

NAFTA 2022 ADVISORY COMMITTEE ON INTERNATIONAL PRIVATE COMMERCIAL DISPUTES

Minutes for the
14th Meeting / Santa Fe, New Mexico
September 26 – 28, 2004
Hotel Santa Fe, 1501 Paseo de Peralta, Santa Fe, NM 87501

Welcome and introduction by U.S. Chair

U.S. Government co-chair Jeffrey Kovar welcomed the members to New Mexico for the 14th Meeting of the NAFTA 2022 Advisory Committee on International Private Commercial Disputes, noting that it was the 10th anniversary meeting of the Committee. Hugo Perezcano Diaz (Mexico) introduced Linda Pasquel, who would be joining him as the new Mexican government co-chair.

Reports from government representatives:

NAFTA Chapter 11 Developments

Kirsten Hillman (Canada) presented a report on NAFTA Chapter 11 Developments. The three governments have made some good progress on issues relating to transparency with respect to settlement of disputes under Chapter 11 of the NAFTA. Agreement was reached to make all government filings public on the websites.

Guidelines on the participation of 3rd parties and a standard form for filing a Notice of Intent have been adopted and are posted on government websites. Parties have also issued individual statements on open hearings. So far hearings in UPS and Methanex have been open to the public via a video feed. It remains possible for the investor to object to open hearings.

The Canadian courts have decided two challenges to awards granted investors under Chapter 11, *Mexico v. Marvin Roy Feldman-Karpa*, and *Canada v. S.D. Myers*. In both cases the courts confirmed the awards and showed substantial deference to the arbitrators decisions. Mexico had appealed the decision in *Feldman-Karpa*, but Canada had decided not to appeal.

There is only one NAFTA case currently pending against Canada.

Jeffrey Kovar (U.S.) reported that a hearing had been held in the last year in the *Methanex* case against the U.S., and reviewed a number of pending and recently filed cases, including three softwood lumber cases (*Canfor*, *Tembec*, *Terminal Forest Products*), a case challenging California environmental and Native American cultural protection regulations affecting gold mining interests (*Glamis Gold Ltd.*), a case involving a Canadian tobacco company's challenge to the U.S. tobacco settlements (*Grand River Enterprises*), and a case challenging the effect of U.S. marijuana restrictions on a Canadian company producing products containing the product (*Kenex*).

Hugo Perezcano (Mexico) reported that Mexico was awaiting a decision in *GAMI Investments Inc. v. United Mexican States*. In other claims, Mexico was seeking consolidation of two cases involving *ACF*, had recently been informed of a claim alleging breach of a Mexico-U.S. water agreement on the Texas border, and was addressing a new claim also involving a bilateral investment treaty with Mexican, Argentinean, and French investors.

Information on each of the cases against the three governments is available on their websites.

FTAA Developments

Linda Pasquel (Mexico) reported that texts had been submitted on the specific topics now agreed to be included in the proposed treaty, including dispute resolution. Meg Kinnear (Canada), who is chair of the dispute settlement group of the FTAA negotiations, noted that the WTO and NAFTA are the common models, but that there was also a proposal for an appellate body. She noted that the FTAA website contains a compilation of national laws and institutions governing arbitration.

Hague Convention Developments

Jeffrey Kovar (U.S.) noted that the Hague Conference member states had narrowed the effort to achieve a convention on enforcement of judgments by focusing on commercial cases involving business parties where in the contract the parties have agreed to the forum to resolve all disputes. In this respect it would be a parallel to the New York Convention for agreements to arbitrate, and would include rules on enforcing forum selection and on enforcing the resulting judgments. There is the possibility that a Convention will be completed by the end of 2005, and interested members should consider the current draft and report and provide input to their

governments. There was some discussion among the members of the Committee about the type of cases that such a convention would attract, given the availability of arbitration under the New York Convention.

Jose Luis Siqueiros (Mexico) announced that he had completed a version of the current draft in Spanish, which will be published on the website of the Hague Conference, and which he could also provide to interested members. The Hague Conference has made efforts to publish more of its documents in Spanish (example of the Child Adoption, Child Support, etc.).

Bob Lutz (U.S.) reported on the project of the American Law Institute to prepare a new federal statute on enforcement of foreign judgments and the project of the Uniform Law Commissioners to prepare amendments to the Uniform Foreign Money Judgment Recognition Act, now in force in over 30 U.S. states.

Other 2022-type bodies

Jeffrey Kovar (U.S.) reported that the Central American Free Trade Agreement had been completed but not yet ratified. He noted that it contains a provision for a group like the 2022 Committee to promote the use of arbitration and other forms of ADR. Opportunities will likely arise for the Committee to assist in the creation of a similar body under the CAFTA.

Status of the Committee Recommendation to the Free Trade Commission on the UNCITRAL Model Law on International Commercial Conciliation

Mr. Kovar reported that the UNCITRAL Model Law on Conciliation has been made a part of the Uniform Mediation Act in the United States for adoption by all 50 states and 3 territories. No other news to report at this time.

Reports from Members:

2022 Committee Website

Selma Lussenburg (Canada) reported on the efforts the Outreach Subcommittee made with the help of Kevin O'Shea and Mariana Silveira from the National Law Center for Inter-American Free Trade to work with the NAFTA Secretariat in Ottawa to put together the 2022 Committee website. Feleke Bogale and Robert Lalonde from the NAFTA secretariat gave a live demonstration of the website, which was met with appreciation and general satisfaction. A number of points

were noted, including that government co-chairs should provide lists of past and present members (in Canada this requires a privacy waiver) as well as points of contact for inquiries. Rather than provide a section of the website with many original articles, Selma Lussenburg (Canada) recommended that in most cases the website simply link to other existing sites. In this connection, Nancy Oretskin (U.S.) was asked to find out if the publisher of the proceedings of the June 1999 conference in Mexico would consent to the website providing links. If not, members that had published their presentations should consider revising them to make them available. To the extent that original materials are submitted to the website, Jeff Talpis (Canada), Bob Lutz (U.S.), and Carlos Mac Cadden (Mexico) agreed to review them for suitability and report to the Outreach subcommittee. Any such material would be included in its original language and not translated into the other two NAFTA languages. The remainder of the website would be in English, French, and Spanish. Mexican and Canadian co-chairs agreed to provide updated translations of the sections of the draft website expeditiously. It was also suggested that the regular NAFTA Secretariat email newsletter update include a reference to the website when it goes live. It was agreed that Kevin O'Shea would remain the principal point of contact with the NAFTA Secretariat for changes to the website. Kevin's contact information: kjoshea@natlaw.com.

Kevin O'Shea (National Law Center) reported that the National Law Center had organized three ADR outreach sessions in connection with trade and customs symposiums, under a contract with the U.S. Department of State - in Monterrey, Calgary, and Vancouver. Members of the 2022 Committee conducted the sessions. The approach has been to insert basic educational sessions into broader programs aimed specifically at small and medium-sized businesses engaged in cross-border trade in the NAFTA region primarily. The Center has also endeavored to focus on particular business sectors such as transportation, maquila suppliers, etc. and to encourage use of standardized ADR clauses in business contracts.

Update on current legal developments in each NAFTA Country

David Haigh (Canada) presented a review of case law developments in Canada, in addition to the NAFTA cases cited by Kirsten Hillman earlier. He noted that each of Canada's provinces has adopted the UNCITRAL Model Law on Arbitration, that courts have upheld the parties' autonomy in deciding what types of cases can be decided by arbitration, rejected standards of "correctness," and not second-guessed arbitrators.

Courts will not tell the arbitrators how to conduct their business. Nevertheless, there were occasionally some anomalous decisions.

Carlos Loperena (Mexico) presented a review of developments under Mexican law. In particular, he circulated a decision of the Mexican Supreme Court that confirmed the constitutionality of Article 1435 of the Commerce Code (adopting Article 19 of the UNCITRAL Model Law), which deals with the arbitrator's power to conduct the proceedings as it deems best -- including questions of the admissibility of evidence, etc. He noted that the "pro-arbitration" attitude of the Court was very plain in the decision.

Bob Lutz (U.S.) referred to the memo submitted by Doak Bishop (U.S.) and briefed the members on several other developments in U.S. law and practice.

First, Mr. Lutz noted that in three recent cases the U.S. Supreme Court had unanimously confirmed the jurisdiction of the arbitral tribunal to decide its own competence (*Pacific Health*; *Green Tree Financial*; *Dean Witter*).

Second, Mr. Lutz announced that the new AAA/ABA Code of Conduct for Arbitrators had come into effect on March 1, 2004. The code replaced the 1977 AAA code, and requires neutrality of party-appointed arbitrators (replacing the presumption that they are predisposed to the party that appointed them), unless the parties expressly agree otherwise. This change will bring U.S. practice in line with international practice.

Finally, Mr. Lutz reported on developments in the U.S. rules on the ability of outside attorneys to conduct arbitrations without a local law license. He reported that Florida and California had taken recent steps to open up practice to outside lawyers, particularly in international arbitrations, but that additional California regulations might be forthcoming to clarify remaining questions.

John Townsend (U.S.) noted developments in the U.S. following the Supreme Court's decision in *Green Tree Fin. Corp. v. Bazzle*, which held that arbitrators have the power to determine that class action arbitrations are included in the scope of an arbitration agreement. Recently the AAA issued a set of class arbitration rules, and there are now about 25 cases pending under those rules. They are public under the rules and can be found on the AAA website. Mr. Townsend highlighted a few cases, including an unexpected class action brought by Harvard College against a Russian oil company seeking billions of dollars in unpaid dividends.

Report on UNCITRAL Working Group on Arbitration

Jose Maria Abascal (Mexico) briefed the group on the UNCITRAL Working Group on Arbitration, which met the previous week in Vienna. He described the two major aspects of the Working Group's current efforts -- (1) Interim Measures: to amend Article 17 of the UNCITRAL Model Law on Arbitration to provide detailed rules for arbitral tribunals to issue interim measures of protection, and to add two new articles providing for the court enforcement of interim measures issued by arbitral tribunals and the power of courts to issue interim measures in support of arbitration; (2) Definition of Writing: to amend Article 7 of the UNCITRAL Model Law to provide a new definition of writing regarding the form the arbitration agreement must fulfill to be valid under the Model Law; and to address the question under Article 2 of the New York Convention, probably through an interpretive statement calling for flexibility. Mr. Abascal noted that a proposal is being prepared to be submitted to the Mexican Government asking it to make the official proposal to the UNCITRAL Secretariat as a text to be considered in future meetings of the working group. The core of the proposal would be to eliminate the writing requirement, in Articles 7 and 35 of the Model Law.

Mr. Abascal noted on (1) that in his opinion, it appeared that the Working Group is ready to reach a compromise on ex parte interim measures, settling on the creation of a "preliminary order" that could not have a duration longer than 20 days, and would be subject to strict safeguards. He noted that that compromise, which he hoped would be agreed at the next session of the Working Group on January 10, 2005, would consist in allowing the arbitral tribunals to issue "Preliminary Orders", as defined in the draft, but without court enforcement of such orders. Also, parties would be allowed to "opt out" of the agreed system. The UNCITRAL Secretariat would prepare a revised working draft. Mr. Abascal noted that the Working Group hoped to approve work on interim measures at the next Commission session in July 2005.

Mr. Abascal also noted that the Working Group was presented with the question whether the draft UNCITRAL Convention on Electronic Contracting should list the New York Convention as an instrument to which its rules on electronic contracting would apply. He noted that the Working Group had been generally favorable, and that the Convention was on track for completion in 2005.

Cecil Branson (Canada), who represents the Committee at the Working Group sessions, reported on his efforts to solicit the views of Committee members before each session. A number of members of the Committee spoke in favor of the

direction in which the Working Group was heading, including the compromise on ex parte preliminary orders, and the inclusion of the New York Convention in the UNCITRAL E-Contracting Convention; and the Committee took note of those views. Mr. Branson noted that he would send out a memorandum highlighting issues raised in the forthcoming Secretariat draft prior to the January Working Group session and circulate it to the members for their views.

Speakers

Luncheon Speaker

David Gantz, Associate Director, National Law Center for Inter-American Free Trade, spoke during lunch, and the issues and themes he spoke on are included in his paper, "An Appellate Body for Review of Arbitral Decisions in Investor-State Disputes: Problems and Prospects."

ADR in Native American Tribes

Robert Yazzie, Chief Justice (retired), Navajo Nation, spoke on "The Navajo Experience with Peacemaking." Justice Yazzie explained the basic approach of "peacemaking" in criminal and civil actions, which is a community-based justice process built on community decisions and organized by tribal leaders. He noted that it is a traditional tribal method that is more accurately called "original dispute resolution" or "ODR," rather than "alternative dispute resolution" or ADR.

Cheryl Demmert-Fairbanks, Chief Justice of the Yavapai-Apache Tribal Court, spoke on "Indigenous Concepts of Justice." Justice Demmert-Fairbanks noted that there are at least 500 different tribes, so there is no single Indian way of justice. She reiterated that the strong sense of community had led to the development over many centuries of a body of law and practice that had a more holistic, "circle of justice" approach. She explained how customary law, trust, relationships, healing, restoration, apology, and forgiveness are essential elements of the process.

In questions, it was clear that members found the approach of Native American Justice to be directly relevant to the goals of mediation - which is to resolve disputes in a non-judicial setting in an expeditious and durable way, and so that the business relationship is preserved.

Breakfast Speaker

Luis Martinez, Executive Director of the International Centre for Dispute Resolution, described the agreement between the Inter-American Commercial Arbitration Commission and the American Arbitration Association (the U.S. national section of IACAC) to administer cases under the IACAC rules that arise under the Panama Convention. It is hoped that this collaboration would provide consistent and expeditious case administration under the revised IACAC rules. Mr. Martinez noted that in addition to the countries party to the Panama Convention, non-parties such as Spain, Portugal, and soon Canada have national sections to IACAC. Under the Convention, parties are bound to conduct arbitration under the IACAC rules unless they have specifically chosen otherwise.

Subcommittee Reports

Subcommittee III – Communication/Outreach (S. Lussenburg, Canada):

- 1.) To complete getting the website up and running in three languages by November 15, 2004.
- 2.) Develop an internal chat room and bulletin board/discussion forum for committee members. Would be password protected.
- 3.) Enhance the website and outreach activities.

Subcommittee IV – Legal Issues (B. Lutz, USA):

Code of Ethics for Arbitrators in NAFTA Commercial Disputes

Bob Lutz (U.S.) presented his draft NAFTA Code of Ethics that the Committee had asked him to prepare at the Oaxaca session. He noted that he had drawn on the AAA/ABA Code and the IBA guidelines. Mr. Lutz had deleted the non-neutrality party arbitrators phrasing that is allowed by agreement of the parties in the AAA Code, and included language requiring all arbitrators to abide by ethical standards of neutrality. The draft also elevates the disclosure requirements. The overall impression is that the proposed code covers all of the points that the IBA Code covers. He prepared a chart (G.4) comparing the different rules of ethics for arbitrators.

The Committee exchanged views on the question of whether a code of ethics for NAFTA should be pursued as a recommendation from the Committee to the NAFTA Ministers. Several members stated that there were sufficient codes in

existence, and that adding another one created more confusion than clarity. Others stated that a code of ethics could be used to create more grounds to challenge the validity of awards, and that it is too difficult to harmonize conflicting cultural differences in such a code. Another view was stated that more and more arbitral tribunals were facing the question of ethical codes of conduct, and an authoritative statement by the committee would be a considerable benefit for arbitrators in the NAFTA region.

The ultimate result of this work was not decided. One suggestion was that the website could provide links to codes of conduct, but caution was expressed about the wisdom of "endorsing" codes in this way given the risk of challenges to arbitral awards. Finally, it was agreed that the subcommittee would do more comparative law research on the law and practice that applies to questions of ethical conduct by arbitrators in the three NAFTA countries.

Discussion ensued over whether there is a need for a new code of ethics for arbitrators. The subcommittee will do more comparative law work.

The committee also discussed the need for an appellate body for private dispute resolution.

Subcommittee V – Mediation and other Forms of ADR (Francisco Gonzalez de Cossio - Mexico):

Nancy Oretskin (U.S.) discussed the possibility of working with a new center of dispute resolution at George Mason University in suburban Washington DC.

Francisco Gonzalez de Cossio (Mexico) reported that the subcommittee would: (1) undertake to identify the various methods of ADR and illustrate when the different types may be usefully employed; (2) research other institutions providing ADR (non-arbitration) services in the NAFTA countries; (3) institute a regular report on legal developments at Committee meetings; (4) keep dispute avoidance on the agenda without any active project; (5) provide guidance on the use of multi-tiered ADR clauses to avoid common traps that might lead to setting aside awards.

Subcommittee VII – Resolution of Small Business and Consumer Disputes (Scott Donahey – U.S.)

Scott Donahey (U.S.) reported that the subcommittee needed new members. He noted that it intended to update its previous study on small claims. In addition, the

subcommittee would prepare a study to be circulated before the next Committee session that would lay out how small business and consumer disputes could be addressed in a cost-effective and expeditious way, drawing on the experience of the ICANN domain name dispute resolution system.

Future Direction of the Committee

Points were raised that the Committee should not stray far from its core mandate into topics such as enforcement of civil judgments and NAFTA Chapter 11 (investment disputes). There was a general view that these updates were of general interest, but should not take up too much of the agenda.

A suggestion was made to do an analysis of the need for more widespread publication of arbitration decisions. This item was referred to Subcommittee V (Legal Issues).

Kirsten Hillman (Canada) suggested that it was time for the Committee to make another report to the Free Trade Commission. Each subcommittee was asked to prepare a paragraph or two summarizing its work since the last report to the Commission, and government delegations will send copies of past Minutes to Kevin O'Shea.

Next Meeting

Ms. Hillman (Canada) announced that the next meeting would take place in September 2005 in Canada. Exact location and dates are still being discussed, but somewhere in the Eastern Maritime region is preferred. Ms. Hillman promised to contact the Committee in the future with the date and location.

Closing Remarks

U.S. Government Chair Jeffrey Kovar thanked all of the Members for their attendance and participation in the 14th Meeting of the NAFTA 2022 Committee, and the meeting was adjourned.