

GRAND RIVER ENTERPRISES *ET AL*

V.

UNITED STATES OF AMERICA

(NAFTA / UNCITRAL Arbitration)

Minutes of the First Session of the Tribunal

Washington D.C.

March 31, 2005

Grand River Enterprises *et al* v. United States of America

**Minutes of the First Session of the Tribunal
March 31, 2005**

The First Session of the Arbitral Tribunal was held on Thursday, March 31, 2005, from 3:00 pm to 5:50 pm at the seat of the World Bank in Washington, D.C.

Present at the session were:

Members of the Tribunal

Mr. Fali Nariman, President
Prof. James Anaya, Arbitrator
Mr. John R. Crook, Arbitrator

ICSID Secretariat

Mr. José Antonio Rivas, Secretary of the Tribunal

Representing the Claimants

Mr. Leonard Violi, Law Offices of Leonard Violi
Mr. Todd Weiler, NAFTALaw.org
Mrs. Chantell Macinnes Montour, Inch Hammond Professional Corporation

Representing the Respondent

Mr. Mark A. Clodfelter, U.S. Department of State
Mrs. Andrea J. Menaker, U.S. Department of State
Mrs. CarrieLyn Guymon, U.S. Department of State
Mr. David A. Pawlak, U.S. Department of State
Mrs. Jennifer I. Toole, U.S. Department of State

Assisting the Respondent

Mr. Mark S. McNeill, U.S. Department of State
Mr. William Lieblich, National Association of Attorneys General

The session considered matters listed in the provisional agenda circulated by the Secretary in his letter of February 22, 2005. The agenda is attached to these Minutes as Annex 1. The parties had in advance of the meeting, by separate letters of March 8 and 9, 2005, notified the Tribunal of their areas of agreement on the points in the agenda. By the same letter the parties had also indicated those procedural matters of the agenda on which they were not able to agree. These minutes reflect the agreement of the parties, as expressed in their letters of March 8 and 9, 2005, and reaffirmed at the meeting. Copies of the letters are annexed hereto, for ease of reference, as Annex 2.

I. Procedural Matters

1. Constitution of the Tribunal and Declarations by the Members of the Tribunal

The parties agreed that the Tribunal had been duly constituted in accordance with the UNCITRAL Arbitration Rules. Declarations of the Members of the Tribunal as to their independence were distributed during the session.

2. Fees and Expenses of the Tribunal Members (Articles 38-40 of the UNCITRAL Arbitration Rules)

The parties agreed that the Tribunal should rely on the ICSID fee schedule, including allowances and reimbursement of travel expenses within limits as set forth in ICSID Administrative and Financial Regulation 14.

3. Representation of the Parties (Article 4 of the UNCITRAL Arbitration Rules)

The Claimants are represented by:

- Mr. Leonard Violi, Law Offices of Leonard Violi, LLC
- Mr. Todd Weiler, NAFTALaw.org
- Mrs. Chantell Macinnes Montour, Inch Hammond Professional Corporation

The Respondent is represented by:

- Mark A. Clodfelter, Assistant Legal Adviser, Office of International Claims and Investment Disputes, U.S. Department of State
- Andrea J. Menaker, Chief, NAFTA Arbitration Division, Office of International Claims and Investment Disputes, U.S. Department of State
- CarrieLyn Guymon, Attorney-Adviser, U.S. Department of State
- David A. Pawlak, Attorney-Adviser, U.S. Department of State
- Jennifer I. Toole, Attorney-Adviser, U.S. Department of State

Assisting the Respondent who were also present were: Mr. Mark S. McNeill and Mr. William Lieblich.

4. Applicable Arbitration Rules (Article 1 of the UNCITRAL Arbitration Rules)

The parties agreed that the applicable arbitration rules are the UNCITRAL Arbitration Rules, except to the extent that they are modified by the provisions of Section B of NAFTA Chapter 11.

5. Applicable Law (Article 1131 of NAFTA; Article 33 of the UNCITRAL Arbitration Rules)

It was confirmed that pursuant to NAFTA Article 1131, the governing law for this arbitration is the NAFTA and applicable rules of international law.

6. Apportionment of Costs and Advance Payments to the Centre (Articles 38-41 of the UNCITRAL Arbitration Rules)

The Claimants on the one hand, and the Respondent on the other, agreed to share equally advance payments to the Centre. It was noted that the parties understand that in accordance with Articles 38-41 of the UNCITRAL Arbitration Rules, upon the issuance of an award, the Tribunal may apportion the costs of the arbitration between the parties if it determines apportionment is reasonable under the circumstances of the case.

It was recalled that the Centre had requested each Party to pay an amount of US\$75,000 to defray the costs of the proceeding until further notice. The Secretary confirmed that payment had been received from both parties which is noted.

7. Records of Hearings (Article 25(3) of the UNCITRAL Arbitration Rules)

It was agreed that substantive proceedings before the Tribunal should be transcribed. The parties agreed that the First Session as well as other procedural or organizational hearings would not be transcribed, but only tape-recorded. The parties also agreed to the use of Live Note transcription software, or a comparable means of making the hearing transcript instantaneously available to the parties and Members of the Tribunal in the hearing room. The parties further agreed that transcripts of proceedings should be made available on a same day service basis. Finally, the parties agreed that transcripts of proceedings may be made available to the public.

8. Means of Communications and Copies of Instruments (Article 15(3) of the UNCITRAL Arbitration Rules)

The parties agreed that correspondence and submissions, including pleadings and memorials (without attachments), should be sent by e-mail on the date the submission is due simultaneously to opposing counsel, the Secretary of the Tribunal, and the Members of the Tribunal. Such documents also should be sent by facsimile to opposing counsel and to the Secretary of the Tribunal at ICSID for further distribution.

The parties agreed that voluminous submissions, such as evidentiary materials and legal authorities, as well as the memorials, should be sent by overnight delivery service to opposing counsel and the Secretary of the Tribunal. The parties agreed to provide two hardcopies of voluminous

submissions to opposing counsel and five hardcopies thereof to the Secretary of the Tribunal for further distribution.

9. Quorum

It was noted and agreed that three Members of the Tribunal shall constitute a quorum. It was also agreed that procedural matters could be decided independently by the presiding arbitrator, subject to revision, if any, by the Arbitral Tribunal.

10. Confidentiality (Article 25(4) of the UNCITRAL Arbitration Rules)

The parties agreed that orders, awards (including interim awards), pleadings, written submissions, transcripts and other materials may be made available to the public by either party, with the exception of confidential business information ("CBI").

The parties also agreed to confer and communicate any agreement to the Tribunal concerning their designation and treatment of CBI within their submissions.

Absent any agreement however: it is directed that should a party wish to protect CBI from disclosure it must designate the particular confidential business information in its submission and provide a redacted version of the submission to opposing counsel, the Secretary of the Tribunal at ICSID and to the Members of the Tribunal; the redacted version could be used for dissemination to the public. If no redacted version of a submission is supplied, as directed, then it would be assumed by all concerned that the submission does not contain any confidential business information.

The parties further agreed that substantive hearings on merits would be open to the public via a live closed-circuit television transmission, provided that ICSID is able to make the appropriate logistical arrangements. It was also noted that no member of the public would be admitted into the hearing room.

11. Decisions of the Tribunal (Article 31 of the UNCITRAL Arbitration Rules)

The parties agreed that decisions of the Tribunal should be made in accordance with Article 31 of the UNCITRAL Arbitration Rules.

12. Procedural Language (Article 17 of the UNCITRAL Arbitration Rules)

The parties agreed that English would be the language of the proceedings. They also confirmed that any supplementary documents or exhibits in a different language would be submitted along with a translation in English.

13. Place of Proceedings (Article 1130 of NAFTA; Article 16 of the UNCITRAL Arbitration Rules)

At this stage it was agreed that the Tribunal shall hold arbitration proceedings in Washington or New York City, as directed by the Tribunal, it being also agreed that at a later date the Tribunal will determine, after hearing the parties, the place of arbitration.

14. Bifurcation

The Respondent stated its intention to seek bifurcation of its preliminary objections from the merits of the dispute; and proposed that, if necessary, damages should be treated in a separate phase from the merits.

The Claimants raised objections to any bifurcation (i.e., a jurisdictional and a merits phase) or trifurcation (i.e., jurisdictional, merits and damages – phase) of the proceedings.

The Tribunal directed that a decision on the above shall be communicated to the parties after perusing the Statement of Claim, the Statement of Defense, Grand River *et al*'s Pleading on Bifurcation and the U.S.' Pleading on Bifurcation.

15. Brief presentation of the case by the parties

During the session each party made a brief presentation of its case.

16-17. Written and Oral Procedures – Pleadings: Number, Sequence, Time Limits (Articles 18-23 of the UNCITRAL Arbitration Rules)

It was agreed by the Parties that the schedule for the written submissions would be as follows:

Grand River <i>et al</i> — Statement of Claim:	Monday, May 16, 2005
U.S. — Statement of Defense:	Thursday, June 30, 2005
Grand River <i>et al</i> — Pleading on Bifurcation:	Friday, July 15, 2005
U.S. —Pleading on Bifurcation:	Friday, July 29, 2005

It was directed by the Tribunal that in their respective Pleadings on Bifurcation, Grand River *et al*, as well as the United States should address the issue as to the appropriateness of the preliminary issues being (or not being) bifurcated.

Finally, it was decided by the Tribunal that it would notify the parties in due course of further oral proceedings in this arbitration.

18. Delegation of Power to Fix Time Limits

The parties agreed that the Tribunal shall, in consultation with the parties, fix the time limits in respect of documents to be filed; and in case of urgency the Chairman would do so.

19. Dates of Subsequent Sessions

It was noted that dates of subsequent sessions would be notified by the Tribunal in due course.

20. Production of Evidence (Articles 24-25 of the UNCITRAL Arbitration Rules)

The parties agreed that Article 3 of the International Bar Association's Rules on the Taking of Evidence ("IBA Rules") shall govern the exchange of documents (excepting Article 3.12, regarding confidentiality); Articles 4 and 5 of the IBA Rules shall govern the presentation of testimony by expert and fact witnesses; Article 8 of the IBA Rules shall govern the conduct of the evidentiary hearing; and Article 9 of the IBA Rules shall govern the admissibility and assessment of evidence.

The Claimants proposed that after the exchange of all written statements as directed above – but before the election of the parties as to which of the witnesses should be cross-examined – the parties should be provided with a right to submit interrogatories to persons in the control of either party who did not provide any evidence in chief; and that responses of such persons would be subject to cross-examination at the election of the party submitting the interrogatory.

The Respondent United States, however opposed the Claimant's aforesaid proposal that the Tribunal grant to the parties a right to obtain testimonial evidence.

It was directed by the Tribunal that this matter would be dealt with appropriately at a subsequent date.

II. Other Matters

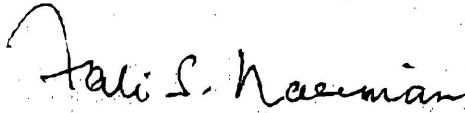
1. Amicus Curiae Participation:

The parties agreed that the Tribunal should later adopt a process for receiving and considering *amicus* submissions, as necessary (but not at this stage), by having recourse to the recommendations of the North American

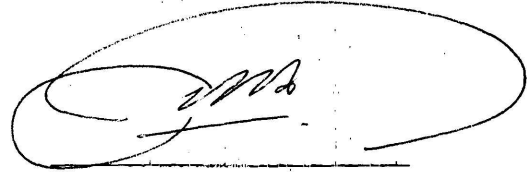
Free Trade Commission on non-disputing party participation, (issued on October 7, 2003, as a guideline).

After consultation with the other members of the Tribunal and the parties, there being no further business, the President adjourned the meeting at 5:50 pm.

Sound recordings were made of the session and deposited in the archives of the Centre. Copies thereof are being distributed to the Members of the Tribunal and to the parties.



Mr. Fali Nariman
President of the Tribunal



José Antonio Rivas
Secretary of the Tribunal