Report of the Sixteenth Meeting of the NAFTA Advisory Committee on Private Commercial Disputes in Morelia, Mexico, June 22 and June 23, 2006.

I. Welcome and Introduction.

The NAFTA Advisory Committee on Private Commercial Disputes (Committee) convened its sixteenth meeting on June 22th and 23th, in Morelia, Mexico. The meeting was chaired by Hugo Perezcano Díaz, General Counselor and Linda Pasquel Peart, Deputy Counselor from the Secretariat of Economy of Mexico and was attended by 29 members of the Committee from the three NAFTA Parties (See Annex 1).

Canadian Co chair, Linda Young, introduced Valery Hughes, Frederic Bachand and William Horton, as the new Canadian members of the Committee.

II. Reports from Governments Representatives on Recent Developments.

1. Hague Convention Developments

David Stewart reported that in the context of The Hague Convention, on June 30 2005 the Convention on Choice of Court Agreements was concluded. This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters. The Convention is open to signature, but so far no state has signed it.

2. NAFTA Chapter 11 Developments

Hugo Perezcano, provided an update on the developments over the last year in NAFTA Chapter 11 cases.

Mexico faces five NAFTA claims and one under two bilateral investment treaties (*Talsud and Gemplus S.A. vs. Mexico*). In the *Thunderbird* case, the tribunal rendered its final award on January 26, 2006. The Tribunal dismissed all Thunderbird's claims. On April 24, 2006, Thunderbird filed, at the United States District Court for the District of Columbia a motion to vacate the award claming the Tribunal majority's misconduct and manifest disregard of applicable law, as well as the Tribunal's manifest disregard of applicable law as to its award of fees and costs. Mexico will submit a brief on July 7, 2006.

With regard to the *Fireman's Fund case*, the Tribunal rendered its jurisdictional award on July 17, 2003. The Tribunal dismissed the investor's claims under NAFTA 1102 (National Treatment), 1105 (Minimum Standard of Treatment) and 1405 (National Treatment – Services). The final award has not been issued.

In the *Corn Products, Inc.* (CPI) case, the claimant's memorial was filed on April 15, 2005. Counter-memorial was filed by Mexico on September 16, 2005. The hearing with the Tribunal will take place on July 10-15, 2006 at Washington, DC.

In the *Archer Daniels Midland Co.* (ADM) case, the second claim brought against Mexico arising from the tax on beverages sweetened with fructose, the claimant's memorial filed on December 21, 2005. Mexico's Counter-memorial was filed on May 15, 2006, and the claimant's reply is due on June 29, 2006; and Mexico's rejoinder on August 14, 2006.

On September 8, 2004, Mexico applied to ICSID for the establishment of a Consolidation Tribunal for claims brought by CPI and ADM. A hearing was held on September 16, 2004. CPI opposed the request of Mexico. On January 15, 2005, the Tribunal rendered a decision which dismissed Mexico's position to consolidate both claims.

Cargill Inc. case is the third claim brought against Mexico arising from the tax on beverage sweetened with fructose. On December 29, 2004 Cargill Inc. filed Submission of a Claim at ICSID, which was registered in August 30, 2005. At this moment, the Tribunal is not duly constituted, but the parties have already designated its arbitrators and the Chairman Tribunal.

On January 20, 2005 seventeen irrigation districts in Texas plus farmers filed submission of a claim to the ICSID, alleging that Mexico seized and diverged water from Rio Bravo. Mexico requested to the ICSID not to register the claim arguing that the investment is not located in the territory of Mexico, but on July 1, 2005 claim was registered by ICSID. The first meeting with the Tribunal was held on February 14, 2006. Mexico requested to submit a preliminary objection. The Tribunal decided to accept Mexico's request and established a submission's calendar. Mexico filed its memorial on Jurisdiction on April 16, 2006. Claimant's counter-memorial is due on June 23, 2006. Mexico's reply is due on July 26, 2006 and the claimant's rejoinder on August 28, 2006. The hearing will take place on November 2006

On October 17, 2005 Claimant filed its memorial in the *Talsud & Gemplus* case. Mexico filed its counter memorial on May 31, 2006. Claimant's reply is due on September 18, 2006 and Mexico's rejoinder on January 29, 2007.

3. WTO Developments.

Sylvie Tabet informed that in the last WTO Ministerial Meeting in Hong Kong (13-18 December 2005) the WTO Members agreed to complete "full modalities" in agriculture and non-agricultural market access by the new deadline they have set themselves: 30 April 2006. Unfortunately this deadline was missed. Despite this, some of the WTO Members like United States have been more receptive to some issues such as market access. India and Brazil show more flexibility too. With regard to the GATS negotiations, the deadline to submit revised offers is July 2006.

4. Bilateral Trade Negotiations.

A) Canada

Sylvie Tabet informed about Canada's trade negotiations:

Free Trade Agreements (FTA) Negotiations: Canada is negotiating FTA with Peru, Singapore, Ecuador, Dominican Republic and South Korea. Negotiations with South Korea are in an advanced stage.

Bilateral Investment Treaties (BIT) Negotiations: Canada maintains negotiations with South Korea, China and India in order to sign a BIT. The Investment Treaty negotiations with China and India possibly will finish at the end of this summer.

All the Canada's dispute settlement negotiations are running on the basis of the NAFTA model.

B) United States

David Stewart informed about US trade negotiations:

FTA Negotiations: United States is carrying out talks to negotiate a FTA with the United Arab Emirates. Negotiations with South Korea as well as with Malaysia started this month. With respect to Ecuador, future rounds of negotiations for a FTA have not been scheduled. At the moment there is nothing to report with regard to the negotiations with Panama.

BIT Negotiations: United States is negotiating with Pakistan.

Concluded Agreements: On April 12, 2005, the United States signed a FTA with Peru. In February a FTA with Colombia was concluded and currently it is under legal review. In November 2005, the United States signed a BIT with Uruguay. In January 19, 2005 a FTA was signed with Oman. Finally, regarding the status of the CAFTA-DR, it entered into force between the United States and El Salvador on March 1, 2006 and with regard to Nicaragua and Honduras on April 1, 2006 but no yet with respect to Costa Rica, the Dominican Republic and Guatemala.

C) *Mexico*

Linda Pasquel and Hugo Perezcano informed about Mexico's trade negotiations:

FTA Negotiations: Mexico is currently negotiating a FTA with South Korea and another with Peru. With respect to Argentina negotiations have just concluded.

BIT Negotiations: Mexico is currently negotiating with India and China. The BIT with Spain is about to expire, so it is currently under review and the next round of negotiations will take place in about two weeks.

Concluded Agreements: México concluded BIT negotiations with United Kingdom

III. Report on UNCITRAL Working Group.

José María Abascal presented a report on the UNCITRAL Working Group. With regard to the UNCITRAL Model Law on International Commercial Arbitration, he

informed that in its last meeting in January, the Working Group finished a draft on interim measures and written form, which will be discussed by the Commission next week in New York. With regard to interim measures, the final draft contains a new Chapter 4 bis titled "Interim measures and preliminary orders". This new Chapter has eleven provisions. Section I, is related to the power of arbitral tribunals to order interim measures and conditions for granting interim measures. Section II relates to preliminary orders and its specific regime. Section III contains provisions applicable to interim measures and preliminary orders, such as modification, suspension, termination, provisional security, disclosure, costs and damages. Section IV relates to the recognition and enforcement of interim measures. Finally, Articles related with court-ordered interim measures are contained in Section V. There is a minor proposal to modify Article 1 in order to include one of the provisions related to the territoriality of court enforcement.

The draft also includes a controversial proposal to modify Article 7 with regard to the form of arbitration agreements because it includes a wide definition of what "writing" means. In contrast to this wide definition, and as a result of a Mexico's proposal, the draft includes an alternative text that offers a definition that makes no reference to the term "writing". A modification to Article 35 is also proposed, it mainly refers to the elimination of the requirement to supply the arbitration agreement when a party is applying for the enforcement of an award.

With regard the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the Working Group proposed a declaration regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1. It basically recommends courts to take into consideration the Model Law, its amendments, and the case law. It also recommends that Article II, paragraph 2 be applied recognizing that the circumstances described therein are not exhaustive, and that Article VII, paragraph 1, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

Some of the relevant issues that will be subject to discussion in the next UNCITRAL Meeting on June 25-June 29, are: the review and update of the UNCITRAL Arbitration Rules, arbitrability of intellectual property rights, investment disputes, unfair competition, and online dispute resolution.

IV. Legal Developments in each country.

1. Developments in the United States of America.

Robert Lutz reported on the recent legal developments in the United States. He focused in some trends regarding recent developments in the United States practice in the last year: (1) partiality in US arbitrators; (2) the use by US court of sanctions with respect to parties who make "frivolous challenges" to the enforcement of arbitral awards; and (3) efforts to make the arbitral process more transparent.

Regarding the first issue, there is a particular case that highlights this trend; this is the *Positive Software vs. New Century Mortgage* case, where the arbitrator failed to

disclose that seven years before becoming an arbitrator, he and his former law firm were co-counseling in a case with one of the law firm which was counseling one of the parties in the quoted case. So, the arbitrator ruled in favor of the party that was represented by that law firm. The Court of Appeals, determined that the arbitrator did not make a proper disclosure. So, regardless of whether there was actual bias, it determined that this situation raises an appearance of bias that satisfies the standard of evident partiality foresee in section 10 of the US Arbitration Act, which provide that a court may vacate an arbitral award where there was evident partiality in the arbitration.

The second trend raises the question of whether challenging arbitral awards can be risky. Challenges and efforts to vacate arbitral awards are in fact proliferating, whether they are meritorious or not, and there is a draft Article, written by Susan Franck from the University of Nebraska, which identifies this trend.

Finally, there is a trend towards transparency in arbitration, particularly with respect to investor arbitration under ICSID. Many cases highlight the fact that the ICSID is more receptive to the "amicus curiae" figure, in particular a recent case called "Aguas Provinciales" against Argentina, where the "amicus curiae" issue was brought by a public group interested in the environmental impact of the decision. This group requested to the tribunal three things, which were considered by the tribunal: (1) to allow the petitioners to submit oral arguments at the hearings in the case as a non-party; (2) the ability to file an "amicus curiae" brief; and (3) to have access to documents and other information of the case. The tribunal denied the first and third petitions, however, the tribunal granted an opportunity to the petitioners to submit an "amicus curiae" brief. This decision was based on a criteria that essentially indicates that if the petitioner, a third party or a non-party, shows good reason and sufficient independence of any of the parties to bring new issues to the tribunal, such "amicus curiae" will be allow, but other participation will be limited.

David Stewart spoke about the US "manifest disregard of the law" doctrine, which is essentially a creation of the US judiciary interpretation of the Federal Arbitration Act, and has been a matter of some controversy in terms of courts ability to set aside or refuse to enforce domestic awards rendered by arbitrators in "manifest disregard of the law" ever since its adoption in 1953 by the Supreme Court in *Wilko v. Swan*. Nonetheless, this non-statutory doctrine has been applied to domestic awards, but not to arbitral awards under the New York Convention, and based on recent cases, it seems to be a trend to narrow and restrict this doctrine, mainly due to the many frivolous arbitration appeals that rely without justification on the "manifest disregard of the law" doctrine.

2. Developments in Canada.

Frédéric Bachand reported that there can be found in a number of recent Canadian cases, issues that may be considered as troubling statements. Most of the time they are dicta that can be found in Canadian courts decisions, dealing with motions seeking to annul international awards made in Canada. All these statements suggest that defenses such as "manifest disregard of the law", "manifest disregard of the facts" even, "manifest injustice" or "unreasonableness" could arguably be available to parties who

launch proceedings in Canada. Those are decisions interpreting the Model Law or interpreting the New York Convention.

Another issue reported was the binding of the clause of arbitration in the context of the class action. The core of this issue is the opposition between the class action and the autonomy of the parties. Courts in Canada have issued opposite criteria. In one hand, some courts have upheld the prevalence of the parties' autonomy over the class action; meanwhile others have considered that the class action is a public policy prevailing over the arbitration clause that is under the parties' autonomy.

Professor Bachand referred to the *Dell Computers Company v. Union des consommateurs, et al*. case before the Supreme Court of Canada (hearing will take place in October, 2006). The Supreme Court decision will rule about the validity of the arbitration clause on contracts celebrated trough the internet and regarding the arbitrability of consumer disputes.

Finally, William Horton focused on the following courts decisions related to arbitration:

a) According to a decision from an Ontario's court, in consumer cases the arbitration clause is not enforceable unless the consumers agree otherwise after the dispute has arisen.

b) Relating to the "competence-competence" principle, a Canadian appeal court ruled that the courts, but not only the arbitral tribunals, may decide whether the assignee, with respect to an agreement which foresees an arbitration clause, is bound to it.

c) In a case before a Court of Appeal in Canada related to the compulsory of an arbitral agreement for third parties, the parties in the arbitration agreement agreed to be bound by the Alberta Rules of Court. These rules provide that parties may request for discovery of non parties. One of the parties on the arbitration requested to the competent court (in accordance to Article 27 of the International Arbitrations Model Law) its assistance in taking evidence, but the Court ruled that it was not permissible to compel non parties under an arbitral procedure. But the Appeals Court ruled that the examination for discovery oppositions was a valid and perfectly permissible kind of evidence in arbitral procedures, due to the fact that from the point of view of a non party, being required for examination in a jurisdictional process represents the same burden than in an arbitral procedure.

3. Developments in Mexico.

Carlos Loperena, reported that during 2004 and 2005, there were several decisions made by the Circuit Courts relating to the validity of the arbitral clause and the relevant authority to rule on it. The Federal Courts have upheld opposite criteria with regard to the interpretation of Articles 1424 and 1432 of the Commercial Code, correlatives of Articles 8 and 16 of the Model Law on International Commercial Arbitration. The Supreme Court has ruled, based on Article 1424 of the Commercial

Code, that judges, but not arbitrators, are competent to resolve on the action of nullity of arbitration agreements.

The second issue reported by Carlos Loperena is related with the "*amparo*". He gave a brief explanation about this concept focused on the differences between "direct amparo" and "indirect amparo". A positive trend in Mexican courts is that some Circuit Courts in Mexico have ruled that if someone wants to challenge a judgment that set aside an award, he has to appeal it through "direct amparo". Mr. Loperena considered it a good trend because it establishes an easier procedure to get the annulment of an award.

The third issue reported by Mr. Loperena was a case involving two broadcasting companies. The final award in this case was a really negative precedent for Mexican arbitration. The case involved a joint venture of two broadcasters to produce news radio programs. It was a conventional agreement which included an arbitration clause providing that arbitrators should be experts in the subject matter of the arbitration. In 2001, pursuant the agreement one of the parties resorted to the arbitration procedure against the other party. The arbitral tribunal was composed by three experts on commercial contracts. There was never any objection from any of the parties about the arbitral tribunal composition. When the arbitral tribunal rendered its final award, the loosing party challenged it before the competent trial court in Mexico City. The court annulled the award on the grounds that the arbitral tribunal had not been composed as the parties had agreed in the agreement, that is to say with experts on telecommunications. This ruling was challenged through "indirect amparo" before a District Court. The District Court overturned the court ruling. Then, this decision was appealed before a Circuit Court that ruled the following: (1) the District Court should not hear the case because only a Circuit Court has jurisdiction, and (2) the Circuit Court, then would analyze the case not taking into consideration the ruling made by the District Court. At that moment, one of the parties appealed to the Supreme Court requesting it to attract the case on the basis of its importance for arbitration development. Finally the Supreme Court decided not to attract the case. On May 2006, the Circuit Court upheld the trial court ruling.

V. Presentation: "Citizen's Perceptions on Arbitrations on Michoacán".

The last item of the agenda for the first day of the meeting was a presentation by Mr. Armando Manzano, member of the *Barra Michoacana-Colegio de Abogados, A.C. (Bar of Michoacan)*. In his presentation, titled "Citizen's Perceptions on Arbitration in Michoacan", Mr. Manzano exposed the results of his survey focused on the knowledge and expectations of the business and lawyer communities in Morelia regarding arbitration and mediation. Most of the lawyers and businessmen polled did not know about the ADR regulated in Michoacan's legislation, and had the idea that this is a very expensive mechanism reserved only for international enterprises. In order to encourage the arbitration in Michoacan Mr. Manzano proposed the following steps:

a. Include in the business and lawyer programs careers an assignment focused on arbitration and mediation.

b. Promote the diffusion of ADR trough the Federal, Local and Municipal Agencies, law bars and associations and trade chambers.

c. Reduce arbitration's costs and convert the ADR in an accessible mechanism for all people, especially for medium and small entrepreneurs.

d. Establish training arbitrators programs given by public or private institutions focused on international trade.

e. Train judiciary on enforcement of international awards.

VI. Presentation "Mediation and Arbitration as an ADR under Michoacán legislation".

The second day of activities started with the presentation titled: "Mediation and Arbitration as an ADR under Michoacán legislation" by María del Pilar Chavéz Franco, Director of the Center of Mediation of Michoacan. Miss Chavéz explained that mediation has suffered an accelerated development in the last 7 years in Mexico. Today, mediation centers (MC) are located in 14 Mexican States. The reasons of this fact are: i) the need of Mexican society to look for pacific alternatives to settle disputes; and ii) the international obligations for Mexico, that entail transforming the legal system in order to adopt the new requirements.

The Supreme Tribunal of Michoacan has recently created The Mediation Center of the Supreme Tribunal. This MC was established in April 2004 as an experimental project. In 2006, the Supreme Tribunal will decide, based on its results, if the MC will continue its activities. If the decision is positive the Supreme Tribunal will start a legislative process before the local Congress, aimed to provide a solid legal framework regarding mediation, by submitting a draft Mediation Act or a draft on Local Codes' amendments aimed to regulate the legal issues relating to mediation.

VII. Reports from Subcommittees.

A) Subcommittee III Communication/Outreach.

Subcommittee III reported about the NAFTA 2022 Committee's website. Now, that the website has been developed and is fully operational (with accessible contents to the general public and a discussion forum available to committee members). The Outreach Subcommittee will undertake the following to increase the use of the website: 1) working with the three governments as well as key relevant associations and organizations (business chambers, bar associations, trade groups, etc.) to develop links to the website; and 2) providing written summaries of the website to key associations and organizations (via regular mailings or publication in newsletters). The Subcommittee will also keep updated the website content as needed and add material as approved by the Committee.

Additionally, the Subcommittee reported that it will continue its presentations on ADR programs directed to audiences in the judicial, business and legal communities. Future outreach work over the next term will take place with a greater emphasis on the

judiciary in the 3 countries. In addition, the Subcommittee will endeavor to incorporate outreach by the committee to the local judiciary during the scheduled 2022 Committee meetings, beginning with the next meeting (the 17th meeting) of the Committee in the United States in 2007.

B) Subcommittee IV Legal Issues.

Subcommittee IV reported about the works prepared by the work groups that integrate it, as follows:

- Frederic Báchand reported that the 3 NAFTA countries courts have adopted a liberal proarbitration approach specifically on disputes that involved application and interpretation of mandatory rules of public policy or public order rules. In other words, arguments regarding the arbitrability of disputes are not likely to be a significant obstacle to the enforcement of international awards in the NAFTA region (in particular in United States and Canada). For this reason, the Subcommitte does not consider appropriate to recommend to the Free Trade Commission (FTC) to take any step in this regard. Nonetheless, members of the Subcommittee agreed to keep analyzing and monitoring the development of the case law on these issues, and report, if necessary, to the FTC if they concluded that such development are likely to cause significant problems with the enforcement of awards.

- Harry Arkin, from the US delegation, reported that in 1993 (when the NAFTA was signed), the concept of arbitration between private investors and states was for all practical purposes, little known or little used. Only since the Argentina's financial collapse on 2002, the ICSID cases have increased over one hundred. NAFTA Parties have been involved in a lot of private-state arbitration cases, as the NAFTA 2022 Committee has taken note. It would thus appear that the NAFTA 2022 Committee could play a useful role in the private-state dispute resolution issues, if the FTC would expand, perhaps by an internal pronouncement, the limitation stated in paragraph 1 of Article 2022 of NAFTA: "between private parties…" to be interpreted to include "and between private investor and states in the NAFTA", and to assist the resolution of disputes in relation with other matters described elsewhere the NAFTA, which interpretation might assist in more efficient resolution of disputes in those subject matters.

- Bob Lutz, according with the project agreed in the last meeting in Ottawa, Canada, presented the third draft "Notes on Arbitrator Conduct for Private Commercial Disputes in the NAFTA region". In this new draft, it was added a paragraph about neutrality duties of the arbitrators. The Subcommittee encouraged to the NAFTA 2022 Committee to endorse the adoption of the referred document.

- Francisco Gonzalez de Cossio informed that in Mexico there are no reported cases where a domestic court has issued an anti-suit injunction to prevent the beginning or the continuance of an arbitral proceeding. In any case, domestic Mexican courts have issued injunctions in support of arbitration proceedings.

C) Subcommittee V. Dispute Avoidance and other forms of ADR.

Julian Treviño proposed the convenience to change the current name of the Subcommittee to "Mediation, other forms of ADR and Dispute Avoidance" or "Dispute Management". He reported that the Subcommittee will continue searching organizations that provide ADR arbitrators in the three countries for specific industries or sectors. At this moment the Subcommittee is only aware of one organization of this kind: The Fruit and Vegetable Dispute Resolution Corporation, which participated in the last NAFTA 2022 Committee meeting, in Ottawa, but it did not find others institutions focused in specific sectors of industries or commerce. Additionally, the Subcommittees will monitor the developments of dispute resolutions under Chapter 7 of the NAFTA (Agriculture). According with Julian Treviño, is very important that the full committee start to study this issue.

D) Subcommittee VII Small and Medium Size Businesses.

The first point referred by the Subcommittee VII was the lack of information about the small and medium size businesses concerns on issues related with ADR. Due to this fact, the Subcommittee has designed a plan:

- The first stage will be to identify the small and medium size business involved in cross border transactions. On this item the governmental agencies of the three countries can provide an *ad hoc* help.

- The second stage of the action plan is trying to obtain information about the options for ADR available for small and medium size businesses. The last report of the Subcommittee on this issue was made four years ago, so the Subcommittee is planning to update it.

- The third stage is establishing contact with the small and medium size businesses with the purpose to know their concerns relating to the mediation and arbitration. The Subcommittee invited the full Committee to consider about having meetings and keeping interaction with the small and medium size business community.

Additionally, Dana Havilland presented a pilot project, to establish an e-ADR service with ramifications in the 3 countries that could assist small and medium-size businesses.

VIII. Discussion on Draft Report of the NAFTA Advisory Committee in Private Commercial Disputes to the NAFTA Free Trade Commission.

Sylvie Tabet (the Canadian co-chair) presented the Draft Report of the NAFTA Advisory Committee in Private Commercial Disputes to the NAFTA Free Trade Commission. This document contains a summary about the mandate and composition of the Committee and its activities and accomplishments. The Committee will continue working in the Draft Report.

Members of the Committee Members provided their comments and suggestions regarding the Draft Report.

IX. Next Meeting.

United States will be hosting the next meeting and has proposed to hold it on early April, 2007.