

# **NAFTA 2022 Committee Meeting 2017**

## **Montreal, Canada**

### **Meeting Minutes**

**May 31 – June 2, 2017**

#### **Attendees:**

<b>Canada</b>	<b>Mexico</b>	<b>United States</b>
Yasmin Shaker, Co-chair Christine Ayoub Kevin Banks Tina Cicchetti Barry Fisher Marie-Claude Rigaud Jean-Francois Roberge Jeffrey Talpis Bryan Duigud David McCutcheon Cynthia Kuehl Sonia Bjorkquist Selma Lussenberg	Samantha Atyade Arellano, Co-chair Carlos McFadden Carlos Loperena	Mike Dennis, Co-chair Tricia Smeltzer, Co-chair Robert Lutz Adalberto Elias Elizabeth Pocock James Nelson Steven Andersen

#### **DAY 1: June, 1 2017**

The government co-chairs made opening remarks.

The Committee adopted the agenda after changing the term “Domestic” to “National” in the section entitled “Updates on Domestic Legal Developments.” There were no other objections and all approved the agenda.

The Committee adopted the minutes from the 2016 meeting without objections or discussion.

### **Legal Developments Reports**

Members from each delegation reported on relevant legal developments in their countries.

- Canada
  - o David McCutcheon delivered the legal updates report for Canada. The report was included in the 2017 meeting packet– and an additional handout was distributed that included updated footnotes.
    - Major developments – Revision of ADRIC rules, adoption of UNCITRAL Arbitration Rules.

- Yasmin Shaker (Canada co-chair) noted that one of the items the Canadian government is focusing on is streamlining the arbitration process for greater transparency and efficiency.
  - Yasmin Shaker also gave an update and some information regarding the work of the International Mediation Institute
- Mexico
  - Carlos Loperena delivered the legal updates report for Mexico. He referenced an article submitted by Francisco Gonzalez de Cossio entitled “Mexico’s fantastic three a pro-arbitration trilogy” (included in the 2017 meeting packet). He discussed recent Mexican Supreme Court precedent and Article 17 of the UNCITRAL Arbitration Rules.
  - Samantha Atayde (Mexico co-chair) reported that the Mexican government is working on the implementation of legislation for Article 17 of the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Conciliation within the Commercial Code. She acknowledged these efforts are still very premature to make any further comments.
- U.S.
  - The U.S. report was developed by Carolyn Lamm and included in the 2017 meeting packet. Delivered by Bob Lutz, he highlighted that the report covers the judicial updates. Mr. Lutz reported on the institutional and legislative developments that occurred within the U.S. in the last year, including updated disclosure requirements for arbitrates involved in international commercial law/disputes.
    - International Law Institute – 4<sup>th</sup> Restatement on the Foreign Relations Law of the U.S. – how international law is viewed in the U.S. by the courts.

## **Subcommittees and Task Forces**

### **Arbitration Agreements Subcommittee:**

The co-chairs reviewed the draft arbitration agreements document and comments were distributed in the 2017 meeting packet. The document will be reviewed by the Subcommittee to determine next steps. After approval, the document will be included on the NAFTA 2022 website.

#### **Action Item:**

- **The Subcommittee will revisit, circulate, and make appropriate revisions to the draft inter-sessionally. The Subcommittee will present a draft in 2018 that the Committee can vote on. Once approved, the document must be posted on the NAFTA 2022 website.**

### **Enforcement of Arbitral Awards Subcommittee:**

Carlos McCadden prepared a draft mandate for the Subcommittee as was discussed at the 2015 meeting. After brief discussion, the government co-chairs approved the new mandate as modified by the Subcommittee. The vote was approved by the Committee.

**Action Item:**

- **Representatives from each country will focus on how issues of public policy are being addressed domestically, research public policy to identify trends and compare findings. Based on these findings, the Subcommittee will identify what type of recommendations can be made.**
- **The Subcommittee agreed to meet via teleconference every 3 months.**

**Judicial Subcommittee:**

Yasmin Shaker (Canada co-chair) delivered the report prepared by Tina Cicchetti, which includes research completed on ADR training for the judiciary in Canada. Carlos Loperena delivered comments on judicial trainings in Mexico completed at the Federal Judicial Institute and some of the trainings that occurred in Mexico in the last year outside the judiciary branch. There was a discussion on whether to re-launch the training program that the Committee carried out in Mexico a few years ago, where speakers from the three countries delivered trainings for Mexican judges. The Canadian co-chair asked Mexico's delegation if Bill Horton's (past NAFTA 2022 member) course could be used in the Subcommittee's work, and whether more information could be placed on the website for those that were not interested in taking the course.

Bob Lutz delivered comments on judicial training within the U.S. He also discussed mandatory programs for the judiciary on ADR that will force judges to become more familiar with the arbitration process. Bob Lutz also spoke about how lawyers have a professional obligation to inform their clients of alternative means to settle disputes. Jim Nelson added that state courts are also seeing issues of international arbitration. State court judges have less education about ADR. He mentioned that he had been approached about running a course for state judges.

There was discussion about including more information (e.g., a manual on ADR for judges developed by Stacy Stong, which addresses international arbitration) on the website with the goal of knowledge sharing. There was also a discussion about the need to come up with some guidelines and criteria for governing what will be put on the website. The Committee expressed concern about past co-chairs and their reluctance to move forward with this and wanted some reassurance as to the level of comfort the current co-chairs have on this topic. The U.S. co-chair wanted some background on what took place with past co-chairs.

**Action Items:**

- **Bob Lutz will circulate the Uniform Law to the Committee.**
- **Bob Lutz will also circulate a guide on international arbitration put together by Stacy Stong, as part of a fellowship.**

- **The Website Subcommittee will review what has been done in the past with respect to guidelines governing what is to be put on the website and will make recommendations to the co-chairs as to future steps.**
- **Carlos McCadden and James Nelson will explore ways to offer education on arbitration and report to the Committee at the 2018 meeting. They will try to recruit judges to assist with judicial trainings on arbitration and will provide updates on this effort at the 2018 meeting. They will check with Tina Cicchetti to see if she is in agreement. This work will be done inter-sessionally.**
- **The Subcommittee should advise as to the status of the draft recommendations to the Free Trade Commission (FTC) concerning judicial education. Co-chairs will review the FTC draft and send it to the FTC inter-sessionally.**

## **Mediation Subcommittee:**

The NLCIFT delivered the report of the Mediation Subcommittee. It suggested a review of the compiled document and made recommendations for future research during the breakout session.

Jeffrey Talpis suggested that the Mediation Subcommittee mirror the efforts on arbitration in their work on international mediation.

Possible participation in an international mediation event with the IBA was proposed by the Subcommittee, as well as a review of work at the UNCITRAL level.

The consensus of the Subcommittee was that mediation should not be separated from arbitration. The Mediation and Arbitration Subcommittees will work together inter-sessionally, including on drafting the Arbitration Agreements paper.

### **Action items:**

- **Steve Andersen is to become Chair of the Mediation Subcommittee.**
- **The Subcommittee requested that co-chairs ask those preparing legal update reports to feature updates on mediation in the same light as arbitration – trends, legislation, case law, institutional updates, literature, etc.**
- **The Subcommittee will consider conducting a survey and some research (including reviewing a recent IMI report) on the major courts in all three countries to ascertain whether there are any mandatory mediation rules, as well as to determine the existence of court mechanisms that promote mediation for commercial matters/disputes.**

- **The Subcommittee recommended that the Arbitration Agreements Subcommittee consider including mediation in its work as well.**
- **The Subcommittee scheduled three intersessional tele-conference calls: August 17, 2017, November 16, 2017, and February 15, 2018.**

## **Task Force**

### **Proposed ODR Task Force:**

Jean-Francois delivered the report of the Task Force. The report included an overview of existing programs and relevant rules. The report is included in the binder and ODR will also be the focus of the Day 2 presentations to determine next steps.

There was a general discussion of the importance of looking at ODR more closely in the context of the NAFTA 2022 Committee. The U.S. co-chair discussed ODR initiatives briefly, as his presentation on Day 2 of the meeting discussed this issue in great detail. It was observed that MSMEs are increasingly engaging in cross-border e-commerce and that they currently have no viable mechanism for resolving the vast majority of their disputes. There was also acknowledgement of the presentation that Nicholas Vermeys of the Cyberjustice Laboratory (University of Montreal) would be making on Day 2 on the work of the Laboratory and current ODR initiatives around the world.

Overall, Committee members felt that there is a need to think about ODR in a much broader perspective. The U.S. co-chair noted that there was an ODR survey circulating among APEC economies. The Committee also discussed the upcoming APEC meeting at which ODR was to be discussed.

There was some discussion on the increasing number of chapters on SME's in Free Trade Agreements (FTAs) and the role ODR can play in resolving cross-border SME disputes.

### **Action Items:**

- **Monitor work being done at APEC for ODR and review APEC survey as results are collected**
- **Build capacity for SMEs around ODR.**
- **A Task Force was formed that would review the different ODR platforms available and identify possible platforms to be used in the NAFTA context. A report would be drafted (there was also discussion of having the Task Force become a Subcommittee in the future, if suitable). The Committee endorsed sending Bob Lutz and Jean-Francois Roberge to the APEC meeting with no objections. The Committee**

**deliberated on the need for a business case from both Canada and the U.S. to support this trip.**

## **Outreach Subcommittee:**

The NLCIFT delivered the outreach report. It reported that it collected information from members using surveys to better inform in-reach and outreach activities, and to encourage greater collaboration. It also discussed the survey results from members and the creation of a PDF materials packet for posting on the website and distribution to Committee members.

There was some discussion of the need to create a google group or other forum in order to collect data. This was brought up because the Committee was previously able to view user stats and other analytics, and this feature is no longer available on the website since it was switched to the new platform.

In 2016, it was voted that the Outreach and Judicial Subcommittees be separate. This year, the Subcommittee has voted to put them back together as one Subcommittee under the title, "Outreach."

### **Action Item:**

- **Canadian co-chair will need to look into the current website platform to see if a google group or other forum is a possibility.**
- **The Subcommittee will update the handout and post to NAFTA 2022 website.**
- **The Subcommittee will make the slides available to share with the Committee for use.**

## **Transportation Task Force:**

The NLCIFT delivered the report for the Task Force and requested discussions regarding next steps for the relationship with Transportation Lawyer's Association (TLA).

The Transportation Lawyer's Association is looking for Mexican lawyers specialized in transportation law matters as well as in ADR to join their roster. The Canadian co-chair asked the Mexican delegation if they had any comments in this regard and they advised that Cecilia Flores, Head of the ICC Mediation Group Committee, is responsible for such matters.

### **Action item:**

- **The NLCIFT is to work with Cecilia Flores on this inter-sessionally to figure out a way to work with the TLA to increase Mexican representatives.**

## **Website Subcommittee:**

The NLCIFT delivered a status report on the website and bio collection. Co-chairs will approve the bios and return them to the Subcommittee for posting on the website.

The Subcommittee would like to create a resource page online, which could be divided by Subcommittee and Task Force, and serve as a place to share information etc. The requirements for a posted document would be that: (1) it be a high quality document; (b) it be neutral – if the position of one country is shown, then the position of the countries must be shown; (3) it not directly advance commercial interests; (4) it be relevant to the work of that specific Task Force or Subcommittee; and (5) it include a general disclaimer. Finally, anything put on the site would have to be approved by the government co-chairs.

This suggestion was approved by the Canadian, Mexican, and U.S. co-chairs who indicated that they would be happy to explore it further once provided with a written proposal. The co-chairs will then present the proposal to their governments.

### **Action Items:**

- **Government Co-Chairs will review bios and send to website Subcommittee for posting.**
- **The Subcommittee is to draft a proposal outlining the above principles for the online resource page to be approved by the co-chairs (this was also noted in the Judicial Subcommittee action items).**

## **Discussion of Future Work:**

Members of the Committee discussed possible future work by the Committee. Potential relevant future work includes:

- o Focus on ODR
- o Focus on SMSEs
- o Guidelines for the judiciary in appointing arbitrators
- o Algorithms becoming the decision makers
- o Interactive forum for assistance in cross-border disputes
- o Prevention of disputes

One major issue that was discussed was the work of the NAFTA 2022 Committee in general: its mission, past achievements, and future, especially with the upcoming NAFTA re-negotiations. It was observed that the Committee has not communicated with the Commission for a number of years and it was agreed that the Commission needs to be aware of the tremendous amount of work that is being done by the NAFTA 2022 Committee. A paper outlining this work needs to be drafted and it was suggested that a Task Force be appointed with two delegates from each country to

prepare such a document. The Task Force would also draft a proposed Article 2022 text for the NAFTA 2.0 negotiators to consider.

It was agreed that Bob Lutz, Steven Anderson, Carlos McFadden, Francisco Gonzalez de Cossio, Barry Fisher, and Selma Lussenburg would form the Task Force. The NLCIFT will assist with survey distribution and collection (to be sent by June 9 with a deadline of June 16 for collection, and to be distributed to all (available) past and present members). The survey must collect answers to the following questions: i) what are the three most important accomplishments of the Committee since its existence; ii) what can the committee accomplish moving forward; iii) if you had the ability to change the Committee's mandate, what would you change it to (monetary resources excluded).

#### **Action Items:**

- **NLCIFT is to take the lead on designing a survey for past and present Committee members on the contributions and future of the NAFTA 2022 Committee.**
- **The Task Force is to draft a recommended NAFTA Article 2022 for the NAFTA 2.0 negotiation process, and forward it to the co-chairs for onward submission to the Commission.**

#### **DAY 2: June 2, 2017 – ODR Focused Outreach Session**

Welcome remarks by Jean-François Gaudreault, Dean of the University of Montreal Faculty of Law.

Introduction by Jean-François Roberge, Ph. D., Faculty of Law, Université de Sherbrooke.

Three ODR-related lectures were presented on day 2:

1. Online Dispute Resolution Initiatives and the Cyberjustice Laboratory, *Nicolas Vermeys*, Assistant Director, Cyberjustice Laboratory.
2. Civil Resolution Tribunal, *Shannon Salter*, Civil Resolution Tribunal's Chair.
3. Developing a Cooperative APEC ODR Framework: Accelerating Justice, Accelerating Trade, *Mike Dennis*, Attorney Adviser, Office of the Legal Adviser for Private International Law, U.S. Department of State.