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RE: *United Parcel Service of America vs. Canada*

SUBMISSION OF THE UNITED MEXICAN STATES PURSUANT TO ARTICLE 1128 OF THE NORTH AMERICAN FREE TRADE AGREEMENT

1. The Government of Mexico respectfully submits the following comments on the interpretation of the NAFTA. It takes no position with respect to any matter of fact arising in the dispute, nor should its failure to address any issue be taken to signify its agreement or disagreement with respect to positions taken by either disputing party.

A. General Comments

2. Mexico has already made submissions on the relationship between Articles 1116 and 1117, on the one hand, and Chapter Fifteen, on the other. Those comments have been reflected in the Tribunal's Award on Jurisdiction. The Tribunal clearly identified what matters addressed in Chapter Fifteen properly fall within the jurisdiction of an investor-State arbitral tribunal. With the exception of one point addressed by the disputing parties in their pleadings on the merits, Mexico does not consider it necessary to make further submissions on the Chapter Fifteen issues.

3. The one additional point concerns a basic issue of State responsibility. The ILC's Articles on State Responsibility deal with the *secondary* rules of State responsibility. According to the Commentary:

> "The articles do not attempt to define the content of the international obligations breach of which gives rise to responsibility. *This is the function of the primary rules*, whose codification would involve restating most of substantive

> international law, customary and conventional."[1] [Emphasis added.]

4. The primary rules that can give rise to a finding of breach in NAFTA investor-State arbitral proceedings are those listed in Articles 1116 and 1117 and none other.[2] As the Tribunal has previously recognized, it has jurisdiction only over alleged violations of an obligation contained in Section A or the provisions of Chapter Fifteen listed in Articles 1116 and 1117.[3]

5. It is incorrect as a matter of treaty interpretation to confuse general principles of State responsibility with precisely worded primary obligations. Specifically, with respect to Articles 1503(2) and 1502(3)(a) --two primary rules at issue in this dispute-- Mexico agrees with Canada that effect must be given to the plain meaning of the words "wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service..." The inclusion of this phrase requires a tribunal to distinguish between those monopolies and state enterprises that have such authority delegated to them and those that do not. Moreover, it requires a tribunal to consider only those acts taken in the exercise of such authority. The two subparagraphs apply only where authority has been so delegated and has been exercised. In this regard, Mexico agrees with Canada's submissions at paragraphs 15-21 of its Reply. The secondary rules on State responsibility cannot be employed to change the content of the primary legal rules governing this dispute.

6. Mexico also agrees that it is incorrect to mix the secondary rules of State responsibility with the primary "Minimum Standard of Treatment" rule contained in Article 1105. (*See* the Claimant's Reply at paragraphs 742-743.)

B. Article 1102

7. With respect to Article 1102, Mexico agrees with Canada that, as the Article's title indicates, it is a proscription against discrimination between investors (or their investments) based on the *nationality of capital*. This point, while trite, is nevertheless fundamental. Article 1102 does not require the NAFTA Parties to regulate their national economies to achieve some absolute form of equality nor does it incorporate a so-called "equality of competitive opportunities test" (a shorthand description for the Article III national treatment tests contained in the *General Agreement on Tariffs and Trade* (GATT)).

8. Article 1102 simply prohibits a Party from according less favorable treatment to investors of another Party as compared to its own investors "in like circumstances" (or to the investments of investors of another Party as compared to the investments of its own investors "in like circumstances").

9. It is a basic error of treaty interpretation to depart from the plain text of Article 1102 and embark on an inquiry as to whether a Party has failed to comply with a test that is not contained

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[1] James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge University Press 2002), page 74, paragraph 1.

[2] And in the case of an investment in a financial institution, Article 1401. See *Fireman's Fund Insurance Company v. United Mexican States*, Decision on Jurisdiction.

[3] *UPS* Award on Jurisdiction, paragraphs 27-28.

in the treaty. The danger of using shorthand tests, rather than adhering to the plain language of the text, is that a tribunal may embark on an inquiry that falls outside of its grant of jurisdiction.

10. Mexico respectfully agrees with the findings of the *Methanex* tribunal, cited in Canada's Reply at paragraphs 62 *et seq*. There is no warrant for employing a shorthand test used to describe the precisely worded obligations contained Article III of the GATT[4], which applies to trade in goods, to the interpretation of Article 1102, which contains its own test for comparing the treatment accorded to investors and their investments.

11. In order to determine whether a Party has not discriminated against investors of another Party, Article 1102 simply requires a tribunal to identify: (i) whether investors of another Party and investors of the Party (or their respective investments) are "in like circumstances" in relation to the treatment accorded; and (ii) whether the investors of another Party (or their investments) are treated less favorably than the investors of the Party (or their investments):

a) If they are *not* in like circumstances, and are treated differently, there is no question of a breach because being in like circumstances is the factual predicate to Article 1102's operation.

b) If they *are* in like circumstances and are treated differently, there may still be no breach; the question then will be whether or not the investor of the other Party is treated less favorably. Differential, but not less favorable, treatment is lawful under Article 1102.

c) A breach of Article 1102 can occur *only* when the investors (or their investments) are in like circumstances *and* the investors of another Party (or their investments) are treated less favorably than the investors of the Party (or their investments).

C. Article 1105

12. With respect to Article 1105, it is beyond doubt that a claimant which alleges a breach of this article must demonstrate a breach of the customary international standard of treatment accorded to aliens.[5] The Tribunal applied this test in its Award on Jurisdiction in concluding that that there is no rule of customary international law prohibiting or regulating anticompetitive behavior.[6]

13. The Tribunal, citing jurisprudence of the International Court of Justice, correctly recognized that to establish a rule of customary international law two requirements must be met: consistent State practice and an understanding that that practice is required by law, *i.e.*, *opinio juris*.[7] The burden of proving the existence of a customary international law rule and its breach rests upon the complainant.

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4 The "competitive opportunities" test discussed at paragraph 488 of the Claimant's Reply.

5 Free Trade Commission Note of Interpretation issued 31 July 2001 and applied by the Tribunal in its Award on Jurisdiction, paragraphs 79 *et seq*.

6 *UPS* Award on Jurisdiction, paragraph 92.

7 *Id*., paragraphs 84-99, especially paragraph 97.

14. Customary international law has developed specific rules to deal with the treatment accorded to aliens. These rules, which are rather basic, perhaps even rudimentary, deal with, for example, the right to unhindered access to the courts and to a fair trial, are discussed in consistent terms by qualified publicists and by international arbitral tribunals.

15. Since the rules are so basic and modern State action in the ordinary course of events rarely offends the rules, arbitral tribunals -- including those established under NAFTA Chapter Eleven-- have tended to use strong qualifiers to emphasize the strictness of the test that must be met in order to find a breach of the customary standard. Hence the *Waste Management* tribunal used the terms "*grossly* unfair" and "*wholly* arbitrary", the *GAMI* tribunal referred to the "*outright and unjustified* repudiation" of rules, the *ADF* tribunal spoke of "*idiosyncratic or aberrant*" conduct and the *Mondev* tribunal spoke of "*clearly* improper and discreditable" conduct.[8] This approach is fully consistent with the approach taken by the Chamber of the International Court of Justice in its seminal treatment of the concept of arbitrariness in the famous *ELSI* case.[9]

16. Moreover, the customary international law rules on the treatment of aliens are not to be confused with conventional international legal rules which, by contrast, are more specifically worded. For example, the conventional obligation of national treatment expressed in Article 1102 goes much further than the customary international law rule prohibiting discriminatory treatment of aliens. The customary international law standard proscribes base discrimination while permitting more favorable treatment of nationals in comparison to aliens, while the treaty standard of national treatment requires the State to engage in more substantial equality of treatment than that required at customary international law.[10]

17. Mexico respectfully requests the Tribunal to take these submissions into consideration in its deliberations.

Attentively,

Hugo Perezcano Díaz

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8 *Waste Management Inc v United Mexican States (Waste Management II)* at paras. 98 and 115; *GAMI Investments, Inc v United Mexican States* at para. 104; *ADF* v *United States of America*, para. 189; and *Mondev International Ltd. v United States of America*, para. 127.

9 "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' (*Asylum, Judgment*, I.C.J. Reports 1950, p. 284). It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety...". *Elettronica Sicula S.p.A. (ELSI) Case (United States of America v. Italy)* [1989] ICJ Rep at para. 128.

10 See *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* ICSID Case No. ARB/99/2 at para 368.