreement on Tariffs and Trade*, hereby establish a free trade area." Can. - Mex.- U.S.: N. Am. Free Trade Agreement, Dec. 17, 1992, art. 101, 32 I.L.M. 289 [hereinafter NAFTA].

2. "The objectives of this Agreement, as elaborated more specifically through its principles and rules, *including national treatment, most-favored-nation treatment and transparency*, are to. . ." NAFTA, *supra* note 1, at art. 102 (emphasis added).

deliberations throughout NAFTA negotiations and permeates all aspects related or derived from NAFTA.[3] The purpose of the transparency principle is that all measures advocated by all Parties must be crystal clear and should not cover objectives contrary to free trade.[4]

Therefore, it was agreed that any law, regulation, procedure, requirement or practice,[5] related or derived from NAFTA, should be duly motivated, be congruent with free trade, and to the possible extent, announced and explained to the other Parties in advance.[6]

The transparency principle was also considered as a principle for the prevention of disputes in the form of an obligation for the governments to consult each other regarding measures and conflict prevention and conflict solution. Consultations are obligatory under diverse circumstances.[7]

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3. This principle was explicitly an understanding among the NAFTA negotiators. Testimony of Dr. Diaz, who was the Legal Advisor of the Mexican Foreign Affairs Department and one of the Mexican negotiators

4. *Id.*

5. The definition of the term "measure includes any law, regulation, procedure, requirement or practice." NAFTA, *supra* note 1, at art. 201.

6. *See, e.g.* ARTICLE 1411: TRANSPARENCY.

> 1. In lieu of Article 1802(2) (Publication), each Party shall, to the extent practicable, provide in advance to all interested persons any measure of general application that the Party proposes to adopt in order to allow an opportunity for such persons to comment on the measure. Such measure shall be provided:
> (a) by means of official publication;
> (b) in other written form; or
> (c) in such other form as permits an interested person to make informed comments on the proposed measure.
> 2. Each Party's regulatory authorities shall make available to interested persons their requirements for completing applications relating to the provision of financial services.
> 3. On the request of an applicant, the regulatory authority shall inform the applicant of the status of its application. If such authority requires additional information from the applicant, it shall notify the applicant without undue delay.
> 4. A regulatory authority shall make an administrative decision on a completed application of an investor in a financial institution, a financial institution or a cross-border financial service provider of another Party relating to the provision of a financial service within 120 days, and shall promptly notify the applicant of the decision. An application shall not be considered complete until all relevant hearings are held and all necessary information is received. Where it is not practicable for a decision to be made within 120 days, the regulatory authority shall notify the applicant without undue delay and shall endeavor to make the decision within a reasonable time thereafter.

7. The term Consultations is used in Articles 316, Annex 300-B, 707, 722, 723, 801, 914, 1005, 1021, 1024, Appendix 1001, 1113, 114, 1209, 1210, 1309, 1413, 1414, Annex 1404, Annex 1403, 1903, 1905, 1907, Annex 1901, 2003, 2006, 2007, 2015, 2104.

The obligation to consult (the act of consulting, considering, having regard, conferring, deliberation) may bring two very important benefits. The first is that it prevents disputes through an early identification and solution of conflicting views.[8] The second is that it opens direct communication channels between the Parties for the solution of an existing dispute.[9]

The word consultation as used in NAFTA means direct talks between the governments or the governments and a private party to agree on a course of action to reach a goal or to find a solution to a problem.[10]

THE COOPERATION PRINCIPLE AND CONSULTATIONS

The principle of cooperation between the NAFTA Parties (Canada, Mexico and the U.S.) is embodied as the cornerstone of dispute settlement. It is also an expression of the principle of transparency regarding conflict solution. The cooperation principle is presented in NAFTA as a legal obligation:

> The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.[11]

However, if a matter is not solved through cooperation or consultations, a Party to NAFTA may make a request for the intervention of the Commission to solve the matter.[12] The Commission may use good offices, conciliation and mediation.[13] If the Commission has not solved the matter within a certain time period, a Party may then request in writing an arbitral panel.[14]

Thus, prior to requesting an arbitral panel, Parties are obligated to engage in consultations and, in the absence of an agreement the Parties then proceed to request assistance from the Commission. If the Parties do not reach an agreement using these two processes, an arbitral panel decides the dispute between the Parties.

Environmental Side Agreement, Articles 20 and 22. Labor Side Agreement, Articles 21, 22 and 23.

8. *See* L.M. Diaz and A. Garza, *Los Mecanismos para la solución de controversias en el Tratado de Libre Comercio de América del Norte*, Revista de Investigaciones Jurídicas, Escuela Libre de Derecho, México, 1993, 72.

9. *Id.*

10. *See supra* note 7.

11. NAFTA, *supra* note 1, at art. 2003.

12. *See id.*, at art. 2001 (establishing the Free Trade Commission, which is comprised of cabinet-level representatives of the Parties or their designees).

13. *Id.*, at art. 2007 (5)(b).

14. *Id.*, at art. 2008 (1).

Chapter Twenty establishes the recourse to dispute settlement procedures using an arbitral panel.[15] This Chapter applies to disputes between Parties that address the interpretation or application of NAFTA, specifically those disputes in which one Party considers an actual or proposed measure of another Party is or will be inconsistent with the obligations of NAFTA or where an action by one Party causes nullification or impairment of an existing NAFTA obligation.[16] Chapter Twenty does not apply to matters covered by Chapter Nineteen that refer to Dispute Settlement in Antidumping and Countervailing Duty Matters.[17]

CONFLICT SOLUTION MECHANISMS FOR PUBLIC-PRIVATE DISPUTES

NAFTA introduced for the first time in a free trade agreement the novel concept of regulating the solution of disputes that may exist between the Parties (governments) and private persons. NAFTA does so in matters concerning investment, Chapter Eleven. This Chapter applies to measures adopted or maintained by a Party relating to investors of another Party, to investments of investors of another Party in the territory of the Party and to certain aspects of all investments in the territory of the Party.[18]

In this context, a NAFTA claim is a legal complaint submitted by a NAFTA Investor who alleges a loss by reason of a breach of NAFTA. The claim is heard by an international panel, normally composed of three arbitrators[19] appointed by the Investor and the NAFTA Party being sued. Panels are formed under the Investor's choice of commercial arbitration rules laid out by either the World Bank (through its International Centre for the Settlement of Investment Disputes – the ICSID) or by the United Nations Commission on International Trade Law (under the UNCITRAL Rules).[20]

After hearing arguments from the Investor and the three NAFTA Parties (i.e. the government being sued for breach of the NAFTA plus the other two governments – if they choose to intervene), the Panel issues an award, a written decision.[21]

In disputes between a government authority and a private person concerning investment, NAFTA, consistent with the principle of

15. *Id.*

16. NAFTA, *supra* note 1, at art. 2004.

17. *Id.*

18. *See id.*, at art. 1101 (defining the scope and coverage of provisions regarding investment, services and related matters and providing specifically for measures adopted with respect to arts. 1106 and 1114).

19. *Id.*, at art. 1123.

20. *See id.*, at art. 1125.

21. *See id.*, at art. 1135.

transparency and the principle of cooperation, also obliges consultation and negotiations between the disputing parties before establishing an arbitral panel.[22]

CONFLICT SOLUTION MECHANISMS FOR PRIVATE DISPUTES

NAFTA does not directly regulate the possible legal processes to solve business disputes between private persons that might arise in the free trade area established in Article 101.[23] However NAFTA contains four key provisions that impact on private disputes.[24]

First and from a procedural perspective, NAFTA excludes the granting of rights for private persons to sue under a Party in a national court wherein the legal cause of action originates in NAFTA.[25]

Second, Chapter Seven creates an Advisory Committee on Private Commercial Disputes regarding Agricultural Goods[26]. This Committee known as the 707 Committee has decided that the best approach to deal with quick and effective dispute resolution for perishable goods and small businesses in the agricultural field was to create an independent entity that would be financed privately.[27] The Fruit and Vegetable Dispute Resolution Corporation (DRC) was formed and as of February 2000, over 500 members had joined with an expected 1500 members by the end of 2001.[28] Under this system, member firms from Canada,

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22. "The disputing parties should first attempt to settle a claim through consultation or negotiation." *Id.*, at art. 1118. *See generally* http://www.cyberus.ca.~tweiler/nafataclaims.html (listing documents and comments of actual cases under ch. eleven) (last visited Sept. 9, 2001).

23. *See* NAFTA, *supra* note 1, at art. 2004 (providing for dispute settlement between the Parties).

24. *See infra* text accompanying notes 25 – 31.

25. "No Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement." NAFTA, *supra* note 1, at art. 2021.

26. NAFTA, *supra* note 1, at art. 707.

> The Committee [on Agricultural Trade established in Article 706] shall establish an Advisory Committee on Private Commercial Disputes regarding Agricultural Goods, comprising persons with expertise or experience in the resolution of private commercial disputes in agricultural trade. The Advisory Committee shall report and provide recommendations to the Committee for the development of systems in the territory of each Party to achieve the prompt and effective resolution of such disputes, taking into account any special circumstance, including the perishability of certain agricultural goods. *Id.*

27. This information was excerpted from the NAFTA Advisory Committee on Private Commercial Disputes Meeting Notes from its Eight Meeting which was held in San Francisco, California November 18-19, 2000.

28. This information was excerpted from the Meeting Notes of the Ninth Meeting of the NAFTA Advisory Committee on Private Commercial Disputes that was held in Calgary, Canada June 22-23, 2000. For more information on the DRC, *See*; http://www.fvdrc.com./main-e.htm

Mexico and the US agree to adhere to a common set of trade standards (practices), mediation and arbitration procedures and enforcement provisions with respect to NAFTA trade regarding specified perishable agricultural products.[29]

Third, Article 2022 of NAFTA provides:

> 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. (emphasis added)[30]

Fourth, Chapter Twenty, Institutional Arrangements and Dispute resolution procedures, Section C. Domestic Proceedings and Private Commercial Dispute Settlement, establishes an Advisory Committee on Private Commercial Disputes (2022 Committee).[31]

The 2022 Committee has prepared three documents: Alternative Dispute Resolution In International Contracts;[32] Enforcing Agreements to Arbitrate and Arbitral Awards in the NAFTA Countries;[33] and What is Mediation.[34] In 1999, the 2022 Committee organized a Conference on Alternative Dispute Resolution for Judges and Businesses in Mexico City.[35]

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29. *Id.*

30. NAFTA, *supra* note 1, at art. 2022 (1).

31. "The [Advisory] Committee [on Private Commercial Disputes] shall 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." *Id.*, at art. 2022(4).

32. NAFTA Advisory Comm. on Private Commercial Disputes, *Alternative Dispute Resolution in International Contracts, at* http://www.ita.doc.gov/legal/adr_k.htm (last visited Sept. 10, 2001).

33. NAFTA Advisory Comm. on Private Commercial Disputes, *Enforcing Agreements to Arbitrate and Arbitral Awards in the NAFTA Countries, at* http://www.ita.doc.gov/legal/adr_enf.htm (last visited Sept. 10, 2001).

34. NAFTA Advisory Comm. On Private Commercial Disputes, *What is Mediation?, in* COMMERCIAL MEDIATION AND ARBITRATION IN THE NAFTA COUNTRIES 357-69 (Luis Miguel Díaz & Nancy A. Oretskin eds., 1999) [hereinafter COMMERCIAL MEDIATION].

35. The NAFTA Advisory Comm. on Private Commercial Disputes and the U.S.-Mex. Conflict Res. Ctr. organized a conference on Alternative Dispute Resolution for judges and businesses on June 3 and 4, 1999, in Mexico City. More than 350 people attended the tri-national conference. Over 120 Mexican judges participated. U.S. and Canadian judges, as well as business people, governmental officers and private lawyers representing the three NAFTA countries also attended. The conference focused on two main themes: 1) the use of arbitration and 2) mediation as an alternative to courts to resolve commercial conflicts in international law. In addition, the relationship of arbitration and mediation to judicial dispute resolution in Can., Mex. and the U. S. was addressed. *See generally* COMMERCIAL MEDIATION, *supra* note 34 (integrating articles submitted during the Conference including the documents prepared by the Committee).

MEDIATION RESPONDS TO THE PRINCIPLES OF TRANSPARENCY AND COOPERATION

Based on the recognition in NAFTA for the use of alternative dispute resolution (ADR) for private commercial dispute settlement, this manuscript suggests that using mediation to resolve international business disputes between private parties, complies with the principle of transparency and the principle of cooperation as set out in NAFTA. Why?

Mediation is a dispute resolution mechanism, which is gaining popularity and acceptance within the international commercial world[36] since it is a process, which allows disputing parties to focus on solving a problem rather than engaging in a complicated legal process. Mediation is a recognized ADR procedure and therefore is included within the terms of reference of the NAFTA 2022 Committee.[37]

WHAT IS MEDIATION?

There is no universal definition of mediation in the international field.[38] Simply stated, mediation is a facilitated negotiation. It is an informal process where an impartial facilitator(s) assists disputing parties to use direct communication to solve a conflict.[39] Skilled

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36. *See, e.g., Report of the Working Group on Arbitration on the Work of its Thirty-Third Session (Vienna, 20 November - 1 December 2000)*, UNCITRAL, 34rd Sess., at 28-9, U.N. Doc. A/CN.9/485 (2001), *at* http://www.uncitral.org/en-index.htm (discussing model provisions on conciliation/mediation).

37. *See* NAFTA Advisory Comm. On Private Commercial Disputes, *Terms of Reference, at* http://www.ita.doc.gov/legal/adr_term.htm (last visited Sept. 10, 2001).

38. Mediation and/or conciliation have been used as dispute resolution procedures internationally for a number of years. In some countries mediation and conciliation are considered a similar process while in other countries some perceive differences between the two. As a result, there is no international uniform definition of mediation. For purposes of the work currently underway by the UNCITRAL Working Group, the term conciliation rather than mediation is used and is defined as a broad notion encompassing various types of procedures in which parties in dispute are assisted by an independent and impartial person to settle a dispute. .*See Settlement of Commercial Disputes, Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Written Form for Arbitration Agreement, Interim Measures of Protection, Conciliation, Report of the Secretary-General*, UNCITRAL Working Group on Arbitration, 33rd Sess., at 28, U.N. Doc. A/CN/WG.II/WP. 110 (2000), *at* http://www.uncitral.org/en-index.htm. *See also* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 27-8 (2d ed. 1991); Walter A. Wright, *Mediation of Private United States-Mexico Commercial Disputes: Will it Work?*, 26 N.M. L. Rev. 57, 59 (Winter 1996).

39. Currently in the U.S., there is a joint initiative between one of the American Bar Association's Drafting Committees and the National Conference of Commissioners on Uniform State Laws (NCCSUL) to draft a Uniform Mediation Act (UMA). In this document, mediation is defined "as a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." Uniform Mediation Act, § 3(2) (draft of Aug. 17,

mediators are able to direct disputing parties to focus on problem solving and interest based negotiation thereby creating a "space for conflict solution."[40] Unlike litigation and arbitration, in a mediation, a third party never orders a solution to the conflict, rather the disputing parties agree to a negotiated settlement. Legal strategies related to tactics and maneuvers addressing such areas as jurisdiction, evidence and enforcement are not relevant in a mediation proceeding.

Disputing parties are allowed to resolve their problems using a business framework related more to business strategies and communication than to a legal framework intertwined with mandatory rules and procedures. One key aspect of mediation is that the process is confidential.[41] Allegedly, all communication including the exchange of documents that occurs during the mediation is protected from disclosure in subsequent proceeding.[42] The confidentiality protection is just another element of mediation, which encourages parties to engage in direct communication. Mediation is a process, which incorporates the will of the Parties at every level; from selection of the mediator to the resolution of the conflict.[43] Although disputants are never forced to participate in a mediation where they don't either agree to or accept the mediator, the integrity and quality of a mediation is very dependent on the mediator.

HOW DOES ONE SELECT A MEDIATOR?

Competent mediators possess great people skills and the ability to communicate either verbally or non-verbally to influence disputing parties to assess their problems from a humanistic approach.[44]

2001) [hereinafter UMA], *at* http://www.nccusl.org. (In August, the UMA was adopted by NCCUSL, The ABA House of Delegates is expected to vote up or down on endorsing the ACT at its next meeting.) *See generally What is Mediation?, supra* note 34; Ann L. MacNaughton & Geoffrey J. Brune, *Mediating NAFTA Disputes: So, You've Never Seen a Mediation?, in* COMMERCIAL MEDIATION, *supra* note 34, at 267-83; L. M. DÍAZ, MORALEJAS PARA MEDIAR Y NEGOCIAR (1999) (discussing the understanding of mediation in Spanish).

40. *See, e.g.,* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1981) (discussing in detail interest-based negotiation); MARK BENNET & MICHELE HERMANN, THE ART OF MEDIATION (1996) (discussing problem solving techniques in mediation). *See also* OBTENGA EL SÍ: EL ARTE DE NEGOCIAR SIN CEDER (Gerardo de Alba Guerra trans., México 1984) (translating into Spanish the book by Fisher & Ury listed herein).

41. Preserving the notion of confidentiality in a mediation has been one of the most difficult tasks of the drafting committee. *See* UMA, *supra* note 39, at § 5 (providing legal protection against subsequent injuries deriving from any communication during the mediation process).

42. *Id.*

43. *See Model Standards of Practice for Mediators of the ABA, SPIDR and AAA*, sec. I, *at* http://www.to-agree.com/spidrstd.htm

44. *See, e.g., Mediation Checklist at* http://adrr.com/adr1/essayg.htm (listing criteria for the selction of a mediator) (last visited Sept. 10, 2001). *See also Using the Mediation*

Mediators use language in ways that give them "interactional power and the assumed right to influence and shape the final outcome."[45] They must be trusty worthy, fair-minded and more committed to process than content.

It is not a requirement that a mediator is an attorney.[46] It is widely believed that a qualified mediator have strong people skills, an analytical mind, have a presence that generates the trust of the parties in both competency and integrity.[47] Experience and mentoring probably help, but the more personal qualities are the characteristics that matter and these very often may develop in the absence of training and educational requirements.[48]

Checklist at http://adrr.com/adr1/essayf.htm (supplementing the outline of the *Mediation Checklist*) (last visited Sept. 10, 2001). Over the last decade as mediation has grown in popularity and use, many individual States in the United States as well as ADR Institutions require and offer specific training in mediation. *See generally* http://www.adr.org (including the American Arbitration Association's guide to mediation); http://www.iccwbo.org (including information on alternative dispute resolution offered by the International Chamber of Commerce); http://www.texasadr.org (including the *Texas Mediation Trainer Roundtable Standards).*

45. Karen Tracy & Anna Spradlin, *Talking Like a Mediator, in* NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES, 110-11 (Jospeh P. Folger & Tricia S. Jones eds., 1994) [hereinafter NEW DIRECTIONS].

46. This topic in itself has generated extensive debate. A mediator must possess excellent communication and listening skills. The field of mediation is a cross-section of multidisciplinary areas and practicing mediators come from a variety of professional backgrounds. *See* James H. Keil, *Hybird ADR in the Construction Industry,*54-AUG DISP. RESOL. J. 14, 20 Keil writes " Good Mediators do not have to be attorneys, and, in fact, many times should not be attorneys."; *see also*, the link to the UMA where there is no requirement mandating that only attorney's can be mediators; or we could provide a link to ACR the newly created merged organization representing mediators http://www.spidr.org/.)

47. David Grappo *Questions Litigators Ask About Mediation,* 55-MAY DISP. RESOL. J. 32, 35.

48. By analogy, a poetic style to present qualifications of a mediator may be compared to the qualifications that Don Quixote described when discussing for him, the most noble of all professions, the errant knight. Quixote said the following:

> It is a science that comprises all or most of the sciences in the world, since he who professes it must be a jurist and know the laws of justice concerning persons and property, so that he may give to everyone what is his own and his due. He must be a theologian, so that he may give reasons for the Christian rule he professes, clearly and distinctly, wherever he may be asked. He must be a physician, and especially a herbalist, so that he may recognize in the midst of deserts and wildernesses those herbs which have the virtue of healing wounds,... He must be an astronomer, to know by the stars how many hours of the night are passed, and in what part and climate of the world he is. He must know mathematics,.. he must be chaste in his thoughts, straightforward in his words, valiant in his deeds, patient in his afflictions, charitable towards the needy and in fact, a maintainer of truth, although its defense may cost his life... In response Don Lorenzo replies: If that is so, I agree that this science is superior to any... I doubt whether there are, or ever been knight errants with so many virtues.

Different forms and styles of mediation exist although all forms share the common feature that a third party never acts as a decision maker.[49] Depending on the type of dispute, number of disputing parties and the complexity of the issues, more than one mediator could be appropriate for the process.[50] With respect to international disputes, co-mediation provides an excellent opportunity to offset potential power imbalances and quell disputing parties concerns of country impartiality. Further, the specific gender, nationality, age and ethnicity of the mediators also have the ability to affect the mediation process.[51]

HOW AND WHEN TO REQUIRE MEDIATION

The most formal and legally recognized venue to request mediation is to include a pre-dispute clause in the transactional agreement.[52] Mediation can be the only dispute resolution process requested or it can be accompanied with a request for arbitration in the event the mediation fails.[53]

In the drafting of pre-dispute clauses, at a minimum, the parties should consider the following: whether mediation is the only dispute resolution mechanism or if it should be integrated with other ADR processes such as arbitration, the number of mediators, a process for selecting the mediators, whether the mediation is administered or ad hoc, and the language and location of the mediation.[54]

In the absence of a contractual provision, disputing parties can agree to use mediation at any time. In this situation, the parties may draft and sign a Submission Agreement [55] that evidences their will to

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MIGUEL DE CERVANTES SAAVEDRA, THE ADVENTURES OF DON QUIXOTE (J. M. Cohen trans., Penguin Books 1950), 582, 583.

49. *See, e.g.*, Tracy & Spradlin, *supra* note 45, at 110.

50. *See, e.g., supra* note 19.

51. *See generally* William A. Donohue & Mary I. Bresnahan, *Communication Issues in Mediating Cultural Conflict, in* NEW DIRECTIONS, *supra* note 45, at 135-58.

52. *See, e.g.*, the U.S.-Mex. Conflict Res. Ctr. (CRC) website, which recommends the following mediation clause. "If a dispute arises out of or relating to this contract, or the breach thereof, the parties agree first to try in good faith to settle the dispute by mediation administered by the CRC." In the event mediation fails, the following arbitration clause is suggested. "In case the mediation is unsuccessful, any unresolved controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration filed with the...CRC and administered by the CRC in accordance with the CRC's Arbitral Rules. A judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof." This language is also available in Spanish *at* http://crc.nmsu.edu (last visited Sept. 11, 2001). *See also* Phillip A. Robbins, *Drafting Mediation Clauses for International Transactions, in* COMMERCIAL MEDIATION, *supra* note 34, at 255-62.

53. *See* Robbins, *supra* note 52, at 256-9.

54. *Id.* at 255.

55. An example of a Submission agreement advocated by the U.S-Mexico Conflict Resolution Center:

engage in a mediation.[56] Other times, the parties merely verbally agree to participate and subsequently conduct the mediation in the absence of any formal agreement to do so.

Like many things in life, timing is critical. Research in this area has shown that the sooner mediation is requested and utilized the better success rate it has in settling the dispute.[57] Since one attribute of mediation is its flexibility and informality, it can be requested, scheduled and completed within a very short time frame. On the other hand, mediation can also be used and requested during either an arbitration and/or litigation.[58]

Mediation is a very versatile dispute resolution mechanism and technically can be utilized whenever the disputants realize that it is better for them to directly communicate with each other rather than allow a third party to mandate a resolution.

Fundamental details to consider when arranging the mediation

Whereas disputes or differences have arisen between the parties with respect to... [refer to transaction, project or events giving rise to the disputes], and Whereas the parties wish to resolve all such disputes or differences by mediation, it is agreed as follows: 1. The parties shall decide if one or more than one mediator shall be appointed and in the absence of agreement by the parties on the selection of mediators, the [U.S.-Mexico Conflict Resolution Center] will select the mediator(s). If more than one mediator is appointed, the mediators shall act collectively. 2. The parties agree that the mediation will be administered by the U.S.-Mexico Conflict Resolution Center]. 3. The procedural rules for any mediation shall be determined by [the U.S.-Mexico Conflict Resolution Center]. 4. In determining the procedures to be followed, the mediator shall observe the following provisions agreed between the parties: (i) the language of the proceedings shall be . . . [language]. (ii) the place of the mediation shall be . . . .[place]. *See generally* Submission Agreement Proposed by the US-Mexico Conflict Resolution Center located at New Mexico State University *available at* http://crc.nmsu.edu.

56. Also known by some as a *compromis,* this is a process where sovereign states refer an existing dispute more traditionally to an arbitration tribunal but also the referral may be made to a process compared to mediation. For a detailed discussion, see DOUGLAS YARN, DICTIONARY OF CONFLICT RESOLUTION, 96-97 (Jossey Bass Publishers) (1999).

57. For the most recent statistics on the use of mediation and its success rate, see the website of CPR, Institute for Dispute Resolution, http://www.cpradr.org and/or the website of the American Bar Association Section of Dispute Resolution http://www.abanet.org/dispute/home.html. *A 1997 Statistical Report published by CPR Institute for Dispute Resolution in the Metropolitan Corporate Council (August 1997) stated that 89% of U.S. Corporations surveyed indicated that they had used mediation in the last three years and 90% of the respondents stated they viewed mediation as a cost-saving measure*; http://www.ilr.cornell.edu/ICR/NEW/execsum.html.

58. There are institutional arbitration clauses that provide for the use of mediation either prior to beginning the arbitration or with agreement of the parties even during the arbitration. Many State and Federal Courts also have adopted rules which mandate the use of mediation for certain cases, especially those dealing with domestic and property issues. *See* the annotated reports of the UMA, *supra* note 37.

include cities in which to meet and conditions that favor a pleasant and relaxing milieu. One should not underestimate the importance that the external environment has in creating a favorable ambiance.

STAGES OF MEDIATION

Although each mediation in a sense follows its own pattern depending on the parties and the content, the general practice of mediation does include some stages which are set out below.[59]

PRE-MEDIATION. During this stage, the parties learn that they previously agreed to use mediation, they agree on the number of mediators and their identity, and determine the location of the mediation.[60] Parties also agree that the person attending the mediation must possess decision-making authority to settle the case.[61]

STAGE 1-OPENING STATEMENT. The Mediator initiates the process by giving a brief opening statement.[62] Included in this statement is a concise explanation of the mediation process and a ratification that the parties agreed to participate in the process and that they understand the role of the mediator.[63] This is the stage where most mediators review the Ground Rules related to the process.[64] Some mediators may reiterate a conflict of interest check. Others also require the parties to sign a confidentiality agreement. [65]

STAGE 2- IDENTIFYING ISSUES. Some mediators allow each party a set time to present their case similar to an opening statement given in court.[66] Other mediators let the parties start talking about whatever issue they prefer.[67] Whichever style is used, in this stage the disputing parties identify or begin to identify the controversial issues. During this phase, the mediator often restates and attempts to reframe issues.[68]

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59. *See* BENNETT & HERMANN, *supra* note 38, at 25-70.

60. *See id.* at 36.

61. *See* Grappo, *supra* note 47, at 37.

62. *See* BENNETT & HERMANN, *supra* note 59, at 35.

63. *See id.* at 35.

64. *See id.* at 35.

65. It is critical during the mediator opening statement to explain the mediation process. Although many parties may nod their heads when asked if they clearly understand this process, the most prudent practice is to clarify the process and explain very slowly how a mediator differs from a decision maker, how the mediator will assist the parties to reach (or not) a negotiated settlement. During this brief statement, the mediator may wish to review basic rules of respect that each party must show toward the other and that only one party speaks at a time. Very often, during this stage, mediators distribute a confidentiality agreement that explains the legal rules of confidentiality and asks that each party sign this agreement. At a minimum, the notion of confidentiality should be discussed even if no agreement is used. *See id.* at 40.

66. *See id.* at 44.

67. *See id.* at 44.

68. *See id.* at 48.

Parties are encouraged to change their approach from a positional frame to one focused more on interests. Often emotions run high and venting is used in a controlled fashion to begin to de-escalate the emotional commitment to the dispute.[69] A preliminary step to establishing common ground is initiated.

STAGE 3- DIALOGUE. During this stage, the parties negotiate directly with each other.

Communication is the key. The type and style of communicate used by the parties relates directly to their emotions. Mediators must use their skills here to manage the emotional climate and at the same time encourage the parties to trust each other, to work together and to attempt to understand the others' views.[70] Again, the milieu is decisive.

Very often, mediators use caucuses at this stage.[71] A caucus is a private, confidential meeting between the mediator and one of the parties.[72] Caucuses allow the mediator to talk privately with each party. During these sessions, negative negotiating behavior can be addressed, trust in the mediator and the process can be strengthened, hidden agendas can be disclosed, emotions, attitudes and perceptions of one party can be shared privately and the acceptability of various solutions and alternatives can be tested.[73]

Within the profession of mediation, there is quite a divergent view around the propriety of using caucuses. At the center of this discourse is the ethical concern of trust.[74] When a mediator talks with one party separately, paranoia and mistrust from the other parties naturally may develop. On the other hand, caucuses are very effective to defuse tense anger, to provide an opportunity for one side to share something openly with the mediator that they are fearful to disclose in the mediation, or that they don't feel appropriate to tell the other party face to face, or to help parties save face in making concessions.[75]

STAGE 4- CREATE OPTIONS FOR MUTUAL GAIN. During this phase, the mediator assists the parties in brainstorming.[76] This is a very useful tool in mediation. It is a process where the mediator works very hard to assist the parties to spontaneously generate as many ideas as possible to solve the conflict.[77] In this stage, the mediator encourages the parties to use their creativity to suggest viable alternatives that

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69. *See id.* at 44.

70. *See id.* at 41.

71. *See* BENNETT & HERMANN, *supra* note 59, at 59.

72. *See* YARN, *supra* note 56, at 69-70, for a definition and discussion on caucus.

73. *See id.* at 70.

74. *See id.* at 70-71.

75. *See id.* at 70.

76. *See id.* at 63-64. For a more thorough discussion on brainstorming, *see* FISHER, URY & PATTON, *supra* note 38, at 58-67.

77. *See* YARN, *supra* note 54, at 63-64.

would meet the needs of both parties.[78] Parties are constrained to let the other talk and encouraged to trade-off each other's ideas and to try to narrow differences.[79] It is in this stage that the parties collectively develop a plausible solution to their dispute.

STAGE 5- DEVELOP AN AGREEMENT. The mediator assists the parties to memorialize their negotiated solution into a written agreement where all parties willingly agree to sign.[80] Many times, the parties' legal staff may edit this initial document.[81]

Often a mediation will move back and forth among stages, especially as new issues surface and are considered. One learns very quickly that often the first issue presented is not necessarily the most important. A mediation is a sequence of communication, and information flows depending on the parties' comfort level and trust in the process.[82]

STYLES OF MEDIATORS

Over the last decade, in the U.S., at least three different styles of mediation have emerged.[83] These styles differ with respect to the level of intervention the mediator uses during the process.

The facilitative model assumes that the mediator is totally neutral and does not present personal views on the merits of the case.[84] This mediator is the least interventionist. In some instances, the mediator may suggest a possible alternative that may resolve the issue but only after it is clear that the parties cannot generate an option themselves.[85] This type of mediator never comments on the settlement and is not apt to remedy a substantive power imbalance between the parties. Although many mediators state publicly, and may feel, that this style is the best,[86] in practice, especially if the situation is volatile, it may not be very useful. The facilitative model represents the purest form of consensual decision- making by the parties.[87]

In the evaluative model, the mediator "pushes" for a settlement, often by presenting his or her own views on the relative merits of the

78. *See id.* at 64.
79. *See id.*
80. *See* BENNETT & HERMANN, *supra* note 38, at 64.
81. *See id.* at 64.
82. *See* BENNETT & HERMANN, *supra* note 38, at 26.
83. However, other authors speak of four styles as DONOHUE & BRESNAHAN, *supra* note 51, at 149-154.
84. YARN, *supra* note 56, at 272-284.
85. *Id.*
86. The authors' draw on their collective experience in this field and have determined this to be a common opinion held by mediators.
87. YARN, at 274.

case.[88] This mediator is quite interventionist and offers his or her own opinion (either overtly or subtly) of options at all stages of the mediation. In this situation, the mediator may intervene substantively in the dispute.

In the empowerment and recognition model, the mediator encourages the parties to choose independently whether and how to resolve the dispute.[89] Great attention is placed on each party respecting the other.[90] This model is rarely used in business conflicts and is more common for family and community dispute resolution.[91]

BENEFITS OF USING MEDIATION WITHIN THE NAFTA TRADING AREA

The NAFTA free trade zone comprises three countries with different cultures and legal systems.[92] So, from a cross-cultural perspective, mediation offers a venue for people from different cultural backgrounds, legal systems and business training to sit down at the same table and discuss their problems without having to learn or understand another country's laws and customs.

Increased trade inevitably creates more business conflicts. [93] Mediation not only provides an effective way to resolve these disputes, but also offers a number of benefits that the other dispute resolution mechanisms lack.

Mediation is the only dispute resolution mechanism that allows the disputing parties to preserve their underlying business relationship at the same time and during the same process that is used to resolve the problem.This aspect is very important for human emotions.

Often disputes arise based solely on miscommunication and misunderstanding. Mediation allows the disputing parties to talk to each other in a safe and controlled environment.[94] Other dispute resolution mechanisms prohibit the parties from direct communication. Litigation and arbitration, to some extent, are built on an adversarial

88. *Id.*

89. *Id.*

90. *Id* at 281-282.

91. *Id.*

92. The legal system in the U.S. and Canada is a common law system and the legal system in Mexico is a civil law system. Basic legal differences exist in the training of attorneys and judges as well as in the actual practice of law.

93. Merchandise trade among the NAFTA partners neared $505 billion in 1998. *See NAFTA Works for America* (5 Year Report-July 1999) *at* http://www.ustr.gov/naftareport/intro.htm. Canada and Mexico rank first and second respectively for overall trade with the U.S. For specific information detailing U.S. trade with its NAFTA partners, *see* Center for the Study of Western Hemispheric Trade *at* http://lanic.utexas.edu/cswht/tradeindex/About.html.

94. The authors' draw on their collective experience in this field.

model.[95] At the end of arbitration and litigation, disputing parties very often detest and loathe their adversary. When a commercial trader is able to resolve a dispute and continue to transact business with the same partner, a business asset is preserved and is considered a value. Businesses prefer to be engaged in commercial activity rather than lawsuits and arbitrations.[96]

Research shows that parties who use mediation generally have very high customer satisfaction with the process.[97] Mediation is seen as a cost effective and time saving mechanism.[98]

In mediation, possible conflicts of law issues are avoided as well as the costs and uncertainty of having to retain legal counsel from a foreign jurisdiction.[99] Mediation, in a sense, offers the same type of environment that was used to initiate the transaction in order to resolve the dispute: direct communication between the parties.[100]

From a business point of view, one critical benefit of using mediation is the shroud of confidentiality it provides.[101] Businesses do not want their proprietary secrets made public.[102] Very often, disputes arise between international trading partners when one fears the other

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95. Steven K. Andersen, *Mediation and the North American Free Trade Agreement*, 55-MAY DISP.RESOL. J. 56, 60. *See generally*, Walter G. Gans, *Saving Time and Money in Cross-Border Commercial Disputes*, 52-JAN DISP. RESOL. J. 50 (1997).

96. ROBERT COULSON, BUSINESS MEDIATION-WHAT YOU NEED TO KNOW, (1989) at 5-7.

97. *See* David Lipsky and Ronald L. Seeber, *The Use Of ADR IN U.S. Corporations: Executive Summary, at* http://www.ilr.cornell.edu/ICR/NEW/execsum.htm.

98. *Id* at 1-3.

99. This is both authors' experience in handling international mediations. *See also* Dr. Julian D. M. Lew and Laurence Shore, *International Commercial Arbitration Harmonizing Cultural Differences*, 54-AUG DISP. RESOL. J. 33,34.

100. When analyzing communication between two different cultures, it is useful to review some of the empirical research in this area. Very often generalizations that one could draw from this research must be made very cautiously since it is very difficult to put an entire culture in one group or another and conclusions could be more destructive than constructive. For a detailed discussion on cultural differences between many countries, *see* GEERT HOFSTEDE, CULTURE'S CONSEQUENCES, (SAGE) (1980). The core of Hofstede's research identified four main dimensions on which cultures can be differentiated: power distance, uncertainty avoidance, individualism and masculinity. This method of differentiating cultures is useful for mediators because it provides a language for understanding cultural biases inherent in the mediation styles used. *See* DONOHUE & BRESNAHAN, *supra* note 49, at 146-49. For a specific discussion on this issue relating to cultural difference between Mexicans and Americans, see Cristina Gabrielidis, Walter Stephan, Oscar Ybarra, Virginia Dos Santos Pearson & Lucia Villareal, *Preferred Styles of Conflict Resolution. Mexico and the United States*, 28 J OF CROSS-CULTURAL PSYCHOL. 6 (Nov. 1997); Walter A. Wright, *Mediation of Private United States-Mexico Commercial Disputes: Will it work?*, 26 N.M. L. R. 57 (Winter 1996).

101. The core of the recently adopted UMA is to provide confidentiality protection. *See supra* note 39.

102. In the experience of both authors, protecting proprietary corporation secrets is a key element in deciding whether or not to use mediation.

may divulge company secrets.[103] Many of the legal tactics used in litigation and arbitration focus on protecting secrets.[104] Mediation allows the parties to discuss the problem in a confidential setting.[105]

CONCLUSION

The modern international attorney today must be well qualified as a negotiator and conflict solver. Business people must consider mediation as a first option. There is legal protection for all participants in mediation through the confidentiality agreement. Recognizing the importance of transparency and cooperation to resolve international commercial disputes will better prepare the attorney for work in the evolving multinational business marketplace.

103. This is particularly acute in international business relationships where the parties are unclear to the degree of protection granted by foreign laws.

104. Robert D. Benjamin, MSW, J.D., *A Critique of Mediation-Challenging Misconceptions, Assessing Risks, and Weighing The* Advantages, *at* http://www.mediate.com/articles/critiq.cfm?plain=t.

105. Donald Lee Rome, *Resolving Business Disputes Fact-Finding and Impasse,* 55-JAN Disp. Resol. J. 8, 11-12.