

Report of the Seventeenth Meeting of the NAFTA Advisory Committee
on Private Commercial Disputes
Held in San Juan, Puerto Rico, on March 8 and 9, 2007

I. Welcome and Introduction

The 17th meeting of the NAFTA Advisory Committee on Private Commercial Disputes convened in San Juan, Puerto Rico, on March 8, 2007. David Stewart, U.S. Government co-chair, welcomed the 25 members in attendance and outlined the proposed order of business. He noted that the first day would be devoted to general reports and Subcommittee meetings, while the second day would consist primarily of outreach activities through a meeting hosted by the University of Puerto Rico Law School, with time for Subcommittee meetings in the afternoon as necessary.

Preliminarily, he reminded members that the Committee's report to the NAFTA Commission needs to be finalized. Meg Kinnear, Canadian Government co-chair, offered to take any additional comments from members on the draft which had previously been circulated and would then finalize the report. Similarly, the minutes for the immediately preceding meeting in Morelia need to be finalized, and any remaining comments should be provided to Linda Pasquel, the Mexican Government co-chair, immediately. Additional items which members might wish to discuss among themselves, with the goal of agreeing on action to be taken, included (i) proposals for rotation of committee members and Subcommittee chairs; (ii) the ongoing role and purposes of the Committee; and (iii) whether the current Subcommittee structure is appropriate (are there too many, have some effectively completed their work, are subcommittees needed for new areas, etc.).

II. Reports from Government Representatives

1. NAFTA Chapter 11 Developments

Meg Kinnear (Canada co-chair) reported on recent developments in cases under NAFTA Chapter 11.

a. Canada

In December 2005 UPS was argued. The case deals with allegations that the courier service of Canada Post is subsidized by the postal service, contrary to Articles 1102 and 1105. Still waiting for a decision. Generally seems to be taking 6-8 months or longer for decisions of Chapter 11 tribunals.

Four new Notices of Intent:

Gallo: concerns an empty mine site in northern Ontario. This was purchased by the investor as a waste disposal site for Ontario passed domestic legislation expropriating the site for

environmental reasons. The issues for claims breach of Articles 1105 and 1110. Garbage generated in Toronto is transported north, causing environmental problems. Expropriation claim.

GL Farms: Challenges Ontario milk permits for export milk; determination of who is an investor (US parent) will be key.

Merrill: Challenges British Columbia log exports and scheme for surplus logs.

Crompton: Pesticide (lindane) treatment for seeds investor claims its pesticide registration was expropriated contrary to Articles 1105 and 1110.

b. United States

Softwood Lumber: In June 2006, the NAFTA Chapter Eleven Consolidation Tribunal issued a decision dismissing claimants' claims challenging the AD/CVD determinations imposed by the United States on Canadian softwood lumber. The Tribunal also dismissed all claims challenging the U.S. government officials' administration of the AD/CVD laws. The Tribunal retained jurisdiction over claimants' challenge to the Byrd Amendment.

The United States and Canada entered into the Softwood Lumber Agreement in October 2006. As part of that agreement, one of the NAFTA Chapter Eleven claimants, Canfor, terminated its Chapter Eleven case. A few months later, in January 2007, Terminal Forest Products determined not to pursue its NAFTA Chapter Eleven claim and sought an order of termination from the Tribunal. The third softwood claimant, Tembec, had withdrawn its claim from the Chapter Eleven proceedings on the eve of the jurisdictional hearing and filed a claim in federal district court seeking to set aside the Tribunal's order of consolidation. In connection with the Softwood Lumber Agreement, Tembec agreed to the dismissal of its district court case.

The United States is pursuing from Tembec costs that it incurred in defending against Tembec's NAFTA Chapter Eleven claim and a hearing on that request was held at the end of January 2007. Tembec, displeased that the United States is pursuing this cost request, has sought to reopen the judgment dismissing its challenge in district court. That motion is pending.

Glamis Gold: filed in 2003, deals with open pit gold mining on native American land; amicus briefs have been filed following guidelines set forth in 2003. The United States will be filing its Rejoinder in this case on March 15. A hearing on the merits is scheduled for two non-consecutive weeks, from August 13-17 and September 17-21.

Grand River: Last year, the Tribunal rendered a decision dismissing the bulk of claimants' claims as time-barred and permitted claimants to amend their claim. The parties are currently engaged in discovery. The Tribunal has not yet issued a schedule for the filing of memorials or for the hearing. Earlier the Tribunal discussed part of the claim as time barred because of the length of time to file. This is the first time bar dismissal under Chapter 11.

BSE: Some 100 cases have been filed by Canadian cattle farmers arising from the "mad cow" situation. The parties are briefing the United States' objection to jurisdiction. Briefing will

be completed in July, and a hearing on the United States' objection is scheduled for October 9-11.

c. Mexico

Thunderbird: Investor state arbitration dismissed claim and gave lengthy judgment on costs. On set aside, the D.C. Circuit addressed standard of review – criteria is that success on the merits is an indicator of who takes the costs. One noteworthy aspect of this case is that it addresses the “manifest error” question — the standard of review and how far the court can go in the review of the facts and the review of the law.

ADM/Cargill: The tribunal refused consolidation in cases where it might have been appropriate based on concerns with respect to confidentiality issues between competitor companies (difficulty in managing confidential issues between countries).

Bayview: Texas water claim, by 48 irrigation districts claiming water diversion by Mexico for use by Mexican farmers. Deals with allegations of breach of international treaty, international law, cross-border link.

2. WTO Developments

Linda Pasquel, co-chair of the Mexican Government delegation, reported on recent developments within the WTO.

On July 24 the WTO/DG proposed to suspend the Doha round of negotiations due to lack of support. At issue is the question of how much to reduce program support for agricultural products. Subsequently some ministerial meetings produced no headway.

At the Davos “mini-ministerial” agreement was reached to re-launch negotiation to get agreement to reduce support programs for agricultural products and increase market access. On February 7 the director general of the WTO announced that the talks would start, with a mandate to seek agreement on how much countries are willing to reduce support, and how much to increase market access. It was determined that the relevant modalities would have to be agreed upon by the end of March 2007.

3. Bilateral Trade Negotiations

The three Government co-chairs then reported on recent developments with respect to BITs, FTAs and investment treaty negotiations.

a. Mexico

Mexico recently completed a BIT agreement with India, which is now ready for signature. FTA negotiations with Korea have been suspended, and the future remains uncertain.

In the context of the CAFTA agreement, Mexico may be able to send inputs to the Central American countries that would subsequently be incorporated into products sent to the U.S. (including textiles). There are some reciprocity considerations that will need to be taken into account. Verification processes also need to be established so that the U.S. and Mexico can confirm the origin of the products. Mexico concluded a customs cooperation agreement with the U.S. at Davos

Mexico has no FTA with the Dominican Republic, although it is engaged in negotiations with other CAFTA countries. The FTA with Chile incorporated a government procurement chapter, and should be signed next month (based on NAFTA chapter 10).

b. *Canada*

Canada is working to finalize FTA texts with Korea and Singapore. A BIT was signed with Peru in 2006, negotiations are close to conclusion with India, and discussions with China are in progress. Talks with Jordan, Vietnam and Indonesia are expected. (The Canadian model BIT (2003) and the U.S. model BIT (2004) are fairly similar.)

Canada signed the Washington Convention on ICSID in December 2006, and it is now waiting for ratification. Five provinces have adopted implementing legislation.

c. *United States*

The FTA with Bahrain entered into force on August 1, 2006. The agreements with Peru, Colombia, and Oman have been signed but have not yet entered into force. Negotiations with Panama concluded in December 2006 but the agreement has yet to be signed. Negotiations with South Korea and Malaysia are ongoing. Future negotiation rounds with Ecuador, United Arab Emirates, and Thailand have not been scheduled.

CAFTA-DR entered into force between the United States and El Salvador on March 1, 2006, with regard to Honduras and Nicaragua on April 1, 2006, and with regard to Guatemala on July 1, 2006. It has not yet entered into force with respect to the Dominican Republic and Costa Rica.

There are ongoing BIT negotiations with Pakistan. Both the US and Pakistan would benefit from conclusion of a “high quality” but important issues remain to be resolved. In November 2005, the United States signed a BIT with Uruguay; that BIT entered into force on November 1, 2006.

III. Legal Developments in Member Countries

a. *United States*

Prof. Lutz (U.S.) reported on a number of recent developments, including

- the U.S. Supreme Court’s decision in *Buckeye* in March 2006;

- a California Court of Appeals decision in *Rambus Inc. v. Hynix Semiconductor, Inc.* in January 2007;
- an Eleventh Circuit decision in *Harbard International v. Hercules Steel*, concerning the doctrine of manifest disregard;
- a challenge to Louisiana's rejection of foreign persons qualifying as lawyers that is on certiorari to the U.S. Supreme Court;
- recent federal legislation prohibiting use of mandatory arbitration in consumer contracts with active military personnel; and
- cases that have raised the question as to whether bankruptcy jurisdiction takes precedence over arbitral enforcement.

b. *Mexico*

Francisco González de Cossío (Mexico) presented the Mexican developments.

As to arbitration agreements, Mr. de Cossio began by noting that most arbitral agreements are recognized and enforced in Mexico. Efforts by recalcitrant parties to ignore them or have them annulled have by and large been unsuccessful.

An important development concerns *competence-competence*. A recent Mexican Supreme Court decision affects the scope of the same under Mexican arbitration law. At issue was whether a challenge to an *arbitration agreement* (in contrast to the *contract containing the arbitration agreement*) should take place before the Arbitration Tribunal or Mexican Court. The Supreme Court, in a divided opinion, ruled that, whereas a challenge to the agreement *as a whole* could take place before the arbitration tribunal, a challenge directed to the arbitration agreement *per se* would need to be effectuated before the Mexican court. The reasoning and procedural history resembles the US Supreme Court decision in *Buckeye*, and Mr. de Cossio felt that it was bad law. He noted that Prof. Bachand had published an article in *Arbitration International* on the matter, and suggested its reading.

As to annulment and enforcement of arbitration *awards*, interesting developments had taken place. They involve the very same case that was reported during the Committee's last meeting in Morelia, where a challenge to an (erroneous) lower court annulment had been unsuccessful. Recently, in an unusual procedural maneuver, the case was brought again before the Mexican Supreme Court. At issue was the specific type of procedural remedy (direct or indirect *amparo*) and the Court held that—contrary to the previous lower (appellate) court decision—that the type of *amparo* that was applicable was direct, in lieu of indirect. The practical impact of the decision is that the case is reopened by remanding it to the respective appellate court.

The case is interesting in many ways. Albeit the holding *per se* is questionable on the procedural (*amparo*) issue, it is safe to say that the court went out of its way to breathe life into a wrongfully annulled award. And this is good news for arbitration generally.

The case is currently *sub judice* before the appellate court.

Ancillary issues were worth addressing. Specifically, a recent Mexican Supreme Court decision held that international treaties were held to supersede even Federal law. Although the issue had been settled by a 2000 decision, the new ruling revisited and restated the holding. The topic is strongly debated within the Mexican practice and academy, and hence worth mentioning.

c. Canada

Selma Lussenburg reported on several recent Canadian decisions. The first, in *Xerox/NPI*, concerned software licensing. MPI won award but Xerox challenging award, stating that the arbitral panel went too far in reviewing records.

The MPI-appointed arbitrator was an expert, not a lawyer, with personal knowledge of the underlying dispute (he was an expert in software code and had worked on the MPI code). Xerox alleged that there was a conspiracy. However, the record clearly evidenced that the expert arbitrator had sufficiently disclosed the process as well as the steps taken.

The second case, *Rogers*, addressed arbitration clauses in consumer contracts. Courts have maintained that such clauses are not enforceable unless the consumer expressly agrees to them after the dispute has arisen (there is legislation to this effect in Ontario, and Quebec has also recently passed similar legislation).

IV. Report on UNCITRAL Working Group

In the absence of Jose Maria Abascal, David Stewart (U.S.) reported briefly on recent developments in the UNCITRAL Working Group on Arbitration. He noted that after considerable debate the WG had approved amendments to the UNCITRAL Model Law on Commercial Arbitration, liberalizing the requirement for a written agreement to arbitrate (in fact, including as an option a provision which did not explicitly require a written agreement) and addressing the issuance of interim measures and provisional relief by arbitrators (and courts).

The WG is now considering proposals for amendments to and revisions of the 1976 UNCITRAL arbitration rules. Among the issues which have been discussed to date are questions related to the scope of the agreement to arbitrate (disputes of a non-contractual nature arising from a defined legal relationship), the requirement for a written agreement (presents somewhat different issues than those addressed in the context of the Model Law), which version of the rules should apply to antecedent agreements to arbitrate, problems of ‘truncated tribunals,’ issues presented by joinder of parties and consolidation of claims, possible revisions to the unique “notice of arbitration” and whether to permit or require a response to such a notice as a separate procedural stage, the need for transparency vs. the expectation of confidentiality in international commercial arbitration, and the meaning and legal implications of terms such as ‘seat,’ ‘place,’ and ‘locus’ of the arbitration.

With respect to the issue of confidentiality, the UNCITRAL provisions do not include a general rule, but they presume that proceedings are confidential. The parties are free to depart from that principle but, in general, confidentiality is very important to the parties. This has been challenged by NGOs on the basis of the need for transparency — the award should be public or

publicly available. The U.S. government has been in favor of transparency, yet against a rule of non-confidentiality under the UNCITRAL framework. No final text has been adopted, but the expectation is that the WG will complete its work on the Rules within the next year or 18 months.

Thereafter, it may turn to considering questions of arbitrability, in particular the issues concerning intra-corporate disputes.

V. Hague Convention Developments

With respect to the new Hague Convention on Choice of Courts Agreements, David Stewart (U.S.) reported that States continue to wait for the final version of the Report on the Diplomatic Conference which adopted the Convention in July 2005. Participating states had raised a number of concerns regarding various aspects of the draft report, which had been communicated to the Co-Rapporteurs and the Permanent Bureau of the Hague Conference. The hope and expectation is that the Report will be finalized and made public this coming spring, permitting States to proceed with consideration of signature and ratification (the Report has since been made available on the www.hcch.net website). To date, no State had yet signed the Convention.

Following a working lunch and time for preliminary subcommittee meetings, the Committee turned to hearing reports from the Subcommittees.

VI. Subcommittee Reports

a. Subcommittee IV - Legal Issues

Prof. Lutz reported on the Subcommittee's consideration of enforcement efforts, in particular (i) the problem with the time required to enforce of awards (how to improve judicial treatment of awards, ensure expeditious consideration of enforcement actions), and (ii) provide for publication of awards. Consideration was also given to the notion of "class actions" or case consolidation; this is an area which the subcommittee believes should be watched carefully.

On the subject of adopting "Guidance Notes for Arbitrator Conduct", Prof. Lutz noted a division of opinion within the Subcommittee. Some, including himself, continue to think that adopting a set of rules setting forth standards of conduct for arbitrators within the NAFTA region would be useful in guiding arbitrators with respect to conflicts of interest and other conduct concerns, as well as ensuring confidence in and credibility of the private commercial arbitration process. A fourth draft of the proposal had been circulated within the Subcommittee for this purpose and was contained in Tab 9 of the Committee Briefing Book for this session. However, he indicated that some other committee members take a contrary view, pointing out that a variety of guidelines and rules already exist (AAA-ABA and IBA), are generally complex and unworkable, and do not on the whole provide clear guidance. Differing views were also expressed as to whether the existence of such rules would provide parties with unnecessary grounds for challenges to arbitrators and their awards.

A motion was made to withdraw the topic of guidelines; however, it was decided that the question of whether to adopt the proposed “Guidance Notes” is deferred until the next meeting, permitting committee members additional time to consider and exchange their views. Prof. Lutz indicated he will consult with those opposing the proposal to see if there was some basis for a compromise as to how to present the “Guidance Notes.”

b. Subcommittee III - Communication/Outreach

The Outreach Subcommittee continues to focus on two initiatives, (i) maintaining and improving the Committee’s website (where the effort is to increase access and exposure, providing appropriate links to other ADR websites and those of not-for-profit organizations, and enhancing the content to better service small/medium size business) and (ii) considering additional outreach programs and meetings (for example, presentations to various World Trade Center groups about ADR).

Regarding the website linkage, Subcommittee members indicated that they need advocates within the Committee to assist in the task of increasing access and exposure to the website by identifying specific groups or entities that could be contacted. Tab 6 of the Committee briefing book for this session includes additional information as to how to proceed; suggestions should be sent to Kevin O’Shea and/or Mariana Silveira at the National Law Center for Inter-American Free Trade.

With respect to the enhancement of the website content, the Subcommittee is looking at Committee members to provide materials. This issue had been raised in prior Committee meetings, and a review committee had been established — although it has yet to receive any materials. Kevin O’Shea and Mariana Silveira agreed to act as editors-in-chief, to solicit materials from members.

Finally, the Subcommittee reported on its outreach activities for the past year, conducted in conjunction with the National Law Center for Inter-American Free Trade. Committee members were also asked to help the Subcommittee identify possible venues for future outreach efforts, including with respect to specific sectors (*e.g.*, transportation, securities, construction, etc.)

The Committee meeting then adjourned with the suggestion to table the remaining subcommittee reports until Friday after the outreach meeting at the UPR Law School.

VII. Friday 3/9 meeting at UPR Law School

The Committee reconvened at the University of Puerto Rico Law School. The session began with opening statements by the government co-chairs and welcoming remarks by the Rector of the University and the Associate Dean of the Law School.

The Outreach Subcommittee then provided an overview of the mandate of the NAFTA 2022 Committee and why the effort to promote ADR is important.

- The Legal Subcommittee presented a panel discussion on the importance of dispute settlement provisions from the practitioner's point of view, emphasizing such issues as when to include an arbitral clause in a contract, whether to specify the procedures, when to choose 1 or 3 arbitrators, how to deal with considerations of evidence and scheduling, whether to place time limits within which the arbitrators must render an award; who bears the cost of the arbitration, etc.

The Small and Medium Disputes Subcommittee discussed the availability and possible uses of on-line or electronic dispute settlement mechanisms, including the process and the issues which need to be explored.

The Committee heard presentations by a number of Puerto Rican legal practitioners and interest groups, including the PR Chamber of Commerce, with respect to the state of ADR law and practice in Puerto Rico, problems and issues in the context of international trade and particular business sectors with an interest in ADR. There was general agreement between the local parties and the 2022 Committee that the best approach for cross-border ADR for small and medium-sized enterprises (SMEs) is the sectoral approach. Business sectors identified for particular interest/focus included agricultural, tourism-related activities and construction.

The event at UPR gathered in excess of 100 people, including government officials, judges, business people, private lawyers, academics and students. This venue provided an excellent opportunity for Committee members to share their expertise and practical perspectives on dispute resolution in the NAFTA region and for the local community to discuss local examples of ADR use and suggestions to further encourage and develop access to ADR.

VII. Committee Reconvenes

Following these outreach presentations and discussions, the Committee reconvened to hear brief reports from two other subcommittees.

a. *Subcommittee VII - Small and Medium Disputes*

This Subcommittee (Dana, Lana, Scott Donahey, Carlos Loperena, Pascal Paradis) has focused on identifying the needs and concerns of small businesses; it has also updated its review as to existing mechanisms to settle disputes in a more expeditious manner, including the use of e-ADR solutions. The Subcommittee also discussed the future of the 2022 Committee as a whole and, in particular, its own role and came to the conclusion that outreach is a significant component of its work. As part of its outreach efforts, and in order to make better use of the website, the Subcommittee volunteered to contribute guidelines, presentations and other materials that could be uploaded to the website. Initially, the Subcommittee will focus on a brief document that will contain an overview of the issues that need to be considered when dealing with a small claim (means, options, traditional arbitration and/or online options). Subcommittee members indicated that they would look forward to receiving from the government chairs and/or other subcommittee members information regarding small and medium-sized businesses that are involved in crossborder transactions — including the sectors that are the major players in crossborder claims.

VIII. Next Meeting

The next meeting will be hosted by Canada on a date to be determined later. Some discussion took place as to whether it would be optimal to meet after 6 months or perhaps closer to 1 year, taking into account anticipated developments within the Committee's area of responsibility. It was suggested that the agenda for next meeting might usefully focus on areas covered by subcommittees V (dispute avoidance and other forms of ADR) and VII (small and medium sized business).

The Committee expressed its appreciation for the enormous effort which had been made by Trish Smeltzer, Kevin O'Shea and Mariana Silveira in arranging for the successful outreach session at the University of Puerto Rico Law School and in the preparation of the notebook of materials for this Committee meeting.